

Buenos Aires, June 8, 2021

Ms. Tlaleng MOFOKENG

Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

Ref: Call for contributions: The right to sexual and reproductive health – Challenges and Possibilities during COVID-19

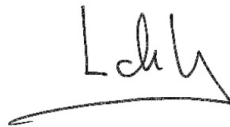
Dear Madam:

We are submitting this report in response to the call for information on challenges and possibilities on the right to sexual and reproductive health in the context of the COVID-19 pandemic.

Started in 1979, the Center for Legal and Social Studies (CELS) is an organization dedicated to the defense and protection of human rights in Argentina, with an intersectional feminist agenda.

We are available to expand or clarify anything you deem necessary.

Sincerely,



**Paula Litvachky**  
Directora Ejecutiva  
Centro de Estudios Legales y Sociales

## **1. Regulatory framework: Law 27,610 on Access to the Voluntary Interruption of Pregnancy (VIP).**

On December 29, 2020, a bill (Law 27,610) was passed for Access to the Voluntary Interruption of Pregnancy (VIP) in Argentina and entered into force on January 24, 2021.<sup>1</sup> It is currently in the implementation phase.

On May 28, 2021, the National Ministry of Health issued Ministerial Resolution N°1531/2021, an update of the Protocol for the comprehensive care of persons with the right to the voluntary and legal termination of pregnancy, targeting health teams, to guarantee access to abortion under the scope outlined in the new law.<sup>2</sup> The law recognizes the sexual and reproductive rights for which the women's and diversity movement has been fighting for almost 40 years, and takes into account the international commitments adopted by our country in the field of human rights.

The law regulates access to voluntary termination of pregnancy and post-abortion care. It establishes the right of persons with gestational capacity to have an abortion up to and including the 14th week of the gestational process. After that, abortion is available under a system of grounds in force in Argentina since 1921 and allows the practice of abortions in cases of rape, danger to the life or health of the pregnant person.

Law 27,610 establishes that the practice must be performed within a maximum period of 10 days and guarantees its access in the public system, union-owned healthcare providers (known as "Obras Sociales"), and in the private system.

Despite the progress that Law 27,610 represents from a regulatory point of view, there is social resistance. Argentina has a public health system in which federal, provincial and municipal governments intervene, so the effective implementation of the law is often in the hands of the local authorities. There are obstacles and a need to improve state efforts to implement the law under equal conditions throughout the country, particularly in some provinces with a strong conservative tendency. Added to this is the challenge for health insurers to effectively guarantee access to the practice by their affiliates.

## **2. Obstacles and resistance to the Law's implementation**

Law 27,610 is facing obstacles and resistance to its implementation. Sectors opposed to abortion on ideological grounds have initiated legal actions to overturn the law. Their arguments include misinterpretations of international instruments regarding the protection of life, which in their view is absolute and from conception, and the conflict of the national law over provincial norms. A report dated April 2021 indicated at least 23 legal actions had been filed against Law 27,610, in 13 provinces of the country.<sup>3</sup>

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<sup>1</sup> <https://www.boletinoficial.gob.ar/detalleAviso/primera/239807/20210115>

<sup>2</sup> <https://www.argentina.gob.ar/noticias/salud-presento-la-actualizacion-del-protocolo-para-la-atencion-integral-de-las-personas-con>

<sup>3</sup> Grupo de Estudios sobre Derechos Sexuales y Reproductivos (GEDESyR), de la Universidad de San Martín, Boletín No. 4, October 2020–April 2021. Available at: <http://www.unsam.edu.ar/escuelas/humanidades/centros/cedehu/GEDESyR/GEDESyR%20Bolet%C3%ADn%204.pdf>

Most of the actions have been dismissed by judges of first instance. However, despite the vagueness of the arguments, judicial operators have upheld these legal actions in a few cases, although they have not succeeded in stopping the implementation of the law. However, their judicial activism has promoted a state of confusion and misinformation regarding the validity of the norm and its mandatory nature for all health providers in the country.

Another obstacle to ensuring access to the right to abortion is that even potential patients and those who must guarantee the practice from the health areas are unaware of the scope of the rights established by Law 27,610. To date, there have been no widespread awareness campaigns to disseminate the rights recognized under the law at the national or provincial level, nor have there been any campaigns aimed at destigmatizing abortion.

### **Access to misoprostol and mifepristone**

Medical abortion improves the position of persons with gestational capacity in the power relations between them and health professionals since it democratizes this link and gives greater autonomy to patients. Guaranteeing access to abortion drugs is a prerequisite for access to a violence-free practice that respects the autonomy of those who have the capacity to bear children.

Misoprostol combined with mifepristone is the safest and most effective option for performing early abortions. In countries where mifepristone is not available, the WHO recommends doses of misoprostol alone. This has been the scientific consensus for years. The WHO established this in its first safe abortion guide in 2003 and has upheld this position to the present day.<sup>4</sup> Moreover, the healthcare protocols of the Argentine Ministry of Health also adheres to this consensus.<sup>5</sup>

In addition, since 2005, both drugs are on the WHO List of Essential Medicines, which is updated every two years.<sup>6</sup> According to the WHO, the essential medicines are “those that satisfy the priority health care needs of the population. They are selected with due regard to public health relevance, evidence on efficacy and safety, and comparative cost-effectiveness.” They are “intended to be available within the context of functioning health systems at all times in adequate amounts, in the appropriate dosage forms, with

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<sup>4</sup> WHO Safe Abortion, 2003. Available at: <https://apps.who.int/iris/bitstream/handle/10665/42586/9241590343.pdf?sequence=1>; WHO, Medical management of abortion 2018. Available at: <https://apps.who.int/iris/bitstream/handle/10665/278968/9789241550406-eng.pdf?ua=1>

<sup>5</sup> Ministerio de Salud de la Nación [Argentine Health Ministry] Argentina, Protocolo para la atención integral de las personas con derecho a la interrupción legal del embarazo 2ª edición revisada y actualizada (Buenos Aires, 2015), available at [https://www.argentina.gob.ar/sites/default/files/protocolo\\_ile.pdf](https://www.argentina.gob.ar/sites/default/files/protocolo_ile.pdf) and Protocolo para la atención integral de las personas con derecho a la interrupción legal del embarazo, 2ª edición (Buenos Aires, 2019). Available at: <http://www.msal.gob.ar/images/stories/bes/graficos/0000001792cnt-protocolo-ILE-2019-2edicion.pdf>

<sup>6</sup> WHO, The selection and use of essential medicines (Geneva: WHO, 2005). Available at: [https://extranet.who.int/iris/restricted/bitstream/handle/10665/43292/WHO\\_TRS\\_933\\_eng.pdf?ua=1](https://extranet.who.int/iris/restricted/bitstream/handle/10665/43292/WHO_TRS_933_eng.pdf?ua=1); WHO, The Selection and Use of Essential Medicines (Geneva: WHO, 2019). Available at: <https://apps.who.int/iris/bitstream/handle/10665/330668/9789241210300-eng.pdf?ua=1>

assured quality and adequate information, and at a price that the individual and the community can afford.”<sup>7</sup>

Although very effective and safe, misoprostol alone is less effective than the combination of mifepristone and misoprostol. Not only is it less effective, the WHO has pointed out that in these cases the time to complete the abortion is longer and the abortion process is more painful.<sup>8</sup>

However, mifepristone is not available in Argentina: nobody imports it nor is it produced here.

Therefore, with the possibility of an effective, quicker, and less painful procedure, the State's failure to ensure the availability of mifepristone implies that people with the ability to abort have to resort to a less effective method that takes longer and subjects them to an unwarranted process of greater pain.

This fact, in itself, accounts for the Argentine State's failure to comply with its human rights obligations regarding the right to health of the people under its jurisdiction.

The UN Committee on Economic, Social and Cultural Rights has noted that health goods and services, and in particular sexual and reproductive health goods and services, must be available (with a sufficient number throughout the country, with trained personnel, and in accordance with WHO definitions), accessible (in geographic and economic terms and without discrimination), of quality (scientifically and medically appropriate), and acceptable (culturally appropriate, gender and life-cycle sensitive, respectful of personal autonomy, and confidential).<sup>9</sup>

In its 2016 General Comment 22 on the right to sexual and reproductive health, the ESCR Committee reasserted the State's obligation “to provide medicines, equipment and technologies essential to sexual and reproductive health, including based on the WHO Model List of Essential Medicines.”<sup>10</sup> Moreover, in 2020, the ESCR Committee highlighted that States must ensure access to up-to-date scientific technologies necessary for women in relation to their sexual and reproductive health.<sup>11</sup>

To guarantee the enjoyment of sexual and reproductive rights in the country, without discrimination and under conditions of equality, it is essential to adopt effective measures so that the safest, most effective, and least painful method of abortion is available for all.

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<sup>7</sup> WHO, Essential medicines [https://www.who.int/topics/essential\\_medicines/en/](https://www.who.int/topics/essential_medicines/en/)

<sup>8</sup> WHO, Safe abortion: technical and policy guidance for health systems, second edition, p. 45, available at: [http://apps.who.int/iris/bitstream/handle/10665/70914/9789241548434\\_eng.pdf?sequence=1](http://apps.who.int/iris/bitstream/handle/10665/70914/9789241548434_eng.pdf?sequence=1)

<sup>9</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health, UN Doc. No. E/C.12/2000/4 (2000), para. 14; General Comment No. 22 on the right to sexual and reproductive health, UN Doc. No. E/C.12/GC/22 (2016), paras. 11-21

<sup>10</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 22 on the right to sexual and reproductive health, UN Doc. No. E/C.12/GC/22 (2016), paras. 13, 14, 17 and 49.

<sup>11</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 25 on science and economic, social and cultural rights, UN Doc. No. E/C.12/GC/25 (2020), para. 33.

## Self-managed abortion for human rights

Since 2005, the year that mifepristone and misoprostol were included in the WHO Model List of Essential Medicines with the requirement for “close medical supervision,”<sup>12</sup> numerous studies have documented medical abortion safety and effectivity through self-managed approaches, without the need for specialized medical care and direct supervision, which was reflected in World Health Organization’s guidelines updates.<sup>13</sup> Retrieving the evidence gathered over the years, the 2019 List of Essential Medicines removed the note requiring “close medical supervision.” The Expert Committee explained that this decision was “based on the evidence presented that close medical supervision is not required for its safe and effective use.”<sup>14</sup>

When the pandemic broke, in a joint press statement issued in early May 2020, dozens of country representatives expressed that sexual and reproductive health needs “must be prioritized to ensure continuity” and called for governments “to ensure full and unimpeded access to all sexual and reproductive health services for all women and girls.”<sup>15</sup> The WHO defined sexual and reproductive care as essential health services to be assured in the context of the COVID-19 pandemic. It urged States to reduce barriers that could delay care, and “minimize facility visits and provider-client contacts through the use of telemedicine and self-management approaches.”<sup>16</sup>

As a way to tackle the difficulties posed by the current health crisis—especially those arising from the confinement measures and to avoid crowding health facilities— some countries, such as France and the UK, temporarily lifted some of the non-therapeutic restrictions on access to medical abortions, allowing self-managed medical abortions at home.<sup>17</sup> According to the UK Royal College of Obstetricians and Gynaecologists, in the six weeks following this decision, approximately 16,500 women accessed safe medical

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<sup>12</sup> WHO, The selection and use of essential medicines (Geneva: WHO, 2005). Available at [https://extranet.who.int/iris/restricted/bitstream/handle/10665/43292/WHO\\_TRS\\_933\\_eng.pdf?ua=1](https://extranet.who.int/iris/restricted/bitstream/handle/10665/43292/WHO_TRS_933_eng.pdf?ua=1)

<sup>13</sup> WHO, Health worker roles in providing safe abortion care and post-abortion contraception, 2015, p. 41. Available at [https://apps.who.int/iris/bitstream/handle/10665/181041/9789241549264\\_eng.pdf?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/181041/9789241549264_eng.pdf?sequence=1); WHO, Expanding health worker roles for safe abortion in the first trimester of pregnancy, 2016. Available at [https://apps.who.int/iris/bitstream/handle/10665/206191/WHO\\_RHR\\_16.02\\_eng.pdf?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/206191/WHO_RHR_16.02_eng.pdf?sequence=1); WHO, Medical management of abortion, 2018, pp. 3, 26, 27 and 40. Available at <https://apps.who.int/iris/bitstream/handle/10665/278968/9789241550406-eng.pdf?ua=1>; WHO, Consolidated guidelines on self-care interventions for health: sexual and reproductive health and rights, 2019. Available at <https://www.who.int/reproductivehealth/publications/self-care-interventions/en/>

<sup>14</sup> WHO, Expert Committee on the Selection and Use of Essential Medicines, The Selection and Use of Essential Medicines (Geneva: WHO, 2019). Available at: <https://apps.who.int/iris/bitstream/handle/10665/330668/9789241210300-eng.pdf?ua=1>

<sup>15</sup> Government Offices of Sweden, Joint press statement Protecting Sexual and Reproductive Health and Rights and Promoting Gender-responsiveness in the COVID-19 crisis, (May 06, 2020). Available at <https://www.government.se/statements/2020/05/joint-press-statement-protecting-sexual-and-reproductive-health-and-rights-and-promoting-gender-responsiveness-in-the-covid-19-crisis/>

<sup>16</sup> WHO, Maintaining essential health services: operational guidance for the COVID-19 context (Geneva: WHO, 2020), p. 29. Available at <https://www.who.int/publications/i/item/covid-19-operational-guidance-for-maintaining-essential-health-services-during-an-outbreak>

<sup>17</sup> H. Margolis, “England Leads Way in UK after U-Turn on COVID-19 Abortion Access,” Human Rights Watch (March 31, 2020). Available at <https://www.hrw.org/news/2020/03/31/england-leads-way-uk-after-u-turn-covid-19-abortion-access>; Haute Autorité de Santé, Interruption Volontaire de Grossesse (IVG) médicamenteuse à la 8ème et à la 9ème semaine d’aménorrhée (SA) hors milieu hospitalier (April 10, 2020). Available at [https://www.has-sante.fr/jcms/p\\_3178808/fr/interruption-volontaire-de-grossesse-ivg-medicamenteuse-a-la-8eme-et-a-la-9eme-semaine-d-amenorrhée-sa-hors-milieu-hospitalier](https://www.has-sante.fr/jcms/p_3178808/fr/interruption-volontaire-de-grossesse-ivg-medicamenteuse-a-la-8eme-et-a-la-9eme-semaine-d-amenorrhée-sa-hors-milieu-hospitalier)

abortion at home in England and Wales, at a time when many in-person services were suspended.<sup>18</sup> Likewise, recently, the US FDA decided to suspend the in-person-provision requirements for medical abortion. Those who need it will be able to access the medication in pharmacies or by mail, without having to go to a special health facility.<sup>19</sup>

Meanwhile, in Argentina, since 2015 if not earlier, public health protocols provide for outpatient medical abortions in public health facilities or the option that women perform the procedure in their homes if they choose to and when therapeutically appropriate.<sup>20</sup> Moreover, misoprostol has been available by prescription in pharmacies since 1998.<sup>21</sup>

In the same vein, countries like Canada<sup>22</sup> and Australia<sup>23</sup> have improved self-managed medical abortion over the last five years, allowing access in pharmacies to both mifepristone and misoprostol.

Also, following the call to ensure the continuity of sexual and reproductive health services during the Covid-19 pandemic, local authorities have issued special procedures for this purpose.

For example, Buenos Aires Province, the most populated in Argentina, issued special guidelines for health teams. They included measures ordered by the health authority to ensure timely access to the termination of pregnancy in cases allowed by Argentine law. In particular, it recommended that health teams prioritize medical abortion procedures and the possibilities of outpatient treatment.<sup>24</sup>

Similarly, at the start of 2020, the National Ministry of Health published the "Recommendations for the First Level of Care of Pregnant Persons, Children and Adolescents - Covid-19" to ensure differentiated care for patients without suspicion of

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<sup>18</sup> Royal College of Obstetricians and Gynaecologists, "Coronavirus (COVID-19) infection and abortion care: Information for healthcare professionals," Version 3.1 (July 31, 2020) <https://www.rcog.org.uk/globalassets/documents/guidelines/2020-07-31-coronavirus-covid-19-infection-and-abortion-care.pdf>

<sup>19</sup> Politico, "FDA lifts curbs on dispensing abortion pills during pandemic," April 12, 2021. Available at: <https://www.politico.com/news/2021/04/12/abortion-pills-481092>

<sup>20</sup> Ministerio de Salud de la Nación [Argentine Health Ministry] Argentina, *Protocolo para la atención integral de las personas con derecho a la interrupción legal del embarazo 2ª edición revisada y actualizada* (Buenos Aires, 2015), p. 34. Available at [https://www.argentina.gob.ar/sites/default/files/protocolo\\_ile.pdf](https://www.argentina.gob.ar/sites/default/files/protocolo_ile.pdf) and *Protocolo para la atención integral de las personas con derecho a la interrupción legal del embarazo, 2ª edición* (Buenos Aires, 2019), p. 43. Available at <http://www.msal.gob.ar/images/stories/bes/graficos/0000001792cnt-protocolo-ILE-2019-2edicion.pdf>

<sup>21</sup> National Administration of Medicines, Food and Medical Technology (ANMAT), Argentina, orders 3646/98, 6726/2018 and 946/2018.

<sup>22</sup> LaRoche and A. Foster, "It gives you autonomy over your own choices': A qualitative study of Canadian abortion patients' experiences with mifepristone and misoprostol," *Contraception* 102/1 (2020), pp. 61-65. DOI: 10.1016/j.contraception.2020.04.007; L. Vogel, "More doctors providing abortion after federal rules change.," *CMAJ*, vol. 190, no. 5, pp. 147-148, 2018.

<sup>23</sup> D. Grossman and P. Goldstone, "Mifepristone by prescription: a dream in the United States but reality in Australia," *Contraception*, 92/3 (2015), pp. 186-9. DOI: 10.1016/j.contraception.2015.06.014

<sup>24</sup> Ministerio de Salud Provincia de Buenos Aires [Ministry of Health for the Province of Buenos Aires], Argentina, *Protocolo para la atención integral de las personas con derecho a interrumpir el embarazo y el acceso a métodos anticonceptivos, en el marco de la pandemia por coronavirus*, Resolución 577/2020.

COVID-19 and Information Note 1: Recommendations to ensure access to sexual and reproductive health services in the context of the COVID-19 pandemic.<sup>25</sup>

Meanwhile, the Federal government also published an informational brochure for women about self-managed medical abortion with misoprostol.<sup>26</sup>

All these governmental decisions are consistent with scientific evidence regarding the safety and effectiveness of self-managed medical abortion.

And, what is of special relevance for the mandate of this Special Rapporteur, is that those decisions are consistent with the State's human rights obligations regarding the accessibility and acceptability of sexual and reproductive health goods and services, and women's dignity and autonomy.<sup>27</sup>

These public policies that allow for the option of a self-managed abortion should be deemed as good practices for a pandemic context and the future. And, accordingly, any regulations that unnecessarily restrict access to these medical abortion modalities should be understood as overmedicalization policies,<sup>28</sup> which are incompatible with International Human Rights Law.

### **Criminalization of women and persons with childbearing capacity**

The enactment of Law 27,610 modified the Argentine Criminal Code, replacing Article 85 which lead to the criminalization of women and persons with childbearing capacity.

Before the enactment of Law 27,610, CELS conducted research on criminalization of abortion and other obstetric events based on data from the Provinces of Santa Fe, Río Negro, Chaco, Chubut, Córdoba, Neuquén, Formosa, Catamarca, Corrientes, Tucumán, Mendoza, Salta, Buenos Aires, Jujuy, San Luis, La Pampa and the Autonomous City of Buenos Aires. The report found evidence of 1,532 lawsuits related to abortion and 37 for obstetric events.<sup>29</sup>

As a consequence of the enactment of Law 27,610, charges and convictions for the crime of abortion in the case of persons with gestational capacity should be reviewed, given that these acts cannot be continued to be criminalized. In addition, legal operators and judicial authorities must re-examine those cases of prosecution of obstetric events, in the light of the rights that the law now recognizes for persons with childbearing capacity.

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<sup>25</sup> Ministerio de Salud de la Nación [Argentine Health Ministry], <https://bancos.salud.gob.ar/recurso/nota-informativa-1-recomendaciones-para-garantizar-el-acceso-las-prestaciones-en-salud-0>

<sup>26</sup> Ministerio de Salud de la Nación [Argentine Health Ministry], "Folleto Interrupción del embarazo con medicamentos" [Termination of pregnancy with medication] available at: <https://bancos.salud.gob.ar/recurso/folleto-interrupcion-del-embarazo-con-medicamentos>

<sup>27</sup> López Cabello, A. and Gaitan, AC, "Safe Abortion in Women's Hands: Autonomy and a Human Rights Approach to COVID-19 and Beyond," Health and Human Rights Journal, Vol. 23, No. 1, available at: <https://www.hhrjournal.org/2021/02/perspective-safe-abortion-within-womens-reach-autonomy-and-a-human-rights-approach-to-covid-19-and-beyond/>

<sup>28</sup> See: UN Working Group on the issue of discrimination against women in law and in practice, UN Doc. No. A/HRC/32/44 (2016), para. 74

<sup>29</sup> See: <https://www.cels.org.ar/web/publicaciones/la-criminalizacion-por-aborto-y-otros-eventos-obstetricos-en-la-argentina/>