

THE TERMINATION OF PREGNANCY AMENDMENT ACT

PREAMBLE

Recognising that several measures in the Choice on Termination of Pregnancy Act 92 of 1996 (hereinafter called ‘the Principal Act’), and the Choice on Termination of Pregnancy Amendment Act 38 of 2004 (hereinafter called ‘the Amendment Act’) have given rise to much confusion;

Recognising that there has arisen in South Africa an ‘abortion industry’ which makes large sums of money out of abortions which are deemed to be legal under the aforesaid Acts, but which contravene section 2 of the Principal Act in one or more ways;

Recognising that contrary to the Principal Act pregnancies are habitually terminated after 12 weeks without a medical practitioner being involved at all;

Recognising that under the Acts aforesaid the termination of pregnancies after 20 weeks do not require any notification or keeping of records and cannot therefore be monitored;

Recognising that no criminal sanctions are imposed against medical practitioners who contravene the provisions of section 2 of the Principal Act;

Recognising that many terminations of pregnancies are performed by unqualified persons using means other than medical or surgical means, and that such abortions attract no penalties under the current legislation;

Recognising that section 4 of the Principal Act (and Regulation 7 made thereunder) relating to Counselling is in most cases ignored;

Recognising that the informed consent of the pregnant woman which section 5 of the Principle Act makes a prerequisite to every termination is very seldom obtained for any abortion;

Recognising that minors who seek abortions need more assistance than the present legislation provides, and that every child has a constitutional right to ‘parental care’ particularly when faced with difficult choices in traumatic circumstances;

Recognising that no statutory provision is made in either Act for the conscientious objector who wishes to exercise his/her right under section 9 of the Constitution not to be unfairly discriminated against on the ground of religion, conscience or belief, and that this lacuna is causing considerable unrest amongst many health professionals;

Recognising that modern medical science has made enormous strides forward since the Principal Act was passed and that it is now accepted that unborn children are viable at 20 weeks gestation, and that congenital deformities can more readily be corrected by surgery before or after birth;

BE IT ENACTED by the Parliament of the Republic of South Africa as follows:-

Amendment of Section 1 of Act 92 of 1996

1. (1) For the definition of “rape” there shall be substituted the following: “rape” shall bear its ordinary meaning of sexual intercourse without the consent of the woman and shall exclude statutory rape as referred to in sections 14 and 15 of the Sexual offences Act, 1957 (Act 23 of 1957).¹

(2) There shall be added the following definition: In respect of ‘Medical Practitioner,’ ‘he’ shall include ‘she’.

Amendment of Section 2 of Act 92 of 1996

¹ It seems illogical to include statutory rape as a ground for abortion when the girl has consented to the sexual act that led to conception.

2. Section 2(1) of the Principal Act is hereby amended –

(a) By the deletion of sub-section 2(1)(b)(iv).²

(b) By the deletion of sub-section 2(1)(c) in its entirety.³

Counselling

3. 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.

Informed Consent – Substitution of section 5 of the Principal Act

² This would remove the ‘social or economic circumstances’ clause which in practice equates second trimester abortions with first trimester abortions.

³ This removes the right to an abortion over 20 weeks altogether.

4. The following section is hereby substituted for section 5 of the Principal Act:

(1) Save as provided for by subsections 2 and 3 of this section, the informed consent of the woman shall be required in every case before a termination of pregnancy is performed and shall in every case consist of the three ingredients of knowledge, appreciation and consent:

- (i) Knowledge means that the woman must be fully informed, in a manner appropriate to her standard of education, of the nature and extent of the risks involved.
- (ii) Appreciation means that she must not merely receive the information but understand it as applicable to her particular situation.
- (iii) Consent means that she must subjectively consent to each step in the procedure and all its consequences.

(2) In the case of a pregnant minor a termination of pregnancy shall only be performed by a medical practitioner who shall counsel her in accordance with section 3 of this Act, and thereafter proceed as follows:

- (i) If, following the counselling procedure, the medical practitioner is satisfied that the minor is able to give her informed consent, and she still wishes to proceed with the termination, he shall then direct her to consult with one or both of her parents or guardians, and advise her to consult with any other person she may have confidence in, and then, if she wishes to proceed, to return after a minimum of 7 days with the written consent of at least one parent or guardian. If appropriate, he must explain that a judge can be asked to give consent in accordance with section 5 of this Act if it is not possible to obtain the consent of one parent or guardian.
- (ii) If, following the counselling procedure, the medical practitioner is not satisfied that the minor is able to give her informed consent,

and he is still of the opinion, after further consultation with a second medical practitioner, that a termination of the pregnancy is in her best interests, he shall contact the parents or guardians and repeat the counselling procedure as set out in section 3 of this Act with the minor and in the presence of at least one parent or guardian. The medical practitioner may then proceed with the termination provided he is satisfied he has the consent of the minor and the informed consent of at least one parent or guardian, or a judge.

- (3) Only a medical practitioner may perform a termination of pregnancy on a woman who appears to be disabled mentally or who appears to be unconscious. In the case of a mentally disabled woman who in the opinion of the medical practitioner is not capable of giving her informed consent, or in the case of a woman who has suffered a continuous state of unconsciousness for a period of at least 14 days and in the view of at least two medical practitioners is unlikely to recover consciousness in the foreseeable future, the pregnancy may be terminated without the informed consent of the woman, provided the informed consent of her natural guardian, spouse or legal guardian (or, if such persons cannot be found her curator personae) is obtained.

Judicial By-Pass

5. In order to provide for the situations envisaged in section 4(2) of this Act, where the consent of a parent or guardian is not available, the Minister shall make Regulations enabling a minor or medical practitioner to apply to a Judge of the High Court in chambers with expedition, without employing a legal representative, and without court fees.

Conscientious Objection

6. 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 the Amendment 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.⁴

Offences and Penalties – Substitution of section 10 of the Principal Act and section 6 of the Amendment Act.

7. The following section is hereby substituted for section 10 of the Principal Act and section 6 of the Amendment Act:

(1) Any person who terminates a pregnancy otherwise than in accordance with the Principal Act, the Amendment Act and this Act (or at a facility not approved in terms of the Acts) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years.⁵

(2) Any person who fails to comply with section 7 of the Principal Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.

(3) Any person who willfully prevents a woman attending a facility approved for terminations of pregnancy, or in any physical manner willfully prevents the lawful

⁴ Based upon the provisions of the Abortion Act, 1967 (UK)

⁵ This makes it a criminal offence for any person, including a doctor, to carry out an illegal abortion.

termination of a pregnancy shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding 2 years.⁶

Regulations

(8) The Minister may make regulations relating to any matter which he or she may consider necessary and expedient to prescribe for achieving the objects of this Act

Short Title and Commencement

(9) This Act shall be called the Termination of Pregnancy Amendment Act, 2007, and shall come into operation on a date fixed by the President by proclamation in the Gazette.

⁶ This clarifies the current provision 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.