

**8 August 2007**

**WRITTEN SUBMISSION**

**WESTERN CAPE PROVINCIAL PARLIAMENT  
HEALTH COMMITTEE**

**HEARINGS ON THE**

**CHOICE ON TERMINATION OF PREGNANCY  
AMENDMENT BILL 2007**

**SUBMISSION**

**PRESENTED BY**

**JUSTICE ALLIANCE OF SOUTH AFRICA**

**(Kindly Note that JASA would like to make an ORAL submission to the Committee)**

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## **SUBMISSION**

### **CTOP AMENDMENT BILL 2007**

Our submission is that the scope of the 1996 Act should not be enlarged in terms of more facilities and more staff unless the widespread abuses of the present legislation, and problems raised by it, are addressed at the same time.

Accordingly we respectfully submit that the following clauses (drafted by counsel with Parliamentary drafting experience) should be added to the Amendment Bill. They are designed to clarify and enforce the 1996 Act and prevent the abuses of the existing law which are prevalent.

#### **1. Counselling**

Before a medical practitioner, or registered midwife or nurse, performs an abortion he or she shall ensure that the woman is counselled in a manner which provides a full opportunity for discussion and questions, and such counselling shall in every case include:

- (a) Sufficient information, imparted either by electronic pictures or coloured diagrams and photographs, to enable the woman to

- understand the existing stage of development of the unborn child in her womb.
- (b) A discussion of the extent of the risks involved in continuing the pregnancy, as set against the risks involved in having an abortion. The latter must be explained in the light of the latest medical science available at the time, and must include explanation of the following risks:
- (i) The increased risk of breast cancer following an abortion.
  - (ii) The risk of depression and associated symptoms after a period of years.
  - (iii) The risk of difficulties in conceiving, and bearing children in the future.
- (c) The available alternatives to abortion, and in particular the ways in which the State and other agencies will support the mother and child, particularly in the event of the child being born disabled.

Why are these clauses necessary?

A. Section 4 of the 1996 Act provides that 'The State shall promote the provision of non-mandatory and non-directive counselling before and after the termination of a pregnancy.'

*The difficulty caused by this section is that practitioners take the view that the onus is on the State, not on them; 'non mandatory' is taken to mean there is no duty on them, whereas Parliament almost certainly intended it to mean that a woman cannot be forced to listen to counselling; and 'non directive' opens the door even wider for the practitioner to assume that if a woman asks for an abortion any mention of the risks*

*involved might be construed as 'directive.' The drafting of the section is uncertain and equivocal. By contrast, the regulations relating to counselling of persons receiving HIV testing are extensive, specific and unambiguous.<sup>1</sup>*

*It is true that the Regulations made under the 1996 Act are more specific as to the content of the counselling but they add nothing as to who must do the counselling. Regulation 7 requires that counselling should include:*

- (i) The available alternatives to TOP (ie adoption, keeping the child etc)*
- (ii) The procedure and associated risks of the TOP (it is submitted this must require the use of graphic material for most women, and must have regard to the current state of medical knowledge which today recognizes at least 3 areas of risk – increased prevalence of breast cancer, the 5-7 year depression syndrome, and difficulties relating to pregnancies in the future.*
- (iii) Contraceptive measures for the future.*

*Not only is it vital that legislation should specify who is responsible for ensuring that counselling is done, but furthermore, there can be little doubt that any abortion performed without such counselling will be illegal in the civil courts and give rise to an action for damages because, without counselling, informed consent required by section 5 cannot be obtained.*

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<sup>1</sup> See Minister of Health's Directive in terms of section 2 of the National Policy for Health Act 116 of 1990 which defines 'informed consent', 'pre-test counselling' and post-test-counselling.' Six different matters are specified as mandatory topics for pre-test counselling discussions.

## 2. Conscientious Objection

Save in a situation where it is necessary to act immediately to save life, no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorized by the Principal Act or this Act (including any treatment relating to surgical evacuation of the womb which may follow medical treatment) to which he or she has a conscientious objection on the ground of religion, conscience or belief.: Provided that the burden of proof of conscientious objection shall rest on the person seeking to rely on it.

*This clause is necessary because so many thousands of health workers find themselves under pressure to perform abortions contrary to their consciences and religious beliefs. 10 years of history has proved that the Constitution does not provide sufficient protection for such persons without an express clause in the CTOP legislation.*

*On June 22 2007 the Labour Court of Appeal (3 judges) handed down a judgement which stressed the need for the Minister to provide certainty in this area of the law. (Charles and others vs Gauteng Health Department and others).*

*NB. The above clause is based upon the conscientious objection clause contained in the Abortion Act, 1967 in the UK which has worked without problems for 30 years.*

### **3. Keeping of Records**

#### **Amendment of section 7(1) of the Principal Act**

Section 7(1) of the Choice on Termination of Pregnancy Act, 1996 is hereby amended by the addition of “ or (c)” after “(b)” in line three.

*This clause is necessary because the present law does not require any records to be kept of third trimester abortions. This is obviously a serious lacuna in the law which presumably crept into the 1996 Act by mistake.*

### **4. Offences and Penalties – Substitution of section 10(1) of the Principal Act**

The following section is hereby substituted for section 10(1) of the Principal Act.:

(1) Any person who terminates a pregnancy otherwise than in accordance with the Principal Act, and this Act, or at a facility not approved in terms of the Acts, or without ensuring that the requirements of the Acts relating to counselling and informed consent have been complied with, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years.

(2) Any person who willfully and physically prevents a woman attending a facility approved for terminations of pregnancy, or in any

physical manner willfully prevents the lawful termination of a pregnancy shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding 2 years.

*Why is this clause necessary?*

*Sub-clause (1) makes it a criminal offence for any person, including a doctor, to carry out an illegal abortion. Currently there is no prohibition against a medical practitioner who carries out an abortion contrary to section 2(1)(a). It also gives teeth to the requirements relating to counselling and informed consent.*

*Sub-clause (2) clarifies the current provision (section 10(c) of 1996 Act) which some try to construe as applicable to health workers who decline to do an abortion on the ground of conscientious objection. The intention of Parliament was to penalize demonstrators who blockade clinics and other forcible behaviour, not those who have conscientious objection.*

**John J Smyth QC**

**Honorary Director of JASA**

**8 August 2007**

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