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RE: OPEN LETTER & LEGAL OPINION: REPORTS RECEIVED OF PHARMACISTS REFUSING TO DISPENSE ABORTIFACIENTS AND REQUEST FOR INTERVENTION FROM THE SOUTH AFRICAN PHARMACY COUNCIL AND THE NATIONAL DEPARTMENT OF HEALTH

1. This letter is addressed to the South African Pharmacy Council (**SAPC**) and the National Department of Health (**NDOH**) by:-
 - 1.1. **Abortion Support South Africa**, a non-profit comprising of activists, researchers and healthcare providers working to increase access to abortion in South Africa and providing accurate and compassionate abortion information as well as digital referrals for women needing abortion pills;
 - 1.2. **The Centre for Human Rights, University of Pretoria**, a university-based institution combining academic excellence and effective activism to advance human rights, particularly in Africa;
 - 1.3. **Ipas South Africa**, an international, non-governmental organisation that seeks to increase access to safe abortions and contraception globally;
 - 1.4. **SECTION 27**, a public interest law centre that seeks to influence, develop and use the law to protect, promote and advance human rights;



- 1.5. **The Independent Community Pharmacy Association**, an independent association that represents one of the largest pool of pharmaceutical professionals in the healthcare sector;
- 1.6. **Marie Stopes South Africa**, South Africa’s largest non-profit provider of sexual and reproductive healthcare services seeking to impact the quality of life in South Africa by decreasing maternal and infant mortality and averting unsafe and illegal abortions;
- 1.7. **The Sexual Reproductive Justice Coalition**, an organisation that contributes to the realisation of sexual and reproductive justice for all. The Sexual Reproductive Justice Coalition provides a platform for individuals and organisations to mobilise, advocate, produce and use evidence to realise sexual and reproductive justice.
- 1.8. **The Legal Resources Centre**, a public interest non – profit law clinic in South Africa founded in 1979. The LRC uses the law as an instrument for justice for poor and marginalised persons. The LRC pursues equality, access to justice, and the recognition of constitutional rights for all through creative and effective solutions.



- 1.9. **The Centre for Applied Legal Studies**, a civil society organisation and law clinic founded in 1978 and based at the School of Law at the University of the Witwatersrand. CALS' vision is a society where historical and social justice is achieved, state institutions are strengthened, and powerful entities are held to account by marginalised individuals.
- 1.10. **Triangle Project**, a non-profit human rights organisation offering professional services to ensure the realisation of constitutional and human rights for lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI+) persons, their partners, and families.
- 1.11. **Gender Dynamix**, an Africa-based public benefit organisation working towards the realisation of all human rights of transgender and gender nonconforming people within and beyond the borders of South Africa; and
- 1.12. **Women's Legal Centre**, an African feminist legal centre that advances womxn's rights and equality through strategic litigation, advocacy and education and training.

(collectively “**endorsers**”)

2. The endorsers listed above all have an interest in promoting and improving access to safe and legal abortions in South Africa and beyond.



PURPOSE OF THIS LETTER

3. The purpose of this correspondence addressed to the SAPC and the NDOH is to:-
 - 3.1. inform the SAPC and the NDOH of reports received by Abortion Support South Africa of pharmacists refusing to dispense abortion medications, such as misoprostol, due to alleged personal beliefs and conscientious objection;
 - 3.2. inform the NDOH and the SAPC of the threat that a refusal by pharmacists to dispense abortifacient poses to individuals' access to safe and legal abortions in South Africa; and
 - 3.3. request an audience with the SAPC and the NDOH to discuss the above alleged conduct which we believe is unlawful in terms of the Choice on Termination of Pregnancy Act¹ (**CTOP Act**) and the National Clinical Guideline for Implementation of the Choice on Termination of Pregnancy Act² (**the Guideline**);

¹ Act 92 of 1996.

² National Department of Health, Republic of South Africa, “*National Clinical Guideline for Implementation of the Choice on Termination of Pregnancy Act*”, 2019, Ed. 1.



- 3.4. call on the SAPC to clarify and communicate the correct legal position to all registered pharmacists by issuing a communiqué/ notice to this effect, in line with the SAPC's mandate.

REPORTS OF PHARMACISTS REFUSING TO DISPENSE/ STOCK ABORTIFACIENTS DUE TO PERSONAL BELIEFS OR MORALS

4. Abortion Support South Africa, since its establishment in 2022, has provided accurate and compassionate abortion information and digital referrals for womxn seeking to terminate their pregnancies. In the course of working to increase access to safe and legal abortions in South Africa, Abortion Support South Africa has received a multitude of reports of pharmacists refusing to dispense and/or stock abortion pills due to a moral or conscientious objections.
5. Since February 2023, Abortion Support South Africa has contacted 312 pharmacies on behalf of its users. The 312 pharmacies contacted represent approximately 7.2% of the 400 pharmacies in the country. Forty percent of the pharmacists contacted indicated that they would not dispense abortion medications even when provided with a valid prescription from a doctor. The pharmacists contacted frequently cited moral or religious reasons for refusing to dispense.



6. Below are quotations of communications received from Abortion Support South Africa's users pursuant to attempts made to fulfil their prescription. It is important to note that the pharmacies referred to in the quotations below are those that received a valid e-prescription by a medical doctor affiliated with Abortion Support South Africa. The pharmacies referred to below also indicated via a telephonic call with a representative of Abortion Support South Africa that they had stock of the requested abortion pills and were willing to dispense. The personal details of the patients have been redacted to protect their privacy.

6.1. 23-year-old, Midrand, Gauteng, LMP 67: "Yesterday I wyent [sic] to the pharmacy where I was supposed to fetch my pills unfortunately I didn't get them they say the owner has not approved to accept my prescription."

6.2. 25-year-old, Midrand Gauteng, LMP 39: "Good morning I went to the pharmacy, and they told me they cannot assist me in terms of the pills. They do not keep them nor they cannot order them for me. Is there any other way that I can still get them? Regards".

6.3. 23-year-old, Thohoyandou, Limpopo, LMP 70: "... the owner doesn't want to issue the medication. They say they don't do digital scripts".

6.4. 32-year-old, Pretoria, Gauteng, LMP 41: "Apologies for my many emails. Please may this script be sent to another pharmacy as the one it was sent to are either unwilling or unable to source the required medicines for me. They also treated



me with disrespect upon seeing what was requested and made me feel very uncomfortable. I am feeling rather nervous as this is already difficult to begin with”.

7. The quotations above are just some of the various reports received from Abortion Support South Africa’s users of pharmacists refusing to dispense despite the pharmacies having indicated that they have the necessary medication in stock and were able to dispense. Many pharmacists are refusing to dispense by raising a conscientious objection to abortifacients generally.
8. The endorsers note these reports with concern particularly insofar as these reports of denial of service by pharmacists adversely impacts access to safe and legal abortions in South Africa. The endorsers are also of the view that this conduct may constitute unlawful conduct. There is accordingly a dire need for a clear and unambiguous directive from the SAPC regarding such practices so that pharmacists are fully aware of their legal obligations to their patients.

THE LEGAL POSITION

9. The endorsers are of the view that pharmacists’ refusal to dispense abortion medications may constitute unlawful conduct. In summation, the rationale for this view is that a pharmacist’s refusal to dispense abortifacients may amount to the limitation of



an individuals' rights to reproductive autonomy, and the right to access healthcare services including reproductive health as enshrined in the Constitution of the Republic of South Africa (**Constitution**). The endorsers are also of the opinion that the denial of service by pharmacists may amount to an obstruction of access to abortion services, which is prohibited by the CTOP Act. This shall be canvassed more fully hereunder.

The Choice on Termination of Pregnancy Act, 92 of 1996 and conscientious objection

10. The CTOP Act promotes reproductive rights and extends freedom of choice by affording every womxn the right to choose to have a safe and legal abortion according to their individual beliefs³. The CTOP Act provides that a pregnancy may be terminated at a womxn's request up to 12 weeks of gestation. Beyond 12 weeks and up to 20 weeks gestation, an abortion may be performed if after a consultation with a pregnant womxn, a medical practitioner is of the opinion that the continued pregnancy would pose a risk to the womxn's physical or mental health; there is a substantial risk that the foetus would suffer from severe physical or mental abnormality; that the pregnancy resulted from rape or incest or the continued pregnancy would significantly affect the social and economic circumstances of the womxn. From 20 weeks gestation onwards, abortions are available only under limited circumstances, including those in which the continued pregnancy would endanger the womxn's life, pose a risk of injury or result in severe malformation of the foetus.

³ Naylor N, O'Sullivan M: "*Conscientious objection and the implementation of the Choice on Termination of Pregnancy Act 92 of 1996 in South Africa*", 2005, Cape Town, South Africa: Women's Legal Centre



11. The purpose of the CTOP Act is to give effect to the constitutional right to reproductive autonomy. The CTOP Act recognises that the Constitution protects the right of persons to make decisions concerning reproduction, and the right to security in and control over their bodies.
12. The CTOP Act does not explicitly regulate or allow for conscientious objections or objections to providing access to an abortion due to personal beliefs. Whilst the endorsers have concerns around the validity of conscientious objections by healthcare professionals, the endorsers are aware that the “right” to conscientiously object to directly performing termination of pregnancy services is usually inferred from section 15 of the Constitution.

Section 15 of the Constitution of the Republic of South Africa and indirect healthcare providers

13. Section 15 of the Constitution is said to implicitly accommodate provider refusal to provide termination of pregnancy services⁴. It is imperative to note, however, that the right to refuse to provide abortion services currently only applies to direct healthcare providers. Healthcare providers who are not directly involved in the abortion procedure,

⁴ Section 15 of the Constitution entrenches the right to freedom of belief and provides:-

“Everyone has the right to freedom of conscience, religion, thought, belief and opinion”



whether medical or surgical, cannot raise a conscientious objection as the basis for refusing to assist those seeking abortion services⁵.

14. Effectively, indirect healthcare providers, such as pharmacists, cannot rely on section 15 of the Constitution as the basis for their refusal to dispense. This position has been encapsulated, and communicated, by the National Department of Health in the Guideline⁶. The Guideline explicitly states that ancillary staff and other healthcare professionals involved in the general care of a patient, *such as a pharmacist*, may not refuse to provide general or standard care to an individual under any circumstances. The Guideline goes further to provide that a healthcare professional who:-

14.1. is not directly involved in performing the termination of pregnancy; and

14.2. refuses to provide care to a womxn seeking termination of pregnancy services

is in violation of the CTOP Act and the Constitution. Importantly, the Guideline is applicable to both public and private healthcare providers⁷.

⁵ National Department of Health, Republic of South Africa, “*National Clinical Guideline for Implementation of the Choice on Termination of Pregnancy Act*”, 2019, Ed. 1.

⁶ Ibid.

⁷ Ibid at para 1.3 which provides:

“These guidelines provide strategic and operational guidance to all public and private healthcare providers”.



15. It is therefore explicitly clear that conscientious objection as a basis for refusing to dispense abortion medications *is not available to indirect healthcare providers such as pharmacists.*

Indirect healthcare providers and obstruction to access

16. The categorisation of pharmacists as indirect providers is significant as this categorisation precludes the applicability of section 15 of Constitution and consequently invokes the obstruction to access provisions of the CTOP Act.
17. In refusing to dispense due to a conscientious objection, underpinned by an erroneous reliance on section 15 of the Constitution, pharmacists are engaging in conduct that amounts to obstruction of access to a safe and legal abortion. This conduct is expressly prohibited by the CTOP Act.
18. Section 10 of the CTOP Act criminalises the conduct of individuals who prevent the lawful termination of a pregnancy or obstructs an individual's access to a facility for the termination of a pregnancy⁸. The Guideline further provides that obstruction to access

⁸ Section of the CTOP Act provides:-

“10. Offences and penalties. – (1) Any person who –

- (a) *Is not a medical practitioner, or a registered midwife or registered nurse who has completed the prescribed training course, and who performs the termination of a pregnancy referred to in section 2(1)(a);*
- (b) *Is not a medical practitioner and who performs the termination of a pregnancy referred to in section 2(1)(b) or (c);*



refers to any person or act which has the effect of preventing an individual from accessing any part of a quality and lawful termination of pregnancy service, in a timely manner.

19. Accordingly, pharmacists who refuse to dispense abortion pills with a mistaken, or intentional, belief that they are entitled to do so on the basis of a conscientious objection are misinformed and acting in contravention of the CTOP Act. Such pharmacists would be guilty of committing an offence and can be subjected to criminal proceedings.
20. It is important to note that the endorsers do not take issue with pharmacists who refuse to dispense abortifacients because the script is invalid⁹. Instead, the endorsers are concerned with incidents whereby a valid script for abortifacients, containing the necessary information, is presented to a pharmacist but the relevant pharmacist refuses to dispense because they conscientiously object.

(c) Prevents the lawful termination of a pregnancy or obstructs access to a facility for the termination of a pregnancy; or

(d) terminates a pregnancy or allows the termination of a pregnancy at a facility not approved in terms of section 3(1) or not contemplated in section 3(3)(a),

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years..” (Emphasis added).

⁹ Regulation 33 of the General Regulations to the Medicines and Related Substances Act, 101 of 1965, provides the particulars that must appear on a prescription for medicine. In the reports cited by Abortion Support of South Africa, the users who were denied access to abortifacients had valid scripts that comply with Regulation 33 of the General Regulations to the Medicines and Related Substances Act, 101 of 1965.



THE ADVERSE EFFECT OF UNREGULATED CONSCIENTIOUS OBJECTION ON ACCESS TO SAFE AND LEGAL ABORTIONS

21. The reports of alleged refusal to care set out above demonstrate how womxn are denied access to abortifacients that they are legally entitled to receive. The prevalence of misinformation around conscientious objections, particularly in the pharmaceutical profession, has the effect of significantly diminishing access to safe and legal abortions in South Africa¹⁰. Should this trend be allowed to persist, access to legal abortions through the use of abortifacients will be drastically impeded. This opens up the possibility of those seeking abortions turning to unsafe and illegal providers.
22. The World Health Organization has recognised that refusal of abortion care on the basis of conscience operates as a barrier to access safe and timely abortions¹¹. Furthermore, it is trite that conscientious objections can delay abortion access¹². Abortions accessed at a later gestational age are associated with an increase of risk complications¹³. Second trimester abortions account for twenty- five percent of abortions performed in South

¹⁰ Trueman, K, “*Abortion in a Progressive Legal Environment: The Need for Vigilance in Protecting and Promoting Access to Safe Abortion Services in South Africa*” (2013) <https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2012.301194>.

¹¹ WHO Abortion Care Guideline, “*Law and Policy Recommendation 22: Conscientious Objection (3.3.9)*”, (para 14,8,109,353).

¹² Harries, J., Cooper, D., Strebel, A. *et al.*, “*Conscientious objection and its impact on abortion service provision in South Africa: a qualitative study*”. *Reprod Health* **11**, 16 (2014). <https://doi.org/10.1186/1742-4755-11-16>.

¹³ L Charrier, M Bo, E Koumantakis, CM Zotti, “*The Impact of Conscientious Objection on Voluntary Abortion in Italy in the Last Two decades*”, *European Journal of Public Health*, Volume 32, Issue Supplement_3, October 2022.



Africa which is far higher than in other countries with legalised abortion, where ten percent is the norm. This is a particular concern for those in rural areas who have to travel further to find other facilities willing to assist with the termination¹⁴.

THE NEED FOR THE SAPC AND NDOH TO EDUCATE PHARMACISTS

23. As is evident from the reports of refusal to care, womxn are approaching multiple pharmacies and are being turned away. It is clear that the problem is widespread and affecting multiple geographical locations across the country. The delays triggered by a refusal to dispense put womxn at risk of exceeding the gestational age limit for medical abortions.
24. The cumulative effect of the above factors is significantly diminishing access to safe and legal abortions in South Africa. The endorsers, therefore, note with concern the reports received by Abortion Support South Africa of pharmacists refusing to dispense abortifacients due to conscientious objections.
25. The endorsers are of the view that the prevalence of miseducation and misinformation on the topic of pharmacists, home-use of abortifacients¹⁵ and conscientious objection,

¹⁴ African Population and Health Research Center, Ministry of Health Kenya, Ipas Kenya, & Guttmacher Institute, (2013), *“Incidence and Complications of Unsafe Abortion in Kenya: Key findings of a National Study”*, available from <https://www.guttmacher.org/pubs/abortion-in-Kenya.pdf>

¹⁵ The Guideline advises at-home abortion up to 10 weeks and notes that “at-home abortion can improve the privacy, convenience, and acceptability of services”. The Guideline state that:



is what perhaps underpins pharmacists' erroneous reliance on section 15 of the Constitution. To combat this dilemma, the endorsers recommend that the SAPC and the NDOH commit to educating healthcare providers, particularly pharmacists, on their duties as well as the legal principles applicable to them.

26. The endorser's are consequently of the view that there is an urgent need for the SAPC to:-

26.1. formulate a position on the topic of conscientious objection insofar as it relates to pharmacists through collaborative efforts with the endorsers as proposed below;

26.2. issue a directive pursuant to these engagements which communicates the formulated position having regard to the endorsers' view that the conduct engaged in significantly diminishes access to safe and legal abortions and may constitute a criminal offence in terms of the Act; and

26.3. launch thorough investigations into any future reports received of such transgressions, and to subject all registered persons found to be in contravention of a potential issued directive to the necessary disciplinary procedures.

27. Such action would be in line with the SAPC's statutory mandate to:-

"facility-based abortion care should be reserved for the management of abortion over 10 weeks and severe complications. Home-use of misoprostol is standard care in public health facilities."



- 27.1. regulate the pharmacy profession and monitor compliance with professional standards; and
- 27.2. investigate alleged misconduct and impose disciplinary sanctions against those found guilty of misconduct – which may include deregistration.
28. The SAPC has a duty to put the public’s interests at the forefront of its regulation of the pharmaceutical profession. Once again, it is the endorser’s view that the practice of pharmacists refusing to dispense abortifacients due to a conscientious objection may constitute criminal misconduct and substantially impedes access to safe and legal abortions.
29. The endorsers are aware that the topic of conscientious objection, as it relates to pharmacists, lacks any guidance from the SAPC and is therefore underregulated. The endorsers aim to represent the rights of those seeking access to abortion services. To this end, the endorsers wish to foster a collaborative environment wherein we work together with the SAPC and the NDOH to give effect to the constitutionally enshrined right to reproductive autonomy.
30. This letter serves as an alert to the NDOH and the SAPC, highlighting the need for prompt attention to this matter to ensure compliance with the relevant legal frameworks and guidelines governing pharmaceutical services and reproductive healthcare.



31. We accordingly request an audience with the SAPC and the NDOH to engage in discussions aimed at improving access to safe and legal abortions in South Africa, particularly in light of the reports set out above. The endorsers are committed to fostering a collaborative and cooperative environment with an aim to engage in a joint consensus seeking approach. In this regard, we wish to avoid a litigious and contentious stance at this stage and hope that the SAPC and the NDOH utilises this opportunity to collaborate with us in improving access to safe and legal abortions in South Africa.
32. Given the serious risk that reduced access to abortion poses to the health and safety of those seeking termination of pregnancy services, we must reinforce the urgency of the situation. In this regard, the endorsers request that the SAPC and the NDOH commit to engaging with us within one (1) month from the date of delivery of this correspondence. Any communication regarding such engagements should be directed to victoria@abortionssupport.co.za.

Sincerely,

Abortion Support South Africa

Centre for Human Rights, University of Pretoria

Ipas South Africa

SECTION 27

Independent Community Pharmacy Association

Marie Stopes

Sexual Reproductive Justice Coalition

Legal Resources Centre



Centre for Applied Legal Studies

Triangle Project

Gender Dynamix

