

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

NOTICE OF INTENT TO INTRODUCE A PRIVATE MEMBER'S BILL AND INVITATION FOR COMMENT ON THE PROPOSED CONTENT OF THE DRAFT CHOICE ON TERMINATION OF PREGNANCY AMENDMENT BILL

Mrs C Dudley, MP, acting in accordance with section 73(2) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), intends to introduce the Choice on Termination of Pregnancy Amendment Bill, 2017, in Parliament. An explanatory summary of the proposed content of the Bill is hereby published in accordance with Rule 276(1)(c) of the Rules of the National Assembly (9th edition).

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. Hence, the principal Act is structured in a manner where a pregnancy may be terminated upon the request of a woman during the first 12 weeks of the gestation period of her pregnancy. From the 13th up to and including the 20th week of gestation, the pregnancy may be terminated if a medical practitioner, after consultation with the pregnant woman, is of the opinion that (a) the continued pregnancy would pose a risk of injury to the woman's own physical or mental health; (b) the fetus would suffer from a severe physical or mental abnormality; (c) the pregnancy resulted from rape or incest; or (d) the continued pregnancy would significantly affect the social or economic circumstances of the woman. After 20 weeks of gestation, the pregnancy may only be terminated if a medical practitioner, after consultation with another medical practitioner or a registered midwife, is of the opinion that the continued pregnancy (a) would endanger the woman's life; (b) would result in severe malformation of the fetus; or (c) would pose a risk of injury to the fetus.

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. 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 arbitrary and vague.

Furthermore, ultra-sound equipment is now readily available to determine more 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. 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 counselling before or after a termination of pregnancy is currently not mandatory.

Hence, the Choice on Termination of Pregnancy Amendment Bill, 2017 ("the Draft Bill"), seeks to amend the principal Act by, *inter alia*, deleting 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.

The Draft Bill will provide for the following amendments:

- an amendment to the definition of "gestation period" in section 1 of the principal Act so that the gestation period of a woman is more accurately determined not only by calculating from the first day of her last menstrual period but also confirming this calculation via an ultrasound examination;
- the deletion in section 2 of the principal Act of certain circumstances under which a pregnancy may be terminated. The first amendment 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. It is not clear from the principal Act what expertise a medical practitioner has to make a decision on the social or economic effect of a pregnancy. This circumstance accordingly appears to be arbitrary and is so broad that it is vague. Up to 12 weeks of the gestation period of a pregnancy, this circumstance will automatically apply and is thus provided for. The second amendment 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. This circumstance is vague. It should be noted that provision is already made in the principal Act for termination of a pregnancy in the event that the fetus would suffer from a severe physical or mental abnormality or that the continued pregnancy would result in severe malformation of the fetus;
- the insertion of new paragraphs into section 3(1) of the principal Act which will ensure that facilities at which terminations of pregnancies take place give the pregnant woman access to ultrasound equipment and ultrasound examinations and also provides counselling;
- an amendment to section 4 of the principal Act which will provide that the State must promote the provision of mandatory (as opposed to non-mandatory) counselling;
- the addition of a new subsection to section 4 of the principal Act, which will stipulate 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. Such information will include relevant information relating to the state of the development of the fetus, including electronic pictures, diagrams and photographs; information on the procedure of the termination and the extent of the associated risks involved in continuing the pregnancy as set against all the associated risks involved in terminating the pregnancy; information on available alternatives to the termination of the pregnancy;

- information on other support available to the pregnant woman such as referral to a social worker who can assist the pregnant woman to access relevant social grants, safe-housing and counselling, where necessary; and information on contraceptive measures;
- the addition of a further new subsection to section 4 of the principal Act which will provide that the counselling services must also 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;
 - the deletion of 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, after the 20th week of the gestation period of a pregnant woman who is severely mentally disabled or in a state of continuous unconsciousness, consent to the termination of a pregnancy if they are of the opinion that the continued pregnancy would pose a risk of injury to the fetus. This circumstance is vague and provision is already made in the principal Act for termination of a pregnancy in the event that the fetus would suffer from a severe physical or mental abnormality or that the continued pregnancy would result in severe malformation of the fetus; and
 - the express repeal of 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.

Interested parties and institutions are invited to submit written representations and comments on the proposed content of the Draft Bill to the Speaker of the National Assembly within **30 days of the publication of this notice**. The representations and comments can be delivered to the Speaker of the National Assembly, New Assembly Building, Parliament Street, Cape Town; mailed to the Speaker of the National Assembly, P O Box 15, Cape Town, 8000 or emailed to bmbete@parliament.gov.za and copied to mmabungane@parliament.gov.za

The Draft Bill will be available on the website of the African Christians Democratic Party (<http://www.acdp.org.za>) once it has been certified by the Chief Parliamentary Legal Adviser or a parliamentary legal adviser designated by him or her as required by Rule 279(4) of the Rules of the National Assembly (9th edition).