Moving towards Improvement in SA Abortion Legislation

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1. Introduction: Is there a realistic prospect of reform?

1.1 The international scene

As the author writes, the international news media[1] are reporting that the US State of South Dakota legislature on March 1 (2006) has passed a Bill prohibiting abortions except where the mother's life is endangered (the Senate by 23 votes to 12, following approval in the House of Representatives). The Governor has said he will sign the Bill into law. The States of Georgia, Indiana, Kentucky, Ohio and Tennessee have introduced similar, if not identical, Bills. The views of Doctors for Life (DFL hereafter), and many other so called 'pro-life' supporters, are therefore no longer to be seen as reactionary as has been the case for a number of years. There is no doubt that the whole scale slaughter of unborn children in America and other Western countries has become increasingly distasteful to an ever increasing proportion of the population. The South Dakota Act will certainly be challenged in the State Supreme Court and may well lead to a further opportunity for the newly constituted Supreme Court of the US to review Roe vs Wade[2].

In the decades following Roe a number of US Supreme Court decisions have curtailed the right to choose an abortion. In Casey[3] the Court declared that the state has a legitimate interest in the life of the foetus from conception, and further pronounced that this interest might be legitimately promoted by enacting restrictive measures to encourage childbirth rather than abortion. The Court added the rider that such restrictions must not burden a woman's right to choose, but made it clear that even 'severe

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2 For example *Time Magazine*, 2006, March, 6.
3 410 US 113, 93 SCt 705 (1973).

inconvenience' is not an 'undue burden' when a woman is considering her right to choose. Following this decision, most States have decreed that graphic material (film, DVD, video or coloured photographs) must be shown to all women seeking abortions before they make up their minds, and the majority of them have also enacted legislation which requires a minor to obtain the consent of at least one parent or of a judge (the 'judicial bypass').

More recently the Florida and Michigan state courts have held that government expressing a preference for normal childbirth over abortion does not violate the US Constitution[4]. In the UK the government has set up a Commission to recommend whether or not the current abortion limit of 24 weeks should be reduced in the light of modern medical science demonstrating first that the foetus is fully formed many weeks earlier, secondly that viability is now seen as below 20 weeks, and against the background of successful operations *in utero* to cure such foetal defects as spina bifida.

In Germany, in 1993, the German Constitutional Court (known as the 'FCC') struck down a federal abortion statute on the grounds that –

the state had a primary duty to protect human life, even before birth. This duty, which began at conception related to every individual life and included a duty also to protect the unborn child against the mother.[5]

It is evident therefore that what has sometimes been derided as the 'pro-life' position gains more and more respectability and adherents as we enter the 21st century.

1.2 The South African scene

Whatever the climate elsewhere, we have to face the realities of life in South Africa where we have a Constitution[6] which specifically provides in section 12(2) for –

"the right to bodily and physical integrity, which includes the right to make decisions concerning reproduction and to security in and control over the body".

4 Planned Parenthood of Southeastern Pennsylvania vs Casey 505 US 833 (1992).

5 Women's Emergency Network vs Bush 323 F 3d 937 (11th Cir 2003) and Taylor vs Kurapati 600 NW2d 670 (Mich App 1999).

6 BV erf GE A III J2 at 312-313.

Sections 9, 10 and 14[7] provide rights to equality, dignity and privacy respectfully and some would argue that these rights may be used to bolster the right to choose an abortion which is found in section 12.

What is to be done? Short of a change in the Constitution we are limited in South Africa to pressing for legislation which complies with the section 12 right to choose, qualified only by section 36[8] which provides for reasonable and justifiable limitations of that right. Section 36 reads:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors …

This section, and the five factors which follow the above quotation, certainly provide a solid constitutional basis for placing restrictions on the right to abortion found in section 12, but the question, of course, is what will be seen by Parliament, and ultimately if the legislation is challenged, by the Constitutional Court judges, to be 'reasonable and justifiable' at this point in time in the evolution of South African society. The auther believes that the time is now ripe to use section 36 to press for greater restrictions on the abortion right.

2. Changing the law and enforcing the law – a two-pronged initiative

The issue is of course hugely controversial in South Africa because a small but hard core of protagonists fight tooth and nail not only to retain the present law but to liberalize it further. Faced with such pressure groups[9] it is essential that we win the support of the media for change by exposing in the Courts the shortcomings of the present law and its widespread abuses. Undoubtedly the vast majority of South African people oppose whole scale abortion on demand and once the private abortion clinics are seen for what they are – essentially a lucrative illegal trade rather than a health service – then a climate for change will develop. DFL believe that pressure on Parliament to revise the legislation and, at the same time the selective use of both the criminal and civil courts to curb those who break the law, is the right way forward. In the courts those who unscrupulously and dishonestly misrepresent the law, abuse it, and line their own pockets

7 Constitution of South Africa, 1996.
8 Constitution of South Africa, 1996.
9 Ibid.

regardless of the welfare of their patients must be the first targets[10]. Others who must be brought to book are those health professionals who intimidate and pressurize nurses, interns and other junior staff to participate in abortions contrary to their constitutional right of conscientious objection[11].

What is vital is that those of us concerned about this cancer in our society should not hesitate to use the tools which the legislation and the Constitution provide to bring those who offend to book. 'What is sauce for the goose is sauce for the gander'. Those of us opposed to our liberal abortion laws have not only the right but the responsibility to see that the law is complied with and constitutional rights are upheld. So for instance, although there are those who say depriving a woman of her right to choose breaches her right to dignity under section 11 of the Constitution[12], is it not a much greater breach of dignity for a woman to be unwittingly subjected to an illegal abortion, because she has not been counselled and therefore not been able to provide her 'informed consent,' as the law requires?

In this paper the author attempts to highlight some features of the legislation relating to abortion currently in force in South Africa, concentrating particularly on the anomalies and those aspects of the legislation which are either ignored or widely abused at the present time, some 9 years after our abortion act[13] came into force[14]. I shall then append a draft *Amendment Bill* which is an attempt to put on the table for discussion new legislation which, although far from ideal, would rectify some of the glaring abuses of the existing law and at least go some way to curb the carnage we see today.

3. *The Choice on Termination of Pregnancy Amendment Act*, 2004

Before the author proceeds to the Principal Act in more detail, a word in parenthesis about the *Amendment Act* which came into force in February 2005. In summary, the 2004 Act drastically increases the facilities where first trimester abortions can be carried out, providing for automatic designation of all hospitals and clinics which offer a 24 hour maternity

10 E.g. the Women's Legal Centre and The Reproductive Rights Alliance.
11 See pages 6 and 10 below for a short outline of the criminal and civil cases against the Rose Clinic, Durban.
12 See page 12 below for details of DFL's case against the Gauteng Health Authority on behalf of a theatre sister dismissed for refusing to assist in abortions evacuations.
13 The *Constitution of South Africa*, 1996.
14 The Choice on *Termination of Pregnancy Act*, 92 of 1996.

service, and secondly it permits nurses as well as midwives to carry out abortions up to 12 weeks, provided they have undergone the requisite training course and obtained registration.. The one area where the law is tightened up rather than liberalized is the provision making it a criminal offence for any person to carry out an abortion in an unauthorized place. This means that a family doctor who prescribes abortion pills in his surgery (as many do) will be committing a criminal offence.

When this Bill was before the National Assembly many individuals and organizations (including Doctors for Life) made representations to Parliament urging that the new legislation should deal with the widespread abuses of the 1996 Act, but all to no avail. Under the Constitution each of the Provincial Parliaments was under a duty to offer the same opportunity to the public to make representations about the Bill; they failed to do so and hence DFL's challenge[15] to the 2004 Act which is currently waiting judgment in the Constitutional Court. There is no doubt that Parliament and the Provinces will be admonished for failing to comply with their Constitutional obligations, and the Court may feel compelled to go further and strike the Act down. Next time abortion legislation comes before Parliament we can be confidant that greater care will be taken to listen, at least, to representations from the public.

4. The Principal Act, 1996

4.1 When is termination permitted and who may perform it?

Abortion is permitted 'on demand' up to 12 weeks[16], but only with the *informed consent*[17] of the woman. Because the requirement of informed consent is mandatory, and, as we shall see, far-reaching, it is misleading to say that abortion up to 12 weeks is unconditionally available in SA.

From 13 to 20 weeks, at least one medical practitioner, in consultation with the mother, must be of the opinion that to continue the pregnancy will cause risk to the woman's health, or a substantial risk of foetal abnormality, or that the pregnancy was caused by rape or incest[18]. The

15 For a more detailed legal analysis of the anomalies in the Act see Professor van Oosten's scathing article in the SALJ 1999, page 60, somewhat ironically entitled 'The Choice on Termination of Pregnancy Act: Some Comments').

16 Doctors for Life International vs The Speaker of the National Assembly and Chairman of the National Council of the Provinces and the Speakers of each Provincial Parliament, and the Minister of health.

17 *The Choice on Termination of Pregnancy Act,* 1996, section 2(1)a.

18 Ibid, section 5(1).

fourth alternative which permits a second trimester abortion is the one which is for obvious reasons almost invariably used, namely when the medical practitioner is of the opinion that the social or economic circumstances of the woman will be significantly affected[19]. Unless the woman is sufficiently wealthy to be able to afford the child and a nanny without feeling it financially, it is hard to see how this condition does not effectively put the second trimester abortion on a par with the first, *save that a doctor must make the decision, not merely a nurse or midwife*.

For these reasons most clinics, government and private, regard any abortion under 20 weeks as 'on demand' and most ignore the requirement that a doctor must assist the mother to make the decision. This abuse of the law has been condoned throughout the country for many years but in 2005 a criminal prosecution against the Rose Clinic in Durban was launched for some 1400 cases of second trimester abortions done without a doctor's permission. The case awaits trial at the time of writing. The police were persuaded to bring the case as a result of information provided by DFL (see 'DFL and the Rose Clinic' below).

Abortion over 20 weeks (there is no upper limit in South Africa as in other countries in the world) may be done where 2 doctors, or a doctor and a nurse, are of the opinion that the woman's life is in danger, or severe malformation of the foetus is predicted, or continuation of the pregnancy would pose a risk of further injury to the foetus[20]. This third condition of 'a risk of further injury to the foetus' is one of the most extraordinary pieces of drafting in an Act riddled with enigmas. An abortion of course guarantees not that the foetus is merely put at risk, but that it is destroyed! Another glaring anomaly in respect of abortions over 20 weeks is that the doctor is *not* required to provide any notification or records and therefore there are no statistics as to such abortions; it follows that this provides a clear invitation to break the law for the many unscrupulous abortionists in SA who simply see their job as a lucrative industry rather than a health service. It is no secret that the greater the gestation period, the greater the fee charged.

Section 10 of the 1996 Act makes it a criminal offence for a nurse or midwife to carry out a second or third term abortion contrary to these provisions. The glaring anomaly here is that there is no offence committed if a doctor does it! This goes someway to explain the lack of prosecutions

19 Ibid, section 2(1)b (i)-(iii).
20 Ibid, section 2(1)b (iv).

under the Act before the current Rose Clinic case. But the charges are quite properly brought where a doctor in charge authorizes, and therefore aids and abets his staff to conduct illegal abortions as in the Rose Clinic. Apart from any other legal principle, the offence of conspiracy is committed under section 18 of the *Riotous Assemblies Act*, 17 of 1956.

4.2 The mandatory requirements of counselling and informed consent

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."

It is immediately evident why counselling is in practice almost always a dead letter. 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 mentioning of the risks involved might be construed as 'directive.' The drafting of the section is appalling and one is driven to suspect that Parliament deliberatively designed it to be equivocal. By contrast, the regulations relating to counselling of persons receiving HIV testing are extensive, specific and unambiguous.[21]

However, section 4 is not the end of the story. Certainly it is confusing, but when read in conjunction with the Regulations[22] passed under the Act (which have the same force of law) and with the section 5 requirement for 'informed consent', the abortionist cannot escape the mandatory obligation to refuse to perform any abortion (even before 12 weeks) unless either he/ she or some other person has spelt out to the mother the following matters specifically required by Regulation 7 (parentheses are the author's – JS):

(i) The available alternatives to TOP (i.e. 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,

21 Ibid, section 2(1)c (i)-(iii).
22 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.

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.

In the author's view there can be no doubt that any abortion performed without such counselling will be illegal in the civil courts and give rise to an action for damages for two reasons:

(i) It is contrary to section 5 of the Act in that informed consent cannot be obtained without such information being imparted to the woman so that she can appreciate and understand it. This requirement of the law was reiterated and explained in detail by Judge Mojapelo in what is known as the second Christian Lawyers Association challenge to the legislation.[23]

The judgment contains this passage:

The courts have often endorsed the following statements by Innes, CJ in Waring & Giitow v Sherborne 1904 TS 340 at 144 to found a defence of consent:

"It must be clearly shown that the risk was known, that it was realised, that it was voluntarily undertaken. Knowledge, appreciation, consent - these are the essential elements; but knowledge does not invariably imply appreciation, and both together are not necessarily equivalent to consent"

The requirement of "knowledge" means that the woman who consents to the termination of a pregnancy must have full knowledge "of the nature and extent of the harm or risk". See Castell v De Greef (supra) at 425. Neething Potgieter & Visser (op cit) at 100-101 and Neethling (op cit) at 121-122.

The requirement of "appreciation" implies more than mere knowledge. The woman who gives consent to the termination of her pregnancy "must also comprehend and understand the nature and extent of the harm or risk," See Castell v De Greef (supra at 425); Neethling Potgieter & Visser (op cit) at 101 and Neethling (op cit) at 122.

The last requirement of "consent" means that the woman must "in fact subjectively consent" to the harm or risk associated with the termination of her pregnancy and her consent "must be comprehensive" in that it must

23 Published in GN R168 of Gov Gaz 17746 31 January 1997.

"extend to the entire transaction, inclusive of its sequences". Castell v De Greef (supra), at 425, Neethling Potgieter & Visser, (op cit) at 120 and Neethling (op cit) at 122.

It seems to the author to be a matter of common sense that no nurse, midwife or doctor can possibly be sure of these matters without taking twenty minutes at least to explain the state of the unborn child in the woman's womb, the procedure he is offering, the risks involved, and the alternatives open to her; he must then be prepared to answer her questions however long it takes. An exception perhaps would be a gynaecologist who wanted an abortion – in such a case it might be reasonable to assume 'informed consent'.

(ii) It contravenes Regulation 7 which puts the onus on the practitioner even if section 4 of the Act is equivocal.

DFL and the Rose Clinic

The question of 'informed consent' would have been tested in the Durban High Court late in 2006 in the suit brought by DFL against the Rose Clinic on behalf of an 18 year old school girl who was the victim of a 28 week abortion without any counselling whatsoever, and without a doctor being involved[24]. It was as a direct result of this illegal abortion that the police have brought criminal proceedings against the director and staff of the clinic[25], and it is of great legal interest that the charges include one of culpable homicide in respect of the son born to the girl who lived for four hours following the abortion.

It is convenient to mention at this point that the Durban civil suit also includes a claim for damages against the girl's school, and its counsellor, who arranged the abortion secretly behind the parents's backs and without providing any counselling or even taking steps to establish the term of the pregnancy. The case against the school is based partly on the contracts between school and pupil, and between school and parents, which contain implied terms that the school will do nothing to the learner, for the learner or on behalf of the learner for which they do not have implied or express consent from the parents. The fact that the girl had just turned 18 years of

24 Christian Lawyers Association vs Minister of Health (no 2) 2005 1 SA 509.

25 Osler (and others) and Doctors for Life International vs Rose Clinic (and others) and Governing Body of Danville Park Girl's High School (and others) and KZN Department of Education

age at the relevant time cannot, we believe, effect the school's duty even if the school is able to rely on the girls's constitutional right to privacy. It is one thing to respect her privacy; it is quite another to arrange an abortion which they well knew was contrary to the parents's religious beliefs. In other words they may be entitled to say: "It would not have been proper for us to tell her parents against her wishes because she was of age"; it is quite another to arrange an abortion without their knowledge.

5. Conscientious objection

When the 1996 Act was on the drawing board strenuous attempts were made by opponents of the Bill to ensure that a conscientious objection clause was included. The UK legislation, for example, contains a clause specifically protecting a conscientious objector from pressure to participate in an abortion as follows:

(i) Subject to subsection (2) of this section, no person shall be under any duty, whether by contract or by statutory or other legal requirement, to participate in any treatment authorized by this Act to which he has a conscientious objection: Provided that in any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it. (2) Nothing in subsection (1) of this section shall affect any duty to participate in treatment which is necessary to save to save the life or to prevent permanent injury to the physical or mental health of a pregnant woman[26].

To the author's knowledge there has only been one reported case in the UK in the four decades since the Act came into force in respect of this conscientious objection clause. The case concerned a secretary who challenged her dismissal by a local health authority for refusing to type a letter of referral for an abortion on grounds of her conscience. The judge at first instance, the Court of Appeal and the House of Lords all held that in its ordinary and natural meaning the word 'participate' referred to actually taking part in treatment and not to making preliminary arrangements. The secretary's dismissal was accordingly upheld.[27]

Those driving the South African Bill successfully resisted the pleas to include such a clause saying that such a clause would 'undermine' the objects of the legislation. They rightly asserted that the Constitution *should* provide all the protection required, but also resorted to 'special

26 The State vs Vikash Nundlall and others
27 Section 4 of the *Abortion Act,* 1967 (UK)

pleading' in spuriously alleging that the word 'choice' in the title of the Act gave not only the woman but the practitioner a choice! The same answers were given when renewed attempts were made in 2004 to introduce such a clause into the Amendment Bill and they continue to be reeled off as a mantra by the minister of health and others in government every time the issue is raised in the media.

There is no doubt that the Bill of Rights does provide full protection for the conscientious objector in sections 9, 15 and 16[28], and this may well be a wider and more comprehensive protection than the UK legislation provides; for instance the secretary in the UK case may be protected in South Africa by the Constitution. In practice however there is such a shortage of health professionals willing to do abortions (e.g. DENOSA, the Nurses' Union, say three-quarters of their members do not wish to do abortions) that pressure and intimidation are common place in an attempt to get government doctors and nurses to do the job.

The problem is particularly acute where the procedure is initiated (almost invariably with *Misoprostil* pills) by one professional and then, as is sometimes the case, a surgical evacuation of the uterus is required in theatre. Theatre staff can suddenly find themselves under pressure to take part in such a procedure even if the case does not require immediate life-saving treatment. (In such an extreme case every health worker accepts the obligation to help save life even at the expense of conscientious objection.)

It is of the highest importance therefore that this issue be tested in the Courts and an authoritative ruling obtained which will affect hundreds of thousands of health professionals. To this end DFL have brought a civil case in the Equality Court on behalf of a theatre sister who was removed from her post at the Kopanong Hospital in Vereeniging for refusing to do evacuations. This case was due to be heard in the Labour Court (on transfer from the Equality Court) in mid 2006.[29]

It is perhaps important to add that the sister in question undoubtedly holds strong religious convictions and no challenge has been raised to that issue on the pleadings. A clause such as that used in the UK would ensure that no health professional were entitled to claim constitutional protection unless he/ she could establish genuine conscientious objection. In other words the fear that

28 Janaway vs Salford Health Authority (1988) 3AER 1079.
29 *Constitution of South Africa,* 1996.

those who simply 'dislike' abortions would be entitled to opt out would be greatly reduced if a statutory clause like that of the UK, with its proviso – which places the burden of proving genuine conscientious objection on the health worker seeking exemption – were introduced in South Africa.

6. Conclusion

There is a pressing need for the legislation relating to abortion in SA to be radically overhauled even though the basic right to an early stage abortion is enshrined in the Constitution. Certainly the abuses of the law bring shame on our society. The Rose Clinic in Durban must have gained at least 1.5 million rand in fees for the 1400 abortions in respect of which criminal charges have been brought. For them, one suspects, and certainly nation-wide, this is only the tip of the iceberg.

To this end the author would like to propose a National Convention under the title of 'Improving the South African Abortion Law' which would lead to the drafting of a new amendment Bill to be presented to Parliament. The Annexure that follows is an attempt at a first draft drawing on the authorlimited experience of assisting in drafting legislation when practicing at the Bar in the UK.

Annexure

THE TERMINATION OF PREGNANCY AMENDMENT ACT, 2007

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).[30]

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

30 Charles and Doctors for Life International vs Gauteng Department of Health and Minister of Health.

Amendment of Section 2 of Act 92 of 1996

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

(a) By the deletion of sub-section 2(1)(b)(iv).[31]

(b) By the deletion of sub-section 2(1)(c) in its entirety.[32]

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

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

31 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.

32 This would remove the 'social or economic circumstances' clause which in practice equates second trimester abortions with first trimester abortions.

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, is 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 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.[33]

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

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

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.[34]

(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 termination of a pregnancy shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding 2 years.[35]

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.

34 Based upon the provisions of the *Abortion Act*, 1967 (UK).
35 This makes it a criminal offence for any person, including a doctor, to carry out an illegal abortion.