



**JOINT SECTION27 AND TREATMENT ACTION CAMPAIGN SUBMISSION ON THE CHOICE ON
TERMINATION OF PREGNANCY AMENDMENT BILL, A PRIVATE MEMBERS BILL PROPOSED
BY DUDLEY MP OF THE AFRICAN CHRISTIAN DEMOCRATIC PARTY**

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Introduction

1. SECTION27 and the Treatment Action Campaign (TAC) are organisations advocating for access to health care services in South Africa.
2. SECTION27 is a public interest law centre that uses and develops the law to advance human rights. It conducts research, advocacy and litigation to achieve its goals, which include a strong focus on the right to access to health care services.
3. TAC is a membership based organisation that has been campaigning for access to health care services since 1998. TAC engages in monitoring, advocacy and campaigning within the health care system to ensure that all public health care users can access quality and dignified health care.
4. We welcome the opportunity to make submissions on the draft private members Bill and regret that the submissions are three days late. We trust that they will nonetheless be helpful to Parliament in considering the draft private members Bill.

Background

5. In July 2017, Dudley MP of the African Christian Democratic Party published a draft private members Bill, proposing amendments to the Choice on Termination of Pregnancy Act 92 of 1996 (TOP Act).
6. SECTION27 and TAC object to the proposed amendments in the strongest possible terms.
7. The rationale of the TOP Act is to determine the circumstances in which and conditions under which a woman may terminate a pregnancy. The Act places a woman's agency and autonomy at the centre. The preamble to the TOP Act is instructive. It states in full:

“recognising the values of human dignity, the achievement of equality, security of the person, non-racialism and non-sexism, and the advancement of human rights and freedoms which underlie a democratic South Africa;

Recognising that the Constitution protects the right of persons to make decisions concerning reproduction and to security in and control over their bodies;

Recognising that both women and men have the right to be informed of and to have access to safe, effective, affordable and acceptable methods of fertility regulation of their choice, and that women have the right of access to appropriate health care services to ensure safe pregnancy and childbirth;

Recognising that the decision to have children is fundamental to women’s physical, psychological and social health and that universal access to reproductive health care services includes family planning and contraception, termination of pregnancy, as well as sexuality education and counselling programmes and services;

Recognising that the State has the responsibility to provide reproductive health to all, and also to provide safe conditions under which the right of choice can be exercised without fear or harm;

Believing that termination of pregnancy is not a form of contraception or population control”.

8. Any amendments to the TOP Act must be in line not only with the rationale of the Act and its constitutional underpinnings but also with the state’s constitutional and international law obligations.

Provisions of the draft Bill

9. The stated objects of the draft Bill are to:
 - 9.1. “delete certain circumstances in which a pregnancy may be terminated”; and
 - 9.2. “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

¹ Clause 2.1 of the draft Bill.

10. In reality, the draft Bill aims to limit women's ability to access safe abortions in health facilities around the country, thereby limiting, without justification, a woman's constitutional right to equality; dignity; bodily and psychological integrity, which includes the right to make decisions concerning reproduction; privacy; and access to health care services, including reproductive health care.

11. The draft Bill does so in several ways:

11.1. directly, by eliminating two important circumstances in which women are currently able to terminate a pregnancy:

11.1.1. where the continued pregnancy would significantly affect the social or economic circumstances of the woman; and

11.1.2. where the continued pregnancy would pose a risk of injury to the foetus.

11.2. indirectly by:

11.2.1. requiring that the calculation of the gestation period is confirmed through an ultrasound examination; and

11.2.2. introducing additional requirements for facilities that may provide abortion services, namely that the facilities must give access to ultrasound equipment and ultrasound examinations and give counselling.

Access to abortion services

12. It is estimated that 50% of abortions in South Africa occur outside of designated health facilities. Health care provider objections to providing abortion procedures result in fewer than half of government designated facilities providing abortion services.² A recent HEARD study on access to safe abortions states the following:³

² HEARD, South Africa Fact Sheet on Unsafe Abortion, May 2016 <https://www.heard.org.za/wp-content/uploads/2016/06/south-africa-country-factsheet-abortion-20161.pdf>.

³ Ibid.

- 12.1. Limited access to second trimester terminations in public health facilities results in women exceeding the legal gestation period for obtaining abortions and seeking abortions outside of designated health facilities.
 - 12.2. Fewer than half of the public health facilities designated by government to carry out abortion procedures actually offer the service. The negative perceptions surrounding abortion result in abortion services not being prioritised, and some public facilities set daily quotas for the number of abortions they are willing to perform. Consequently, women are turned away when the daily quota has been reached, resulting in missed opportunities for first trimester terminations.
 - 12.3. Only a limited number of healthcare facilities offer second trimester abortions. Women often have to travel long distances to access these facilities, with waiting periods in most public hospitals exceeding four weeks. This leads to women seeking second trimester abortions exceeding the 20-week gestation legal limit for terminating pregnancy and being referred for antenatal care services.
13. The lack of real access to abortion services, due to lack of facilities and equipment required and widespread “conscientious objection” to abortion on the part of health care workers, including outside of the legislated perimeters of such objection, already violate women’s rights. The draft private member’s Bill would violate these rights further, including through further equipment and personnel requirements.
14. Not all public facilities that are designated facilities in terms of the TOP Act will have ultrasound equipment or the expertise to undertake the tests that would be required by the draft Bill. In fact, ultrasound machines and health care workers able to operate them are frequently only found in major hospitals and not at clinics, where women often seek (and are entitled to seek) abortion services. The unavailability of equipment or personnel would lead to an additional and unreasonable barrier to accessing abortion services.
15. Furthermore, the requirement to provide ultrasound examinations does not increase the safety of women accessing abortion services. Abortion care carried out by professional health care practitioners is exceedingly safe, even without the use of an ultrasound.

Abortion complications are not reduced with the introduction of an ultrasound. The additional restriction does not at all improve the health outcomes of women accessing these services.

International law obligations

16. South Africa is a State to two relevant international human rights instruments, Convention on Elimination of all forms of Discrimination Against Women (CEDAW) and the International Convention on Economic Social and Cultural Rights (ICESCR).

16.1. Article 16(e) of the CEDAW requires states to take measures to realise the right to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.

16.2. Article 12 of ICESCR may be understood as requiring measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care.

Constitutional framework

17. In light of past gender discrimination, our Constitution requires that legislative measures seek to advance women's rights, not reverse them. Reproductive freedom is an important feature of our constitutional democracy. Our Constitution recognises that women have control over their bodies and reproductive capacities. This is located in a woman's right to bodily integrity⁴ and reproductive decision-making⁵ as well as the right to dignity⁶. Forcing women to carry a foetus to term is an invasion of these rights.⁷

⁴ Section 12(2)(b) of the Constitution.

⁵ Section 12(2)(a) and section 27(1)(a) of the Constitution.

⁶ Section 10 of the Constitution.

⁷ Albertyn & Others *Gender, Law and Justice* Juta 2007, at page 364.

Right to health care services

18. The state has an obligation to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to access health care services, including reproductive health care.⁸ The National Health Act 61 of 2003 (“NHA”) was promulgated to give content to these rights and obligations.
19. One of the objects of the NHA is to protect, respect, promote and fulfil rights of vulnerable groups, including women. This is achieved through several measures, including free health care services for:
- 19.1. pregnant and lactating women who are not members of medical schemes;
 - 19.2. children below the age of six who are not members of medical schemes; and
 - 19.3. for all pregnant women, termination of pregnancy services in accordance with the TOP Act.
20. The TOP Act provides for safe abortions and has had the effect of reducing dramatically deaths related to abortion by providing an alternative to unlawful and dangerous “backstreet abortions”.
21. Reproductive health is the condition in which the reproductive process is accomplished in a state of mental, physical and social well-being.⁹ It implies that people have the ability to practice and to enjoy safe sexual relations and that women can safely experience pregnancy and childbirth and should be assured that the conditions necessary for infant survival, growth and healthy development exist.¹⁰ Access to safe abortion services contributes to reproductive health through the reduction of maternal morbidity and mortality and through allowing women to make choices should the conditions necessary for infant survival, growth and healthy development not exist.

⁸ Section 27(2) of the Constitution.

⁹ Woolman & Others *Constitutional Law of South Africa* Juta 2008, volume 3, at page 37-24.

¹⁰ *Constitutional Law of South Africa* volume 3, at page 37-24.

22. The importance of an individual's health and well-being will affect their ability to enjoy other freedoms. According to Cook et al, "this is especially true within the context of women, where gender differences within social roles and barriers impact, in particular, on women's ability to access health services".¹¹
23. The right to health care services has been elaborated upon and interpreted by the Committee on Economic, Social and Cultural Rights in General Comment no. 14 of 11 August 2000 ("General Comment 14"), which has a bearing on the draft Bill in the following respects:
- 23.1. The obligation to progressively realise the right of access to health care services requires that the State adopt measures that are 'deliberate, concrete and targeted towards the full realisation of the right'.¹²
- 23.2. There is a strong presumption that retrogressive measures taken in relation to health care rights are not permissible and if they are taken the State bears an extremely high burden of proof to justify them.¹³
24. The Constitutional Court has cited General Comment 14 as follows: "retrogressive measures...would require the most careful consideration and would need to be fully justified with reference to the totality of the rights provided for in the Covenant and in the context of the full set of the maximum available resources".¹⁴
25. In this constitutional context, it is our view that rather than contributing to an overall improvement in women's access to reproductive rights, the draft Bill constitutes a retrogressive measure. It introduces potential barriers to access whereas the current TOP Act and regulations promote access to health care services for women by promoting reproductive rights and extends freedom of choice by affording every woman the right to choose whether to have an early, safe and legal termination of pregnancy according to

¹¹ Cook et al "Reproductive Health and HIV/AIDS" in Goldblatt & McLean *Women's Social and Economic Rights: Developments in South Africa* Juta 2011, at page 17.

¹² Committee on Economic, Social and Cultural Rights in General Comment no. 14 of 11 August 2000, at para 30.

¹³ Ibid at para 32.

¹⁴ *Government of South Africa v Grootboom* 2001 (1) SA 46 at para 45.

her individual beliefs. Such barriers to access must be appropriately justified and be evidence-based. The State faces a high burden of proof and ‘careful consideration’ of whether it is fully justified with reference to the totality of rights. We deal with other rights below.

Right to Equality

26. The Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. The state must take steps to promote equality, particularly for those that have been historically disadvantaged. Section 9 (2) of the Constitution provides:

“Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance person, or categories of persons, disadvantaged by unfair discrimination may be taken”.

27. As Albertyn and others argue, women’s social and economic position as a group is an important consideration and is usually located within the right to equality and “the equality argument also places women within the actual contexts of their lives, suggesting that they are not equal in choosing to fall pregnant (rape, coercive sex and social norms prevent this), nor are they equal in bearing the consequences of pregnancy and raising children. Hence they must be given the choice about whether or not to take the pregnancy to term”.¹⁵

28. The removal of the ability of women to obtain an abortion for social or economic reasons or if the continued pregnancy would pose a risk of injury to the foetus violates women’s rights to equality.

¹⁵ Albertyn & Others *Gender, Law and Justice* Juta 2007, at page 364.

Human dignity

29. The Constitution provides that everyone “has inherent dignity and the right to have their dignity respected and promoted.”¹⁶ A woman’s right to reproduce or not reproduce is an integral part of her inherent dignity. The courts have dismissed challenges to this right. Mojaelo J held that section 12(2) of the Constitution guarantees the right of every woman to determine the fate of her pregnancy.¹⁷ He noted that while the state does have a legitimate interest in the protection of pre-natal life, such regulation may not amount to a denial of a woman’s right to freedom and security of the person.¹⁸

30. The consequences of an unwanted pregnancy forced to term impacts not only upon a woman’s quality of life but often that of her existing family and children, the newborn and society as a whole. Access to abortion services enhances the quality of life of all these individuals.¹⁹

31. The draft Bill infringes women’s right to dignity by, inter alia, denying access to an abortion for social and economic reasons and if the continued pregnancy would pose a risk of injury to the foetus, as well as by putting up structural barriers such as requirements that ultrasound equipment be used and that mandatory counselling take place prior to an abortion.

Informed consent

32. In terms of section 6 of the NHA, everyone has the right – before obtaining medical services – to be told what treatment options are available, the benefits and the risks of the treatment. This is linked to a woman’s right to relevant information about her health. According to HPCSA ethical guidelines, health care practitioners must take account of a patient’s individual needs and priorities in obtaining consent. For example, patients’

¹⁶ Section 10 of the Constitution.

¹⁷ *Christian Lawyers Association v Minister of Health* 2005 (1) SA 509.

¹⁸ *Christian Lawyers Association v Minister of Health* 2005 (1) SA 509 at 526.

¹⁹ *Constitutional Law of South Africa* volume 3, at page 37-23.

beliefs, culture, occupation or other factors may have a bearing on the information they need in order to reach a decision.

33. The TOP Act currently requires the state to promote the provision of non-mandatory and non-directive counselling, before and after the termination of a pregnancy. The purpose of counselling in the context of the TOP Act is to assist a woman seeking termination of pregnancy services to make an informed choice. The court held in *Christian Lawyers* that, “In a sense therefore the Constitution not only permits the Choice on Termination of Pregnancy Act to make a pregnant woman’s informed consent the cornerstone of its regulation of the termination of her pregnancy, but indeed requires the [TOP Act] to do so. To provide otherwise would be unconstitutional.”²⁰

34. The draft Bill seeks to introduce fear and shame into the counselling process by requiring that women be exposed to images of a foetus, including electronic pictures, diagrams and photographs. The draft Bill also seeks to use the informed consent framework to further limit access to termination of pregnancy services by fundamentally altering the counselling framework from the current “non-mandatory and non-directive counselling” to “mandatory and non-directive counselling”. The proposal to force counselling upon women who seek an abortion, not only violates a woman’s dignity, but may serve as a barrier to access. This contradicts the rationale of the TOP Act, which is to provide important reproductive health services to women in a way that respects their dignity.

35. We further note that the provision of information on the procedure and risks, alternatives to termination, and information on contraceptives as part of the counselling services is already provided for in the regulations to the TOP Act.²¹

²⁰ *Christian Lawyers Association v Minister of Health* 2005 (1) SA 509 at 518.

²¹ Government Notice R168 in *Government Gazette* 17746 of 31 January 1997.

Conclusion

36. The proposals in the draft private member's Bill seek to roll back advances in sexual and reproductive health rights gained by women in South Africa since our democracy. In our view, the draft Bill would not pass constitutional muster if it was challenged in court. We strongly recommend that this private member's Bill be rejected by Parliament.

37. For more information, please contact:

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