

REPUBLIC OF SOUTH AFRICA

CHOICE ON TERMINATION OF PREGNANCY AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 76)
(Explanatory summary of Bill and prior notice of its introduction published in
Government Gazette No. 40970 of 10 July 2017)
(The English text is the official text of the Bill)*

(MRS C DUDLEY, MP)

[B 34—2017]

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[] Words in bold type in square brackets indicate omissions from existing enactments.

Words underlined with a solid line indicate insertions in existing enactments.

To amend the Choice on Termination of Pregnancy Act, 1996, so as to amend a definition; to provide that a medical practitioner and a social worker must both be of the opinion that the continued pregnancy would significantly affect the social or economic circumstances of the woman, where the pregnancy is being terminated under such circumstances; to delete the circumstance that a pregnancy may be terminated if it would pose a risk of injury to the fetus; to ensure that a pregnant woman has access to ultrasound examinations and sufficient counselling to enable her to make a fully informed choice regarding the termination of her pregnancy; to ensure that the State promotes mandatory counselling; to repeal the Choice on Termination of Pregnancy Amendment Act, 2004; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 92 of 1996, as amended by section 68 of Act 32 of 2007 and section 1 of Act 1 of 2008

1. Section 1 of the Choice on Termination of Pregnancy Act, 1996 (Act No. 92 of 1996) (hereinafter referred to as the “principal Act”), is hereby amended—
- (a) by the deletion of the Roman numerals which appear before and after each definition; and
- (b) by the substitution for the definition of “gestation period” of the following definition:
- “**‘gestation period’** means the period of pregnancy of a woman calculated from the first day of the menstrual period which in relation to the pregnancy is the last and which calculation is confirmed by an ultrasound examination;”.

Amendment of section 2 of Act 92 of 1996 15

- 2. Section 2 of the principal Act is hereby amended—**
(a) by the deletion in subsection (1)(b) of subparagraph (iv);

- (b) by the insertion in subsection (1) after paragraph (b) of the following paragraph:
- “(bA) from the 13th up to and including the 20th week of the gestation period if a medical practitioner and a social worker, after consultation with the pregnant woman, are of the opinion that the continued pregnancy would significantly affect the social or economic circumstances of the woman; or”;
- (c) by the substitution in subsection (1)(c) for subparagraphs (i) and (ii) of the following subparagraphs:
- “(i) would endanger the woman’s life; or
- (ii) would result in a severe malformation of the fetus [**; or**]₂”; and
- (d) by the deletion in subsection (1)(c) of subparagraph (iii).

Amendment of section 3 of Act 92 of 1996, as substituted by section 2 of Act 1 of 2008

3. Section 3 of the principal Act is hereby amended by the insertion in subsection (1) after paragraph (c) of the following paragraphs:

- “(cA) gives access to ultrasound equipment and ultrasound examinations;
- (cB) gives counselling;”.

Substitution of section 4 of Act 92 of 1996

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

“Counselling

4. (1) The State shall promote the provision of **[non-mandatory]** mandatory and non-directive counselling, before and after the termination of a pregnancy.

(2) The facilities referred to in section 3(1) and (3) shall provide counselling, which shall include—

- (a) relevant information relating to the state of development of the fetus, including the provision of electronic images;
- (b) information on the procedure of the termination of the pregnancy and the extent of the associated risks involved in continuing the pregnancy as set against all the associated risks involved in terminating the pregnancy;
- (c) information on the available alternatives to the termination of pregnancy including adoption;
- (d) information on other support available to the pregnant woman including referral to a social worker who can assist the pregnant woman to access relevant social grants, safe-housing and counselling for women in crisis, where necessary;
- (e) information on contraceptive measures which can be taken in future; and
- (f) an opportunity for comprehensive discussion and questions, in order to assist the pregnant woman to make an informed choice regarding the termination of her pregnancy and to assist the pregnant woman in giving informed consent prior to the termination of the pregnancy.

(3) The counselling referred to in subsection (2) shall, in the case of a pregnant woman referred to in section 5(4)(a) or (b), be provided to such pregnant woman’s natural guardian, spouse, legal guardian or *curator personae*, as the case may be.”.

Amendment of section 5 of Act 92 of 1996, as amended by section 7 of Act 1 of 2008

5. Section 5 of the principal Act is hereby amended—

- (a) by the substitution in subsection (5)(b) for subparagraphs (i) and (ii) of the following subparagraphs:
- “(i) would endanger the woman’s life; or
- (ii) would result in a severe malformation of the fetus [**; or**]₂”; and
- (b) by the deletion in subsection (5)(b) of subparagraph (iii).

Repeal of laws

6. The Choice on Termination of Pregnancy Amendment Act, 2004 (Act No. 38 of 2004), is hereby repealed.

Short title

7. This Act is called the Choice on Termination of Pregnancy Amendment Act, 2017. 5

MEMORANDUM ON THE OBJECTS OF THE CHOICE ON TERMINATION OF PREGNANCY AMENDMENT BILL, 2017

1 BACKGROUND

- 1.1 The purpose of the Choice on Termination of Pregnancy Act, 1996 (Act No. 92 of 1996) (hereinafter referred to as the “principal Act”), which came into operation on 1 February 1997, is to determine the circumstances in which and the conditions under which the pregnancy of a woman may be terminated.
- 1.2 Since the principal Act was passed, modern medical science has made enormous strides forward and it is now accepted that the fetus is viable at 20 weeks after gestation. While the principal Act does indeed seek to balance the increasing interests of the fetus as the pregnancy advances, there are certain circumstances under which a termination of pregnancy is allowed, which can be argued to be too broad and also vague. Also, the principal Act currently provides that a pregnancy may be terminated from the 13th up to and including the 20th week of the gestation period if a *medical practitioner* is of the opinion that the continued pregnancy would significantly affect the social or economic circumstances of the woman. It is not clear what expertise a medical practitioner has to make a decision on the social or economic effect of a pregnancy.
- 1.3 Furthermore, ultra-sound equipment is now readily available to determine accurately the period of gestation, provide information regarding the state of development of the fetus and provide images of the fetus in the womb to assist the pregnant woman to make an informed choice regarding the termination of her pregnancy and to assist her in giving her informed consent. However, genuine informed consent of the pregnant woman which is a prerequisite to every termination as per section 5 of the principal Act, is seldom obtained as insufficient information is made available to the pregnant woman during the counselling. Also, it must be noted that currently counselling before or after a termination of pregnancy is not mandatory.

2 OBJECTS OF THE BILL

- 2.1 The objects of the Choice on Termination of Pregnancy Amendment Bill, 2017 (“the Bill”), are to, *inter alia*, delete certain circumstances in which a pregnancy may be terminated; to provide that a social worker, in addition to a medical practitioner, must be of the opinion that the continued pregnancy would significantly affect the social or economic circumstances of the pregnant woman before terminating the pregnancy; and to ensure that a pregnant woman has access to ultrasound examinations and sufficient mandatory counselling to enable her to make a fully informed choice regarding the termination of her pregnancy.
- 2.2 The Bill is not about whether or not abortion can be condoned for any reason. However, it is about ensuring the maximum protection of a woman by allowing her to apply her mind to the relevant facts and information in order to make an informed choice. It also aims to ensure that through mandatory, as opposed to non-mandatory counselling, adequate budgets are made available for this purpose. Further, the Bill aims to prevent unnecessary discrimination against pregnant women in low-income families or challenging social and financial circumstances by ensuring that a social worker’s expertise is offered before a pregnancy is terminated for social or economic reasons. The Bill further seeks to prevent the very broad and vague circumstance of “a risk of injury to the fetus” being used as a valid reason to terminate an otherwise viable baby after 20 weeks of gestation as indeed every birth or pregnancy could be said to pose a risk of injury to the fetus.

3 CONTENTS OF THE BILL

- 3.1 Clause 1 of the Bill amends the definition of “gestation period” in section 1 of the principal Act so that the gestation period of a woman is determined not only by calculating the first day of the last menstrual period but also confirming it via an ultrasound examination. Clause 1 also corrects certain typographical errors by deleting the Roman numerals which appear in section 1 of the principal Act.
- 3.2 Clause 2 of the Bill amends section 2 of the principal Act by deleting certain circumstances in which a pregnancy may be terminated. The first amendment to section 2 is to delete section 2(1)(b)(iv) from the principal Act, which currently allows that a pregnancy may be terminated from the 13th up to and including the 20th week of the gestation period if a medical practitioner, after consultation with the pregnant woman, is of the opinion that the continued pregnancy would significantly affect the social or economic circumstances of the woman. The second amendment is to insert a new paragraph into the principal Act which contains the content of the deleted section 2(1)(b)(iv) but has been modified to allow that a pregnancy may be terminated from the 13th up to and including the 20th week of the gestation period if a medical practitioner and a social worker, after consultation with the pregnant woman, are of the opinion that the continued pregnancy would significantly affect the social or economic circumstances of the woman. The third amendment to section 2 is to delete section 2(1)(c)(iii) from the principal Act, which currently allows that a pregnancy may be terminated after the 20th week of the gestation period if a medical practitioner, after consultation with another medical practitioner or a registered midwife, is of the opinion that the continued pregnancy would pose a risk of injury to the fetus.
- 3.3 Clause 3 of the Bill amends section 3 of the principal Act by inserting new paragraphs (cA) and (cB) into subsection (1) to ensure that facilities at which termination of pregnancies may be undertaken give the pregnant woman access to ultrasound equipment and ultrasound examinations to accurately determine the gestation period of the fetus and also access to counselling.
- 3.4 Clause 4 of the Bill amends section 4 of the principal Act by providing that the State must promote the provision of mandatory (as opposed to non-mandatory) counselling. A further amendment to section 4 of the principal Act is to insert a new subsection (2), which stipulates the kind of information that must be made available to a pregnant woman during counselling to assist her in making an informed choice regarding the termination of her pregnancy and to assist her in giving informed consent prior to the termination of her pregnancy. This clause also inserts a new subsection (3), which provides that the counselling services must be provided to either the natural guardian, spouse, legal guardian or *curator personae*, as the case may be, in the event that such person is the person giving consent for a termination of pregnancy on behalf of a severely mentally disabled or unconscious pregnant woman.
- 3.5 Clause 5 of the Bill amends section 5 of the principal Act by deleting section 5(5)(b)(iii) from the principal Act, which currently allows that two medical practitioners or a medical practitioner and a registered nurse or midwife may consent to the termination of a pregnancy, after the 20th week of the gestation period of a pregnant woman who is severely mentally disabled or in a state of unconsciousness, if they are of the opinion that the continued pregnancy would pose a risk of injury to the fetus.
- 3.6 Clause 6 repeals the Choice on Termination of Pregnancy Amendment Act, 2004 (Act No. 38 of 2004), which was declared invalid in the constitutional court case, *Doctors for Life International v Speaker of the National Assembly and others*, 2006 (6) SA 416 CC, in that Parliament had failed to comply with its constitutional obligation to facilitate public involvement before passing Act 38 of 2004 and as a consequence, adopted it in a manner that was inconsistent with the Constitution. Following this judgment, the Choice on

Termination of Pregnancy Amendment Act, 2008 (Act No. 1 of 2008), was passed and came into operation on 18 February 2008.

3.7 Clause 7 provides for the short title.

4 ORGANISATIONAL AND PERSONNEL IMPLICATIONS

4.1 It is foreseen that additional trained personnel and counsellors would need to be employed.

5 FINANCIAL IMPLICATIONS FOR THE STATE

5.1 Some financial costs are expected. For example, all facilities would require ultrasound machines and additional trained counsellors and personnel. The costs involved for the equipment, additional personnel and training should be covered by the general budget allocation. However a cost analysis is recommended.

6 DEPARMENTS, BODIES OR PERSONS CONSULTED

6.1 The following departments, bodies and persons were consulted:

- Doctors for Life
- Cause for Justice
- Christian Medical Fellowship
- Christian View Network
- COSATU
- Catholic Parliamentary Liaison Office

6.2 The following papers and articles were considered:

- H Strydom and S Humpel, “*An Examination of the Importance of Pre-Abortion Counselling*”, Social Work/Maatskaplike Werk, 2009 accessed at <http://socialwork.journals.ac.za>
- RB Gold and E Nash, “*State Abortion Counseling Policies and the Fundamental Principles of Informed Consent*”, Guttmacher Policy Review, Guttmacher Institute, Vol. 10, Issue 4, 2007, accessed at <https://www.guttmacher.org/gpr>
- C Pickles, “*Termination of pregnancy rights and foetal interests in continued existence in South Africa: the Choice on Termination of Pregnancy Act 92 of 1996*”, PER: Potchefstroomse Elektroniese Regsblad, Vol. 15, 2012
- A P Beadle, “*Counseling and Waiting Periods Before Abortion Procedures Do Not Change Women’s Decisions*”, 2012 accessed at <https://thinkprogress.org/study>
- Ministry of Health, “*Guidelines on Termination of Pregnancy*”, 17 April 2015
- A Ramkissoon, C Searle, C Burns and M Beksinska, “*Sexual and Reproductive Health Rights*”, SAHR, 2010
- S Osman, “*Women’s Reproductive Health in South Africa — A Paradox*”, Sangonet Pulse”, 2011, accessed at <http://www.ngopulse.org>
- M O’ Sullivan and C Bailey, “*Reproductive Rights*”, Constitutional Law — Revision Service 3, 1998.
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- E Klinck, “*Law in Practice: Informed Consent: Old Rules in New Formats*”, Medical Chronicle, 2012
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 - Centre for Reproductive Rights, "*Mandatory Delays and Biased Counseling for Women Seeking Abortions*", 2010, accessed at <https://www.reproductiverights.org>
 - TJ Joyce, SK Henshaw, A Dennis, LB Finer and K Blanchard, "*The Impact of State Mandatory Counseling and Waiting Period Laws on Abortion: A Literature Review*", Guttmacher Institute, 2009
 - M Mongelli, "*Evaluation of Gestation: Ultrasonographic Assessment of Gestational Age; Combining Menstrual and Ultrasonographic Dates; Clinical Methods of Estimating Gestational Age*", Medscape, 2016, accessed at <http://emedicine.medscape.com>
 - MB Mankga, "*Nasciturus fiction and the principles of the law of delict considered in the light of a recent judgment*", Codicillus, Vol. 48, No. 2, 2007
 - VT Smit, "*Everyone has the right to life — Fact or nasciturus fiction?*", De Rebus, 2015
 - Z Moosa, "*The interest of the unborn child*", Spotlight, 2014, accessed at <http://www.spotnews.co.za>
 - C Pickles, "*Pregnancy Law in South Africa*", JUTA, 2017.

7 PARLIAMENTARY PROCEDURE

- 7.1 It is proposed that this Bill must be dealt with in accordance with the procedure prescribed by section 76 of the Constitution, since the contents of the Bill, in a substantial measure, deals with 'health services', which is a functional area of concurrent national and provincial legislative competence listed in Part A of Schedule 4 to the Constitution. According to section 76(3) of the Constitution, a Bill must be dealt with in accordance with the procedure established by either section 76(1) or section 76(2) if it falls within a functional area listed under Schedule 4 to the Constitution.
- 7.2 The Parliamentary Legal Advisers are further of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.