

# CHOICE ON TERMINATION OF PREGNANCY AMENDMENT BILL

REPUBLIC OF SOUTH AFRICA

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## CHOICE ON TERMINATION OF PREGNANCY AMENDMENT BILL

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*(As introduced in the National Assembly (proposed section 76) (Explanatory memorandum and prior notice of its introduction published in Government Gazette No.....of ....2017)*

*(The English text is the official text of the Bill)*

(MRS CHERYLLYN DUDLEY, MP)

[B ..... 2017]

### GENERAL EXPLANATORY NOTE:

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

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

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## BILL

To amend the Choice on Termination of Pregnancy Act, 1996, so as to amend a definition; to delete certain circumstances in which a pregnancy may be terminated; 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**

2. Section 2 of the principal Act is hereby amended—

(a) by the deletion in subsection (1)(b) of subparagraph (iv);

(b) 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**].”; and

(c) 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;

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(cB) gives counselling;”.

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#### **Amendment of section 4 of Act 92 of 1996**

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

#### **“Counselling**

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

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

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(a) relevant information relating to the state of the development of the fetus, including the provision of electronic pictures, diagrams and photographs;

(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."

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

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1. **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**]<sub>1</sub>”; and

(b) by the deletion in subsection (5)(b) of subparagraph (iii).

#### **Repeal of laws**

1. **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.

#### **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, and that congenital deformities can more readily be corrected by surgery before or after the birth of the fetus. 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 to 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.

1.3 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; 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.

### **1. 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 13<sup>th</sup> up to and including the 20<sup>th</sup> 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 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 20<sup>th</sup> 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 terminations 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 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 20<sup>th</sup> 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 expressly 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 which came into operation on 18 February 2008.

3.7 Clause 7 provides for the short title of the Act.

## **4 ORGANISATIONAL AND PERSONNEL IMPLICATIONS**

## **5 FINANCIAL IMPLICATIONS FOR THE STATE**

5.1 Major financial implications are not expected. The costs involved should be covered by the general budget allocation, however a cost analysis is recommended.

## **6 DEPARTMENTS, BODIES OR PERSONS CONSULTED**

6.1 The following departments, bodies and persons were consulted:

- Dr W J Fourie (PhD), Dean of Faculty of Nursing and Health Studies, Manukau Institute of Technology, Auckland, New Zealand
- M L Fourie - Registered Nurse and Midwife (RSA), Telehealth Nurse, Healthline, New Zealand
- Doctors for Life

## **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 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.