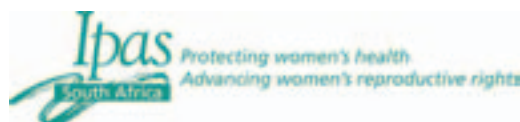


woman **know** your rights



CONSCIENTIOUS OBJECTION AND THE IMPLEMENTATION OF THE CHOICE ON TERMINATION OF PREGNANCY ACT 92 OF 1996 IN SOUTH AFRICA

Nikki Naylor · Michelle O'Sullivan



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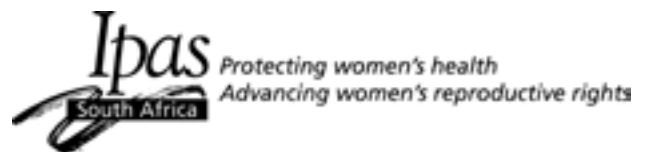


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GLOSSARY OF TERMS AND ABBREVIATIONS

CEDAW Convention on the Elimination of All Forms of Discrimination Against Women

CTOP Act: The Choice on Termination of Pregnancy Act 92 of 1996 as amended

TOP: Termination of Pregnancy

WHO: The World Health Organization

Health Workers: People who work in a health facility, who provide health services or ancillary services such as administrative, catering and security staff. Health workers also include nursing staff who are not, in terms of the CTOP Act, eligible to provide TOP services and perform terminations.

Health Professionals: People who work in a health facility or in private practice who, in terms of the CTOP Act, are eligible to provide TOP services and perform terminations. Include Medical Practitioners, Registered Nurses and Registered Midwives. It excludes Enrolled Nurses and Enrolled Nurse Auxiliaries.



WOMEN'S LEGAL CENTRE

BACKGROUND

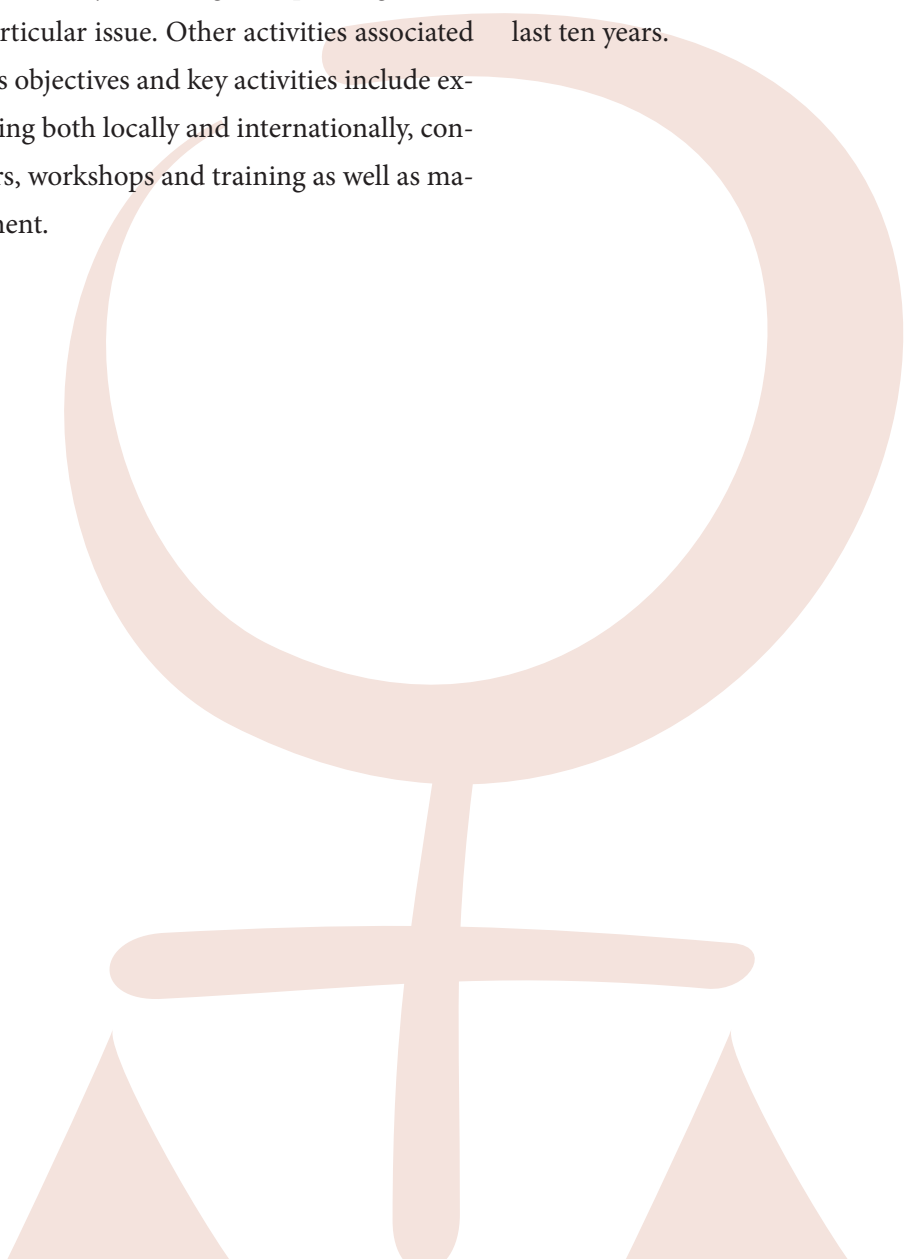
The Women's Legal Centre Trust ('the Centre') was formed in 1998 for the purpose of establishing a women's legal centre where legal assistance would be given, free of charge, in cases which involve public interest or constitutional litigation to advance the rights of women. The central aim of the Centre is to advance the struggle for equality for women, particularly black women, who suffer socio-economic disadvantage. In order to fulfill this aim, the Centre litigates cases, which advance women's rights and are in the public interest, particularly constitutional cases, free of charge. The key activities of the Centre are litigation and advocacy for law reform but the Centre employs a variety of strategies depending on the nature of the particular issue. Other activities associated with the Centre's objectives and key activities include extensive networking both locally and internationally, conducting seminars, workshops and training as well as materials development.

The Centre has identified a number of broad priority areas in which it litigates cases and conducts law reform.

These areas are:

- violence against women;
- fair access to resources in relationships;
- access to land/housing;
- access to fair labour practices and
- access to health (particularly reproductive health).

The focus areas have been developed with regard to the perceived needs of gender reform in the legal sector, and with a view to consolidate the work of the Centre in the last ten years.



IPAS

BACKGROUND

Ipas is an international non-governmental, not-for-profit organization that works globally to improve women's lives through a focus on reproductive health. Ipas has worked for three decades to increase women's ability to exercise their sexual and reproductive rights and to reduce deaths and injuries of women from unsafe abortion.

Ipas programs were implemented in 1995 to provide technical assistance in training, research, advocacy, distribution of reproductive-health technologies and information dissemination.

Ipas's role includes:

- Expanding community-level access to abortion services in the selected provinces
- Achieving sustainable, affordable access to abortion and reproductive technologies, including manual

vacuum aspiration (MVA) instruments, at appropriate levels in both the public and private sectors

- Creating and strengthening alliances and partnerships in support of women's sexual and reproductive health rights.

Ipas believes that no woman should die because of a lack of access to safe sexual and reproductive health services. Our stated goal is thus to save women's lives and enhance their reproductive choices by preventing unsafe abortions, improving the treatment of abortion related complications, reducing the health consequences of unsafe abortion and increasing access to safe, elective abortions. Ipas strives to empower women in their reproductive decision-making and choices.

EXECUTIVE SUMMARY

Can one argue that health care workers should place their duty before their beliefs? Can one use one's beliefs to, in effect, deny women access to services? This issue is more complex than it seems at first glance and seems to ask to what extent a health professional/worker should subordinate his or her moral beliefs to his or her duty to provide access to abortion services.

This manual attempts to deal with the above issue within the context of conscientious objection in relation to the Choice on Termination of Pregnancy Act, 92 of 1996 as amended (CTOP Act). The manual aims to assist persons faced with claims of competing constitutional rights in relation to a woman's right to exercise reproductive autonomy. It looks at how legalization of abortion in South Africa and the right to freedom of conscience, religion and belief as enshrined in the Constitution. The manner in which these rights interact with each other and the

broader context of the CTOP Act and reproductive autonomy is set out.

The Manual adopts a question / answer format, which will illustrate the working of the constitutional rights and the CTOP Act and aims to be as user-friendly as possible so as to assist management within designated facilities to deal with the issue of health professionals who conscientiously object to performing abortion services. The duties of the State and health professionals will furthermore be set out with a separate section focusing on the international framework, particularly the World Health Organisation (WHO) Guidelines on Safe Abortion and international decisions dealing with the issue of conscientious objection.

An addendum at the end of the manual contains the relevant provisions of the CTOP Act and the Bill of Rights.

THE RIGHT TO REPRODUCE OR
NOT TO REPRODUCE... IS PROPERLY PERCEIVED
AS AN INTEGRAL PART OF MODERN WOMEN'S STRUGGLE
TO ASSERT HER DIGNITY AND WORTH AS A HUMAN BEING.
DENYING A WOMAN THE FREEDOM TO MAKE AND ACT UPON DECISIONS
CONCERNING REPRODUCTION TREATS HER AS A MEANS TO AN END AND
STRIPS HER OF HER DIGNITY...²



A THE RATIONALE AND PURPOSE OF THIS MANUAL

Having a right to a Termination of Pregnancy (TOP) entails the right to the actual service, together with an enabling environment to exercise that right. In particular, the right to TOP implies positive attitudes on the part of health care providers, geographical closeness to the service, affordability and the removal of all barriers that could obstruct a woman from accessing the service. Since the coming into operation of the CTOP Act, issues of inaccessibility and unavailability in relation to the provision of services have continued to plague South Africa. Whilst a number of legal, social and economic factors impact on a woman's right to access a termination of pregnancy, the issue of health care workers and their right to conscientiously object to providing this service remains a significant hurdle both locally and globally. The WHO recognises this and has found as follows in its 2003 report:

“Women's knowledge and perceptions about services and the social context may also represent a barrier

to using the services to which they are entitled. Studies show that women often fear mistreatment, negative attitudes, or social condemnation, all of which inhibit their seeking care...”³

The purpose of this manual is therefore to set out how the right to equality, reproductive autonomy, freedom of religion and expression and the right to health care all interact with each other and the limitations on these various rights within the context of access to TOP services. It is envisaged that this manual will assist facility management and health care providers in terms of dealing with health care professionals/workers who seek to conscientiously object to the provision of TOP services. In addition, the manual aims to assist nursing and medical students in their training around issues of TOP and the right to conscientiously object thereto.

THE WORLD HEALTH ORGANISATION STUDIES SHOW THAT WOMEN OFTEN FEAR MISTREATMENT, NEGATIVE ATTITUDES OR SOCIAL CONDEMNATION, ALL OF WHICH INHIBIT THEIR SEEKING CARE. THAT'S WHY IT'S IMPORTANT TO ENSURE THAT A WOMAN SEEKING A TOP IS TREATED WITH RESPECT AND DIGNITY AND THAT SHE IS NOT DENIED ACCESS PURELY BECAUSE OF SOMEONE'S BELIEF.



B THE CONTEXT OF ABORTION IN SOUTH AFRICA

The CTOP Act has been hailed as one of the most progressive pieces of legislation dealing with the legalization of abortion. The CTOP Act was introduced in 1996 and repealed the previous restrictive provisions, which criminalized abortion in South Africa. The CTOP Act has liberalized women's access to abortion on demand and has been hailed as a significant step towards decreasing the number of unsafe terminations of pregnancy. The CTOP Act recognises the devastating consequences in terms of mortality and morbidity for women where they lack access to safe terminations. The Medical Research Council estimated that in 1994, 425 women died in public hospitals as a result of incomplete unsafe abortions and concluded in its research that "unsafe abortions are an important cause of maternal mortality and morbidity in South Africa."⁴

The rationale (purpose) of the CTOP Act is set out in its Preamble and really sets the context within which one needs to view the Act. It provides as follows:

"Recognising that the Constitution protects the right of persons to make decisions concerning reproduction and to security 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;...

Recognising that the State has a 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;

This Act therefore repeals the restrictive and inaccessible provisions of the Abortion and Sterilization Act, 1975 (Act No. 2 of 1975) and promotes 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 her individual beliefs".

The CTOP Act therefore promotes reproductive rights and extends freedom of choice by affording every woman the right to choose to have an early, safe and legal abortion. Ultimately, the CTOP Act recognizes that each woman is best placed to make the decision concerning whether or not to have an abortion in accordance with her individual belief. Accordingly, the CTOP Act clearly promotes the values of the Constitution of South Africa.



C WHAT ARE THE CONSTITUTIONAL VALUES THAT INFORM THE CTOP ACT?

Section 12(2) of the Constitution⁵ provides as follows:

“Everyone has the right to bodily and psychological integrity, which includes the right -

- i. to make decisions concerning reproduction;*
- ii. to security in and control over their body...”*

This right protects the decision of a woman to terminate a pregnancy. Section 27(1)(a) of the Constitution goes on to provide that everyone has the right to have access to health care services, including reproductive health care and furthermore provides that no person may be refused emergency medical treatment.

Section 32 protects a woman’s right to access to information in order to exercise or protect her rights. It therefore protects her right to information regarding termination of pregnancy service provision.

In addition, the rights to equality, dignity, life and privacy are all enshrined in the South African Constitution (Chapter 2 Bill of Rights) and support the right of women to access safe abortions. Therefore, the founding values of the Constitution, namely, dignity, freedom and equality need to be borne in mind when applying and interpreting the provisions of the CTOP Act.

Reproductive autonomy is not only protected in the Constitution. South Africa has signed and ratified international conventions, most notably the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁶, which obliges the State to take certain measures in terms of reproductive autonomy. Article 12 of CEDAW provides that *“state parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”*

Article 16(1)(e) of CEDAW provides that women have the right to decide freely and responsibly on the number and spacing of children and to have access to information and education to make informed choices. Furthermore, the CEDAW Committee published “General Recommendation 24: Women and Health” in order to elaborate on what is expected of states in the context of Article 12. In this regard the Recommendation states that women have the right to be fully informed of options available to them in terms of sexual and reproductive rights. The Recommendation goes on to provide that states should refrain from obstructing action taken by women in pursuit of health goals.

IS IT LEGAL FOR ME TO TERMINATE MY PREGNANCY?

YES, DURING THE FIRST TWELVE WEEKS YOU CAN TERMINATE YOUR PREGNANCY LEGALLY. YOU DON'T NEED TO GET PERMISSION FROM ME AS THE DOCTOR OR FROM YOUR HUSBAND OR PARTNER.

CAN I STILL GET ONE IF I AM OVER 13 WEEKS?

FROM THIRTEEN TO TWENTY WEEKS A MEDICAL PRACTITIONER NEEDS TO BE SATISFIED THAT YOUR PREGNANCY IS A RISK TO YOUR PHYSICAL OR MENTAL HEALTH OR THAT THE FOETUS MAY SUFFER FROM SEVERE PHYSICAL OR MENTAL ABNORMALITY; OR THAT THE PREGNANCY RESULTED FROM RAPE OR INCEST. YOU CAN ALSO HAVE A TERMINATION IF THE MEDICAL PRACTITIONER IS SATISFIED THAT YOUR PREGNANCY WOULD SIGNIFICANTLY AFFECT YOUR SOCIAL OR ECONOMIC CIRCUMSTANCES.

D WHAT DOES THE CTOP ACT SAY ABOUT A WOMAN'S RIGHT TO ABORTION?

The CTOP Act provides that a pregnancy may be terminated upon request of a woman during the first twelve weeks of her gestation period of her pregnancy. The CTOP Act provides that it is only the consent of the woman that is required for the termination, which means that the consent of her husband/partner is not required. In the case of a minor, parental consent is NOT required, but a minor is advised to consult with her parents, guardian, and family members before the pregnancy is terminated, provided that the termination shall not be denied because such minor chooses not to consult them. The CTOP Act also stipulates that women shall have access to information concerning their rights regarding TOP and that non-mandatory and non-directive counseling shall be promoted by the State.

WHAT HAPPENS AFTER TWENTY WEEKS?

ONLY IN LIMITED CASES WILL THIS BE ALLOWED AND TWO MEDICAL PRACTITIONERS OR A REGISTERED NURSE AND A REGISTERED MIDWIFE WHO HAVE UNDERGONE THE PRESCRIBED TRAINING WILL HAVE TO BE SATISFIED THAT CONTINUING YOUR PREGNANCY WILL ENDANGER YOUR LIFE OR THE FOETUS' LIFE OR CAUSE SEVERE MALFORMATION IN THE FOETUS.



E IS THE RIGHT TO A TERMINATION OF PREGNANCY (TOP) LIMITED AT ALL?

Yes. The right to access a TOP is limited. It is only during the first twelve weeks that a TOP is available on demand. From thirteen up to and including the twenty weeks of the gestation period a TOP is only permitted where a medical practitioner, after consultation with the pregnant woman, is of the opinion that:

- (1) the continued pregnancy will pose a risk of injury to the woman's physical or mental health;
- (2) there exists a substantial risk that the foetus will suffer from psychological or mental abnormality ; or
- (3) the pregnancy resulted from rape or incest, or
- (4) the continued pregnancy would significantly affect the social or economic circumstances of the women.

From twenty weeks onward terminations are available under limited circumstances where medial practitioner

in consultation with another medical practitioner or registered midwife is of the opinion that the continued pregnancy:

- (1) would endanger the women's life; or
- (2) would result in severe malformation of the foetus; or
- (3) would pose a risk of injury to the foetus.

From the foregoing it is clear that after 12 weeks of the gestation period onwards the decision is no longer the women's alone. The decision then becomes that of the woman and medical practitioner who must be of the opinion that she falls within the specified grounds listed above. The availability of abortions after 20 weeks is severely curtailed and all these restrictions to the principle of abortions on demand are really an attempt to balance the increase interest of the foetus as it becomes more viable.

F WHAT IS CONSCIENTIOUS OBJECTION?

According to the New Dictionary of Medical Ethics,⁷ conscientious objection is “*to object in principle to a legally required or permitted practice.*” This would mean that notwithstanding the legalization of abortion, a health professional could on the basis of his/her principles object to

perform a legal abortion. The European Code of Medical Ethics⁸ expands on this and provides that “*it is ethical for a doctor, by reason of his own beliefs, to refuse to intervene in the process of termination of pregnancy, and to suggest consultation of other doctors.*”

G WHAT DOES THE CTOP ACT SAY ABOUT THE RIGHT TO CONSCIENTIOUSLY OBJECT?

The CTOP Act does not mention a right to conscientious objection but does set out duties in terms of how health professionals are expected to act in terms of the legislation. Section 10(1)(c) of the CTOP Act provides that “any person, who prevents the lawful termination of pregnancy or obstructs access to a facility for the termination of pregnancy, shall be guilty of an offence and liable on conviction to a fine / imprisonment for a period not exceeding 10 years.” It seems that this section seeks to prevent victimization and discrimination of health professionals who are willing to perform a termination of pregnancy.

There is a further duty on the State in terms of the CTOP Act to promote the provision of non-mandatory and non-directive counseling before and after a termination of pregnancy. This section further limits the right to conscientious objection of health professionals in the State’s employ, as it stipulates that women must receive counseling and that this should be non-mandatory and non-directive. This is further reinforced by the Regulations to the CTOP Act, which sets out that a woman requesting a TOP shall be informed:

- (1) *that she is entitled to the termination of her pregnancy upon request during the first twelve weeks of the gestation period;*
- (2) *that under the circumstances determined by the Act, her pregnancy may be terminated from the*

thirteenth up to and including the twentieth week of the gestation period;

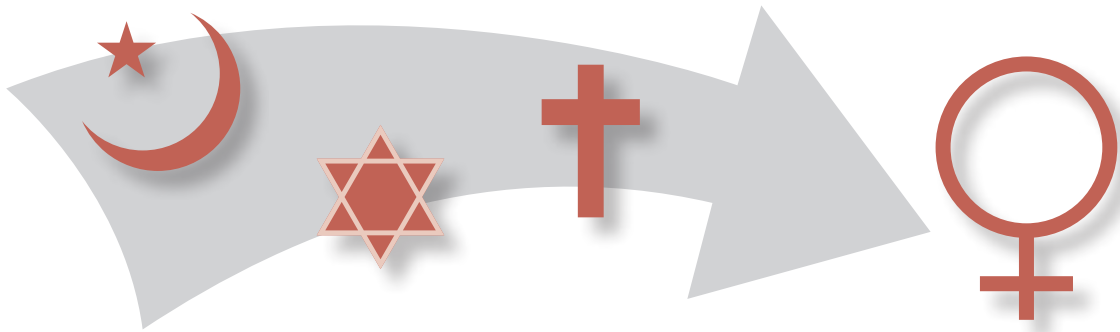
- (3) *that only her consent is required for the termination of pregnancy;*
- (4) *that counseling contemplated in the Act shall be available; and*
- (5) *of the locality of facilities for the termination of pregnancy.*

It is clear therefore that a health professional’s right to freedom of conscience is limited by the CTOP Act and the Regulations to the extent that they must provide information, which will allow women to exercise their rights in terms of the Act. A health professional and health care worker’s right to conscientious objection are therefore clearly limited by the CTOP Act when considering the obligation to provide access to information, together with the fact that the CTOP Act creates an offence if any person prevents a lawful TOP or obstructs access to a facility performing termination of pregnancies.

It should, however, be noted that the CTOP Act does not set out that a health professional has to perform a TOP and rather frames it in the negative in that a health professional may not prevent access to a termination of pregnancy. Therefore, whilst the right to freedom of conscience may protect the decision of individual health care professionals in terms of whether they actually perform a TOP this

does not extend to refusing to provide women with information about TOP, including information concerning available facilities and appropriate referrals. The right will not extend to attempts to prevent other health care professionals from performing TOP's, through victimization,

harassment or discrimination. Furthermore, the right does not provide protection for health professionals in the public sector who seek to impose mandatory waiting periods or provide mandatory directive counseling designed to deter women from accessing TOP's.



H WHAT ABOUT THE CONSTITUTIONALLY ENTRENCHED RIGHT TO FREEDOM OF RELIGION AND BELIEF? DOES THIS IMPACT ON THE RIGHT OF HEALTH CARE PROFESSIONALS TO CONSCIENTIOUSLY OBJECT?

It is often argued that the right to freedom of conscience is enshrined in the Constitution and that this right includes a decision not to perform a TOP. It is important to note in this regard that the right is a right to freedom of conscience, religion, thought or belief and is contained in Section 15 of the Constitution. Taken together these rights protect the moral autonomy of both groups and individuals. Importantly, it includes the moral autonomy of women to make decisions to have abortions based on their beliefs and thus protects women's moral and reproductive autonomy and not only the right of conscientious objectors. The CTOP Act does not coerce anyone to have an abortion and instead protects the choice of women to either have an abortion or not, based on their own personal belief or choice.

Whilst the Bill of Rights in the South African Constitution entrenches a number of fundamental freedoms, no right in the Bill of Rights is absolute since the Constitution

provides that all rights can be limited in terms of a 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 certain factors set out in the Constitution. Accordingly, one needs to balance the relative rights in relation to each other and consider the factors set out in the Constitution.

The factors set out in the Constitution are:

(1) *The importance of the purpose of the limitation:*

This is significant since the purpose of the CTOP Act is to give effect to Constitutional rights of women, namely, women's rights to equality, freedom and security of the person, access to information and access to reproductive health care services. Since there are competing interests at stake it is important to limit a blanket right to conscientious objection so as to take these other rights into account.

(2) *The nature and extent of the limitation:*

The limitation is not severe since the CTOP Act does not force all health professionals to perform TOP's at all times. It limits involvement to providing information to women (thus giving effect to the right to access to information) and limits health workers from preventing or obstructing a termination from taking place.

(3) *The relationship between the limitation of the right in question and its purpose:*

There is a proportional relationship between the limitation and the purpose, the limitation seeks to ensure that women have access to information about TOP services free of barriers and that the individual conscience of health care workers do not violate the rights of other health care workers who are willing to provide the service.

(4) *Whether there are less restrictive measures available to achieve the purpose:*

There are no less restrictive means to achieve the objectives of the CTOP Act and the constitutional imperative in relation to women's reproductive autonomy. If women are not referred to appropriate facilities and given information regarding TOP services, they will in effect be denied access. Denying women access in turn renders the CTOP Act meaningless.

In summary, therefore it is clear that the CTOP Act does not mandate all health workers to perform terminations of pregnancies at all times. It merely limits their participation in a termination of pregnancy to the provision of information. There must be a proportional relationship between the limitation of the right to freedom of

conscience and the purpose. The limitation seeks to ensure that women have access to information about TOP services and are able to access TOP services free of barriers and that the individual conscience of health professionals do not violate the rights of other health care workers who are willing to provide the service.

Whilst our Constitutional Court has never been tasked with pronouncing on how these rights will be balanced proportionally, a similar human rights framework exists in Canada and the Canadian Courts there have already had to deal with the issue of reproductive autonomy and conscience. In *Attorney General of Ontario v. Dieleman*,⁹ the Court held that freedom of religion did not provide protection for people engaging in activity, which harmed others or injured parallel rights. The case involved protesters outside of abortion clinics and the homes of doctors who performed TOP services. The Court recognized that the right to freedom of religion did entitle the abortion protesters to express their views but not to the point where women's rights and access to health facilities were infringed upon.

In *R. v. Lewis*,¹⁰ the British Columbia Supreme Court upheld the constitutionality of the Access to Abortion Services Act. The Act created zones around the homes and offices of doctors where any form of protest was prohibited. Lewis challenged the Act claiming it infringed on his freedom of conscience, religion and expression. The Court agreed, finding it was a constitutional infringement, but found that the infringement was justified in light of the competing rights at stake, namely to ensure that women had access to reproductive health services in an atmosphere of privacy and dignity. Thus, the women's rights trumped Lewis's right to conscience.

I CAN A HEALTH PROFESSIONAL EVER BE EXPECTED TO PUT HIS/HER MORAL BELIEFS ASIDE FOR THE SAKE OF THE RIGHTS OF THE PATIENT?

Can one argue that health professionals should place their duty before their beliefs? Can one use one's beliefs to, in effect, deny women access to services? This issue is more complex than it seems at first glance and seems to ask to what extent a health professional should subordinate his or her moral beliefs to his or her duty. Some authors maintain that, *"a physician's role is to subordinate moral beliefs ... for the ultimate commitment is to the patient even if that necessitates the violation of one's moral views."*¹¹

Whether one agrees with the authors or not it is clear that there is no absolute right to conscientiously object, since other values and rights come into play, such as the patient's right to autonomy, dignity and well being and thus one cannot ever give a health professional blanket authority to refuse to assist a patient.

The right to conscientiously object to performing a termination can never mean that a health professional may refuse to assist a woman in need of emergency medical treatment, where her life is in danger. In this regard Section 27(3) of the Constitution provides that no one may be refused emergency medical treatment. In the case of *Soobramoney v Minister of Health*, the South African Constitutional Court held that section 27(3) of the Constitution, had clearly been enacted to ensure that:

*"treatment was given in an emergency and was not frustrated by reason of bureaucratic requirements or other formalities. A person who suffered a sudden catastrophe which called for immediate medical attention should not be refused ambulance or other emergency services which were available and should not be turned away from a hospital which was able to provide the necessary treatment. What the section requires is that remedial treatment that is necessary and available be given immediately to avert that harm."*¹²

This means that a health professional that refuses to assist in such circumstances may be found to be negligent. In addition the State and/or the health professional can be held liable civilly and/or criminally for preventing access. The position is similar within the international context. The WHO Guidelines¹³ states in this regard that laws protecting a health professional's right to conscientious objection are normally inapplicable when a patient is in an emergency situation, where the life or health of the mother is at risk. If no alternative provider who is willing to perform the abortion services is available, the health professional must perform an abortion to save the life or prevent permanent damage to the woman's health. The health professional is subsequently protected by the principle of double effect. Essentially, this means that an action that has a good objective, such as saving a patient's life, may be performed despite the fact that the objective can be achieved only at the expense of an unavoidable harmful effect. This means that a facility must have personnel who are adequately trained to perform TOP procedures in the event of an emergency.

In the United Kingdom, the British Abortion Act explicitly states in section 4(2) that conscientious objection is inapplicable when the continuation of pregnancy poses a serious danger to life or health – physical or mental.

Furthermore, it should be noted that a nurse or hospital worker cannot refuse to clean the ward where terminations take place or refuse to make up beds and transport patients to and from theatre in TOP cases. The right to object in these cases does NOT extend to persons not directly involved in the provision of the service. Whilst there has been no decision in the South African courts in this regard, in the UK the case of *Janaway v Salford Health Authority*¹⁴ dealt with such a situation. Here the Court held that a secretary could not refuse to write a

letter of referral based on her conscientious objection to the procedure the patient was being referred for. The Court recognized that there was no duty to participate in any treatment authorized by the Abortion Act of 1967, if a party conscientiously objected to the treatment. However, “participation” referred to the actual procedure

and did not extend to any arrangements preliminary to or in preparation for such a procedure. Accordingly, protection was not afforded to the general support staff such as secretarial or clerical staff. Therefore, the secretary could not invoke the right to conscientious objection in refusing to type the letter.

CAN I EVER BE FORCED TO PERFORM A TOP AND BE EXPECTED TO PUT ASIDE MY MORAL BELIEF THAT ABORTION IS WRONG?



WHILST THE LAW RESPECTS YOUR RIGHT TO CONSCIENTIOUSLY OBJECT THIS RIGHT IS NOT ABSOLUTE, YOU CAN BE EXPECTED TO PUT ASIDE YOUR BELIEF WHEN A WOMAN REQUIRES EMERGENCY MEDICAL TREATMENT TO SAVE HER LIFE. IN THOSE CASES YOU HAVE A MEDICAL AND LEGAL OBLIGATION TO ASSIST THE WOMAN CONCERNED AND YOU COULD BE HELD LIABLE FOR NEGLIGENCE IF YOU FAIL TO ASSIST. ALSO, EVEN IF YOU DON,T BELIEVE IN ABORTION AND DO NOT WANT TO PERFORM ONE, YOU HAVE A DUTY TO GIVE THE WOMAN INFORMATION ABOUT WHERE SHE CAN ACCESS A TOP AND WHAT HER RIGHTS ARE IN TERMS OF THE LAW.

K WHAT STEPS CAN FACILITY MANAGEMENT TAKE WHERE A PERSON REFUSES TO ASSIST A WOMAN WISHING TO ACCESS A TERMINATION AT A DESIGNATED FACILITY?

Where a person refuses to assist and such person is not directly involved in performing the actual termination (e.g. person is required to clean ward, make beds, transport the patient), such person may be disciplined for misconduct or failure to carry out an instruction and disciplinary steps may be taken against such staff member, in accordance with the relevant facility disciplinary procedure.

emergency medical treatment, particularly where there is no other health professional to provide assistance.

Where a health professional refuses to perform a TOP on the basis of conscientious objection, such person would first have had to register as a conscientious objector and is STILL under a duty to provide the woman with information regarding TOP’s and appropriate referral.



Where the woman presents at a facility with an incomplete abortion and her life is in danger a health professional CANNOT under any circumstances refuse her

L IN APPOINTING HEALTH PROFESSIONALS TO POSITIONS IN DESIGNATED FACILITIES CAN THE DEPARTMENT OF HEALTH REFUSE TO APPOINT A CONSCIENTIOUS OBJECTOR?

Yes. Although health professionals have a right not to be discriminated against on the basis of their religion / conscience, our law also recognises the concept of “fair discrimination.” The Employment Equity Act provides that it will not be unfair to discriminate against someone on the basis of the inherent requirements of the job.

The inherent requirements of a job refer to those aspects of the job, which are considered to be “essential” to the job. Non-compliance with the requirement must result in more than a mere inconvenience or limited disruption for an employer. In the case of someone who is a conscientious objector, this would mean that no service would be rendered, which would be in direct contravention of the State’s duty to provide access to TOP’s at designated facilities. This can therefore be said to be more than a mere inconvenience and

may be seen as “essential” in terms of a job within a designated facility.

Thus, an advertisement for a job at a designated facility where TOP’s have to be performed in terms of the CTOP Act would have as an essential requirement the fact that the health professional concerned is not a conscientious objector. The requirement must appear from the advertisement for the job. Failure to appoint a conscientious objector will thus not be deemed to be unfair discrimination and would rather fall within fair discrimination. The hospital concerned would raise as a defence the fact that not being a conscientious objector is an inherent requirement of the job. By the same token, moving a conscientious objector to another ward in the hospital where TOP’s are not being performed can never be deemed to be unfair discrimination.



M WHAT ETHICAL CONSIDERATIONS APPLY TO NURSES?

The South African Nursing Council drafted ethical guidelines with reference to TOP, which would apply to nurses in relation to TOP services. It sets out that:

- (1) A nurse may refuse to participate in the act of performing a TOP.
- (2) A nurse may object to removal and disposal of the expelled products of conception.
- (3) A nurse must lodge in writing to the employer his/her refusal to carry out the above-mentioned function.
- (4) A copy of the letter of refusal shall be placed in the nurse's official staff record, as proof of such refusal.
- (5) Irrespective of any conscientious objection a nurse **MUST** provide the following to healthcare users:
- (6) Nursing care (assessment, planning, implementation, monitoring and evaluation);
- (7) Basic assistance with activities of daily living;
- (8) Emotional, physical and psychological support;
- (9) Prescribed medication;
- (10) Comfort and pain relief measures.

N CAN A MEDICAL OR NURSING STUDENT REFUSE INSTRUCTION / EXAMINATION IN ABORTION PROCEDURES ON THE BASIS OF CONSCIENTIOUS OBJECTION?

No, since the right of conscientious objection does not apply where patients' lives or permanent health are at risk, it appears that health care providers must be capable of performing TOP's in emergency cases, such as when it is necessary to complete an incomplete abortion. This does not detract from their right to properly object to the initiation of procedures on conscientious grounds in routine cases. Students must therefore be properly trained and qualified to deal with emergency situations. Similarly medical

schools responsible for training graduates to serve the needs of the public, including in conditions of emergency, may be required to instruct students in procedures they might properly perform in routine cases. Further, under religious teaching on the principle of double effect, procedures that achieve abortion indirectly and are primarily geared to save the life of the woman concerned are not prohibited and health care professionals must therefore be competent in their performance of these duties.



O WHAT INTERNATIONAL STANDARDS HAVE BEEN SET?

According to the *Declaration of Lisbon on the Rights of the Patient*, adopted by the 34th World Medical Assembly in 1981 a physician should always act according to his or her conscience and always in the best interest of the patient. The intent of the Declaration was to place emphasis on medical professional independence and also on the best interests of a patient. These two principles come into direct conflict in the area of abortion and thus regard should be had to other international standards, which have set guidelines in terms of conscientious objection.

The WHO⁵ provides that health professionals have a right to conscientious objection in abortion cases, but they also have an ethical obligation to follow professional ethical codes, which usually require health professionals to refer women to skilled colleagues who are not, in principle, opposed to abortions allowed by law. If no alternative provider is available, the health professional must provide the TOP to save the woman's life or to prevent permanent damage to her health. The legal burden of proving the conscientious objection is in good faith falls on the person claiming the objection. A health professional can generally be exempted from participating in or conducting an actual abortion procedure but not

from providing general care to a patient, including post-op recovery. Also, the right only extends to health workers who would otherwise be required to perform services directly on patients, not to hospital service staff who might try to refuse to perform their normal functions on the basis of the type of treatment a patient is receiving (cleaning staff).

Accordingly, the WHO recommends that when a hospital, clinic or health centre has been designated as a public facility offering services allowed by law, it cannot endanger women's lives or health by refusing services purely on the basis of conscientious objection. Furthermore, only professionals who otherwise would be required to perform services directly on patients can invoke grounds of conscience for the purpose of being exempted from performing abortions. Facility service staff cannot refuse to perform functions such as delivery of meals, replacement of bedding and booking appointments on the basis of conscientious objection. This is evident when having regard to some jurisdictions where the right to conscientiously object has been narrowly interpreted to protect the conscience of health professionals who perform the actual procedure and not the conscience of every person involved.



APPLICATION OF THE ABOVE PRINCIPLES BY WAY OF PRACTICAL EXAMPLES

PRACTICAL EXAMPLE 1

Ms. X is employed at a small public health designated facility on the outskirts of Cape Town. She is one of 15 women who work in the kitchen delivering meals to patients. All women work on a roster and are required to deliver meals to Ward 12, the TOP ward. She registers with the Facility Superintendent that she is a conscientious objector and refuses to deliver meals to Ward 12. As Facility Superintendent what should you do? Do you have to accommodate her conscientious objection? What if all the women voice conscientious objection?

Whilst there has been no decision dealing with this aspect in South Africa it is clear from the WHO Guidelines that only persons involved in actual service provision may raise a right to conscientious objection. The decision in the United Kingdom is also instructive in this regard since in that case the Court rejected an argument that a secretary typing letters of referral could conscientiously object thereto.

Notwithstanding the above, the Facility should also be aware of the fact that accommodating Ms X could be potentially disastrous when all other persons not providing actual services all conscientiously object (for example, if all women working in the kitchen were to object) as this would mean that no food would be delivered to patients seeking TOP services. This would clearly be an untenable position for the hospital.

By the same token women seeking access to TOP services should be afforded dignity, privacy and respect and not be victimized or harassed by staff. Where staff do engage in victimizing conduct Facility management would be authorised to take disciplinary action against such staff member for misconduct.

A policy should be developed setting out the position of staff not involved in actual service provision and strict adherence should be adopted in relation to such policy.

YOU DO NOT HAVE A RIGHT TO CONSCIENTIOUS OBJECTION, SINCE YOU ARE NOT PERFORMING THE ACTUAL OPERATION. THE POLICY OF THIS HOSPITAL IS CLEAR, YOU SHOULD THEREFORE SERVE FOOD TO ALL PATIENTS AND IF YOU ARE HARSH OR RUDE TO ANY OF THE WOMEN ACCESSING TOP'S I WILL HAVE TO DISCIPLINE YOU.



PRACTICAL EXAMPLE 2

Ms X attends at a public health designated facility in KwaZulu-Natal after being raped. She advises that she has been to Rape Crisis and does not wish to report the matter to the police but has been told that she will be able to obtain the emergency contraceptive pill from the pharmacy or sisters working at the facility. Mr. Y, a pharmacist in the facility refuses to fill a prescription sent from the TOP ward on the basis that he is a conscientious objector. Mr. Y will be on duty for the next week, as the only other pharmacist working in the facility is on leave at the moment. Ms X has asked to see facility management and has lodged a complaint against Mr. Y and the facility. Is Mr. Y justified in his refusal? What duty does the facility have?

The facility has a duty to provide access for women seeking the emergency contraceptive pill, as part of the woman's right to reproductive autonomy. Since Mr. Y is not involved in actual service provision and will not be terminating a pregnancy but simply providing pills. He should therefore not be allowed to register his conscientious objection. Where a facility has already permitted him to register such objection, the hospital has a duty to provide and ensure that alternative services are made available for women seeking prescription contraceptive methods, as any conscientious objection on the part of Mr. Y can never amount to a complete denial of Ms. X's rights.

Whilst there has been no case similar to this in South Africa, a decision in the United States offers useful guidance. In *Brownfield v. Daniel Freeman Marina Hospital*,¹⁶ the court ruled that a rape survivor who was denied information about emergency contraception at a Catholic hospital's emergency room could sue for medical malpractice. The hospital refused to provide such information or treatment because of religious convictions. The Court asserted that a woman's "right to control her treatment must prevail over [a hospital's] moral and religious

convictions." Further, it is the hospital's duty to provide full information about all medical options in order to protect a patient's right to choose whether to undergo medical treatment. The court stated, "Meaningful exercise of this right is possible only to the extent that patients are provided with adequate information upon which to base an intelligent decision."

In another decision in the European Court of Human Rights in the case of *Pichon and Sajous v France*,¹⁷ the Court upheld a conviction under the consumer code of pharmacists who refused to fill prescriptions for contraceptive pills based on religious beliefs. The Court did not feel that the pharmacists' refusal could be justified by their religious beliefs. The Court further stated that although the pharmacists had a right to their religious beliefs under Article 9, these religious beliefs did not trump the right of customers to have access to contraceptives and that the right to religious freedom did not guarantee the right to behave in public in a manner governed by that belief.



PRACTICAL EXAMPLE 3

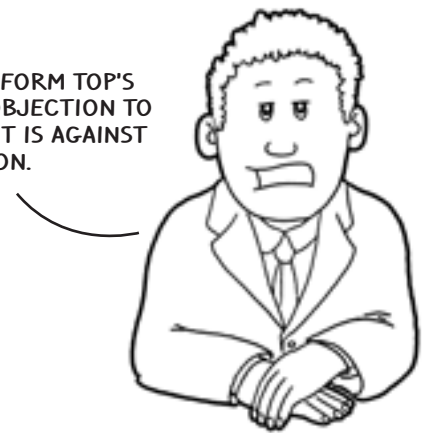
The Dept of Health seeks to employ a midwife/ medical practitioner in a remote area in the Northern Cape Province. Currently there are no TOP services offered there and the Department is seeking to employ someone who will be prepared to perform TOP's. They are faced with two candidates, one who does not have an objection to performing a TOP and another who objects strongly on the basis of her conscience. Is the department justified in not employing the midwife/medical practitioner who refuses to perform TOP's or does this amount to unfair discrimination on the basis of conscience?

The Department will have to demonstrate either that:

- i. *the discrimination is fair; or*
- ii. *that it is an inherent requirement of the job to perform TOP's.*

On the basis of the facts above, it is likely that the Department will be able to demonstrate that their choice is fair or that in the circumstances, performing a TOP is an inherent requirement of the job. They will argue that they have to provide TOP services in terms of the Act, that there are no services currently available to women in that area and the purpose of the discrimination is to give effect to women's constitutional rights to access health care services, freedom and security of the person and equality.

WILL I HAVE TO PERFORM TOP'S BECAUSE I HAVE AN OBJECTION TO PERFORMING TOP'S. IT IS AGAINST MY RELIGION.



PRACTICAL EXAMPLE 4

The Department of Health seeks to employ a midwife/ medical practitioner in a remote area in Gauteng. Currently there are TOP services offered by the facility, and women in Gauteng generally have access to TOP services, but the Department would prefer to employ someone who will be prepared to perform TOP's. They are faced with two candidates, one who has no objection to performing TOP'S and another who objects strongly on the basis of their conscience. Is the department justified in not employing the mid-wife/medical practitioner who refuses to perform TOP's on that basis or does this amount to unfair discrimination on the basis of conscience?

The Department will have to demonstrate either that:

- i. *the discrimination is fair; or*
- ii. *that it is an inherent requirement of the job to perform TOP's.*

On the basis of the facts above, the Department must demonstrate that their choice is fair or that in the circumstances performing TOP's is an inherent requirement of the job. They will have to show that access to TOP's will be enhanced by appointing the candidate who will perform TOP's and that this requirement is of overriding importance and outweighs the impact that not appointing the other applicant will have.

It is likely that in the context of promotions, the same considerations will be relevant. However, the arguments will differ from case to case, where the Department is selecting a candidate for promotion.

MR X THIS IS AN INHERENT REQUIREMENT OF THIS POSITION BECAUSE THERE ARE NO SERVICES AVAILABLE IN THIS AREA, WE HAVE TO ENSURE THAT WOMEN HAVE ACCESS TO TOP'S. WE HAVE TO GIVE PREFERENCE TO SOMEONE WHO WILL BE WILLING TO PERFORM TOP'S.



CONCLUDING REMARKS

Ultimately, one should bear in mind that conscientious objection can have a negative impact on women's health. If healthcare information and treatment options are withheld, patients do not receive optimal health care and cannot make informed choices. In some cases the effect of conscientious objection on the part of the health worker may take away the right of individual women to obtain a termination of pregnancy and in such cases women may resort to illegal abortions, which may have an extremely negative effect on their health and well-being.

Why is it that, in spite of the legalization of abortion, women still resort to unsafe practices instead of safe ones?

A recent survey has shown that only 53 percent of all South African women are aware of the CTOP Act, and that 61 percent of rural women were totally unaware of the availability of legal abortion. Researchers argue that ignorance of the law, unavailability of the service; taboos and stigmatization definitely play a substantial role.¹⁸ In addition it has been argued that, appeals to conscientious objection by health care workers in state-run institutions are a major contributor to the high number of unsafe abortions.¹⁹

REFERENCES

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- ⁴ Jewkes R et al: *The Epidemiology of Incomplete Abortion in South Africa*, SAMJ Volume 87 No 4 April 1997
- ⁵ Constitution of the Republic of South Africa, Act 108 of 1996 (see Annexure)
- ⁶ The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), effective 1981, ratified by South Africa in 15 December 1995. Full text accessible at: <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>
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- ¹² *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) at para 20
- ¹³ World Health Organisation, note 3 above
- ¹⁴ *Janaway v. Salford Health Authority* (1988), 1 A.C. 537 (House of Lords)
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- ¹⁷ *Pichon and Sajous v France* (2001) (App no 49853/99), European Court of Human Rights (3rd Section)
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- ¹⁹ Van Bogaert L: *The limits of conscientious objection in the developing world*, 2002, Developing World Bioethics, Vol 2, No.2, p 131-143

CHOICE ON TERMINATION OF PREGNANCY ACT 92 OF 1996

[ASSENTED TO 12 NOVEMBER 1996]

[DATE OF COMMENCEMENT: 1 FEBRUARY 1997]

(Afrikaans text signed by the President)

as amended by

Choice on Termination of Pregnancy Amendment Act 38 of 2004

Regulations under this Act

DESIGNATION OF FACILITIES FOR THE SURGICAL TERMINATION OF PREGNANCIES

DESIGNATION OF FACILITIES FOR THE SURGICAL TERMINATION OF PREGNANCIES

DESIGNATION OF FACILITIES FOR THE SURGICAL TERMINATION OF PREGNANCIES

REGULATIONS UNDER CHOICE ON TERMINATION OF PREGNANCY ACT 92 OF 1996

ACT

To determine the circumstances in which and conditions under which the pregnancy of a woman may be terminated; and to provide for matters connected therewith.

Preamble

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;

This Act therefore repeals the restrictive and inaccessible provisions of the Abortion and Sterilization Act, 1975 (Act 2 of 1975), and promotes 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 her individual beliefs.

1 DEFINITIONS

In this Act, unless the context otherwise indicates-

'Director-General' means the Director-General of Health;

‘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;

‘Head of Department’ means the head of a provincial health department; [Definition of ‘Head of Department’ inserted by s. 1 (a) of Act 38 of 2004.]

‘incest’ means sexual intercourse between two persons who are related to each other in a degree which precludes a lawful marriage between them;

‘medical practitioner’ means a person registered as such under the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act 56 of 1974);

‘Member of the Executive Council’ means the member of the Executive Council of a province who is responsible for health in that province;

[Definition of ‘Member of the Executive Council’ inserted by s. 1 (b) of Act 38 of 2004.]

‘Minister’ means the Minister of Health;

‘minor’ means any female person under the age of 18 years; ‘prescribe’ means prescribe by regulation under section 9;

‘rape’ also includes statutory rape as referred to in sections 14 and 15 of the Sexual Offences Act, 1957 (Act 23 of 1957)

‘registered midwife’ means a person registered as such under the Nursing Act, 1978 (Act 50 of 1978), and who has in addition undergone prescribed training in terms of this Act;

[Definition of ‘registered midwife’ substituted by s. 1 (c) of Act 38 of 2004.]

‘registered nurse’ means a person registered as such under the Nursing Act, 1978 (Act 50 of 1978), and who has in addition undergone prescribed training in terms of this Act;

[Definition of ‘registered nurse’ inserted by s. 1 (d) of Act 38 of 2004.]

‘termination of a pregnancy’ means the separation and expulsion, by medical or surgical means, of the contents of the uterus of a pregnant woman;

‘woman’ means any female person of any age.

2 CIRCUMSTANCES IN WHICH AND CONDITIONS UNDER WHICH PREGNANCY MAY BE TERMINATED

- (1) A pregnancy may be terminated-
 - (a) upon request of a woman during the first 12 weeks of the gestation period of her pregnancy;
 - (b) 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-
 - (i) the continued pregnancy would pose a risk of injury to the woman’s physical or mental health; or
 - (ii) there exists a substantial risk that the fetus would suffer from a severe physical or mental abnormality; or
 - (iii) the pregnancy resulted from rape or incest; or
 - (iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman; or
 - (c) after the 20th week of the gestation period if a medical practitioner, after consultation with another medical practitioner or a registered midwife or registered nurse, is of the opinion that the continued pregnancy-
 - (i) would endanger the woman’s life;
 - (ii) would result in a severe malformation of the fetus; or
 - (iii) would pose a risk of injury to the fetus.

[Para. (c) amended by s. 7 of Act 38 of 2004.]

(2) The termination of a pregnancy may only be carried out by a medical practitioner, except for a pregnancy referred to in subsection (1) (a), which may also be carried out by a registered midwife or registered nurse who has completed the prescribed training course.

[Sub-s. (2) amended by s. 7 of Act 38 of 2004.]

3 PLACE WHERE TERMINATION OF PREGNANCY MAY TAKE PLACE

- (1) Termination of a pregnancy may take place only at a facility which-
- (a) gives access to medical and nursing staff;
 - (b) gives access to an operating theatre;
 - (c) has appropriate surgical equipment;
 - (d) supplies drugs for intravenous and intramuscular injection;
 - (e) has emergency resuscitation equipment and access to an emergency referral centre or facility;
 - (f) gives access to appropriate transport should the need arise for emergency transfer;
 - (g) has facilities and equipment for clinical observation and access to in-patient facilities;
 - (h) has appropriate infection control measures;
 - (i) gives access to safe waste disposal infrastructure;
 - (j) has telephonic means of communication; and
 - (k) has been approved by the Member of the Executive Council by notice in the Gazette.
- (2) The Member of the Executive Council may withdraw any approval granted in terms of subsection (1) (k).
- (3) (a) Any health facility that has a 24-hour maternity service, and which complies with the requirements referred to in subsection (1) (a) to (j), may terminate pregnancies of up to and including 12 weeks without having to obtain the approval of the Member of the Executive Council.
- (b) The person in charge of a health facility contemplated in paragraph (a) must notify the relevant Member of the Executive Council that the health facility has a 24-hour maternity service which complies with the requirements referred to in subsection (1) (a) to (j).
- (4) The Member of the Executive Council shall once a year submit statistics of any approved facilities for that year to the Minister.
- (5) Notwithstanding anything to the contrary in this Act, the Minister may perform any of the functions that the Member of the Executive Council may or must perform, if it is necessary to perform such function in order to achieve any of the objects of this Act.

[S. 3 substituted by s. 2 of Act 38 of 2004.]

4 COUNSELLING

The State shall promote the provision of non-mandatory and non-directive counselling, before and after the termination of a pregnancy.

5 CONSENT

- (1) Subject to the provisions of subsections (4) and (5), the termination of a pregnancy may only take place with the informed consent of the pregnant woman.
- (2) Notwithstanding any other law or the common law, but subject to the provisions of subsections (4) and (5), no consent other than that of the pregnant woman shall be required for the termination of a pregnancy.
- (3) In the case of a pregnant minor, a medical practitioner or a registered midwife or registered nurse, as the case may be, shall advise such minor to consult with her parents, guardian, family members or friends before the pregnancy is terminated: Provided that the termination of the pregnancy shall not be denied because such minor chooses not to consult them.

[Sub-s. (3) amended by s. 7 of Act 38 of 2004.]

- (4) Subject to the provisions of subsection (5), in the case where a woman is-
 - (a) severely mentally disabled to such an extent that she is completely incapable of understanding and appreciating the nature or consequences of a termination of her pregnancy; or
 - (b) in a state of continuous unconsciousness and there is no reasonable prospect that she will regain consciousness in time to request and to consent to the termination of her pregnancy in terms of section 2,
her pregnancy may be terminated during the first 12 weeks of the gestation period, or from the 13th up to and including the 20th week of the gestation period on the grounds set out in section 2 (1) (b)-
 - (i) upon the request of and with the consent of her natural guardian, spouse or legal guardian, as the case may be; or
 - (ii) if such persons cannot be found, upon the request and with the consent of her curator personae:

Provided that such pregnancy may not be terminated unless two medical practitioners or a medical practitioner and a registered midwife or registered nurse who has completed the prescribed training course consent thereto.

[Sub-s. (4) amended by s. 7 of Act 38 of 2004.]

- (5) Where two medical practitioners or a medical practitioner and a registered midwife or registered nurse who has completed the prescribed training course, are of the opinion that-
 - (a) during the period up to and including the 20th week of the gestation period of a pregnant woman referred to in subsection (4) (a) or (b)-
 - (i) the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or
 - (ii) there exists a substantial risk that the fetus would suffer from a severe physical or mental abnormality; or
 - (b) after the 20th week of the gestation period of a pregnant woman referred to in subsection (4) (a) or (b), the continued pregnancy-
 - (i) would endanger the woman's life;
 - (ii) would result in a severe malformation of the fetus; or
 - (iii) would pose a risk of injury to the fetus,they may consent to the termination of the pregnancy of such woman after consulting her natural guardian, spouse, legal guardian or curator personae, as the case may be: Provided that the termination of the pregnancy shall not be denied if the natural guardian, spouse, legal guardian or curator personae, as the case may be, refuses to consent thereto.

[Sub-s. (5) amended by s. 7 of Act 38 of 2004.]

6 INFORMATION CONCERNING TERMINATION OF PREGNANCY

A woman who in terms of section 2 (1) requests a termination of pregnancy from a medical practitioner or a registered midwife or registered nurse, as the case may be, shall be informed of her rights under this Act by the person concerned.

[S. 6 amended by s. 7 of Act 38 of 2004.]

7 NOTIFICATION AND KEEPING OF RECORDS

(1) Any medical practitioner, or a registered midwife or registered nurse who has completed the prescribed training course, who terminates a pregnancy in terms of section 2 (1) (a) or (b), shall record the prescribed information in the prescribed manner and give notice thereof to the person referred to in subsection (2).

[Sub-s. (1) amended by s. 7 of Act 38 of 2004.]

(2) The person in charge of a facility referred to in section 3 or a person designated for such purpose, shall be notified as prescribed of every termination of a pregnancy carried out in that facility.

(3) The person in charge of a facility referred to in section 3 shall, within one month of the termination of a pregnancy at such facility, collate the prescribed information and forward it by registered post confidentially to the relevant Head of Department: Provided that the name and address of a woman who has requested or obtained a termination of pregnancy, shall not be included in the prescribed information.

[Sub-s. (3) amended by s. 3 (a) of Act 38 of 2004.]

(4) The Head of Department shall-

(a) keep record of the prescribed information which he or she receives in terms of subsection (3); and

(b) submit to the Director-General the information contemplated in paragraph (a) every six months.

[Sub-s. (4) amended by s. 3 (b) of Act 38 of 2004.]

(5) The identity of a woman who has requested or obtained a termination of pregnancy shall remain confidential at all times unless she herself chooses to disclose that information.

8 DELEGATION

(1) The Member of the Executive Council may, on such conditions as he or she may determine, in writing delegate to the Head of Department or any other officer in the service of the State, any power conferred upon the Member of the Executive Council by or under this Act, except the power referred to in section 9.

(2) The Head of Department may, on such conditions as he or she may determine, in writing delegate to an officer in the service of the State, any power conferred upon the Head of Department by or under this Act.

(3) The Member of the Executive Council or Head of Department shall not be divested of any power delegated by him or her, and may amend or set aside any decision taken by a person in the exercise of any such power delegated to that person.

[S. 8 substituted by s. 4 of Act 38 of 2004.]

9 REGULATIONS

The Member of the Executive Council may, in consultation with the Minister, make regulations relating to any matter which it is necessary or expedient to prescribe for the proper implementation or administration of this Act.

[S. 9 substituted by s. 5 of Act 38 of 2004.]

10 OFFENCES AND PENALTIES

- (1) Any person who-
- (a) is not a medical practitioner, or a registered midwife or registered nurse who has completed the prescribed training course, and who performs the termination of a pregnancy referred to in section 2 (1) (a);
 - (b) is not a medical practitioner and who performs the termination of a pregnancy referred to in section 2 (1) (b) or (c);
 - (c) prevents the lawful termination of a pregnancy or obstructs access to a facility for the termination of a pregnancy; or
 - (d) terminates a pregnancy or allows the termination of a pregnancy at a facility not approved in terms of section 3 (1) or not contemplated in section 3 (3) (a),
- shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years.
- [Sub-s. (1) substituted by s. 6 of Act 38 of 2004.]
- (2) Any person who contravenes or fails to comply with any provision of section 7 shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.

11 APPLICATION OF ACT

- (1) This Act shall apply to the whole of the national territory of the Republic.
- (2) This Act shall repeal-
- (a) the Act mentioned in columns one and two of the Schedule to the extent set out in the third column of the Schedule; and
 - (b) any law relating to the termination of pregnancy which applied in the territory of any entity which prior to the commencement of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), possessed legislative authority with regard to the termination of a pregnancy.

12 SHORT TITLE AND COMMENCEMENT

This Act shall be called the Choice on Termination of Pregnancy Act, 1996, and shall come into operation on a date fixed by the President by proclamation in the Gazette.

SCHEDULE

No. and year of law	Short title	Extent of repeal
Act 2 of 1975	Abortion and Sterilization Act, 1975	In so far as it relates to abortion

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, ACT 108 OF 1996

[ASSENTED TO 16 DECEMBER 1996]

[DATE OF COMMENCEMENT: 4 FEBRUARY 1997]

(Unless otherwise indicated - see also s. 243 (5))

(English text signed by the President)

as amended by

Constitution of the Republic of South Africa, Act 108 of 1996
Constitution of the Republic of South Africa Amendment Act 35 of 1997
Constitution of the Republic of South Africa Amendment Act 65 of 1998
Constitution of the Republic of South Africa Second Amendment Act 87 of 1998
Constitution of the Republic of South Africa Second Amendment Act 2 of 1999
Constitution of the Republic of South Africa Amendment Act 3 of 1999
Constitution of the Republic of South Africa Amendment Act 34 of 2001
Constitution of the Republic of South Africa Second Amendment Act 61 of 2001
Constitution of the Republic of South Africa Amendment Act 18 of 2002
Constitution of the Republic of South Africa Second Amendment Act 21 of 2002
Constitution of the Republic of South Africa Amendment Act 2 of 2003
Constitution of the Republic of South Africa Second Amendment Act 3 of 2003

Regulations under this Act

REGULATIONS GOVERNING 'THE ORDER FOR MERITORIOUS SERVICE - DIE ORDE VIR
VOORTREFLIKE DIENS'

RULES OF THE CONSTITUTIONAL COURT

ACT

To introduce a new Constitution for the Republic of South Africa and to provide for matters incidental thereto.

Preamble

We, the people of South Africa,

Recognise the injustices of our past;

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to-

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.

Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.

God seën Suid-Afrika. God bless South Africa.

Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.

CHAPTER 1

FOUNDING PROVISIONS (SS 1-6)

1 REPUBLIC OF SOUTH AFRICA

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

2 SUPREMACY OF CONSTITUTION

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

3 CITIZENSHIP

- (1) There is a common South African citizenship.
- (2) All citizens are-
 - (a) equally entitled to the rights, privileges and benefits of citizenship; and
 - (b) equally subject to the duties and responsibilities of citizenship.
- (3) National legislation must provide for the acquisition, loss and restoration of citizenship.

4 NATIONAL ANTHEM

The national anthem of the Republic is determined by the President by proclamation.

5 NATIONAL FLAG

The national flag of the Republic is black, gold, green, white, red and blue, as described and sketched in Schedule 1.

6 LANGUAGES

- (1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.
- (2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.
- (3) (a) The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.
(b) Municipalities must take into account the language usage and preferences of their residents.
- (4) The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.
- (5) A Pan South African Language Board established by national legislation must-
 - (a) promote, and create conditions for, the development and use of-
 - (i) all official languages;
 - (ii) the Khoi, Nama and San languages; and
 - (iii) sign language; and
 - (b) promote and ensure respect for-
 - (i) all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and
 - (ii) Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.

CHAPTER 2

BILL OF RIGHTS (SS 7-39)

7 RIGHTS

- (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
- (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
- (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

8 APPLICATION

- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-
 - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
 - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).
- (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

9 EQUALITY

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) 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 persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

10 HUMAN DIGNITY

Everyone has inherent dignity and the right to have their dignity respected and protected.

11 LIFE

Everyone has the right to life.

12 FREEDOM AND SECURITY OF THE PERSON.

- (1) Everyone has the right to freedom and security of the person, which includes the right-
 - (a) not to be deprived of freedom arbitrarily or without just cause;
 - (b) not to be detained without trial;
 - (c) to be free from all forms of violence from either public or private sources;
 - (d) not to be tortured in any way; and
 - (e) not to be treated or punished in a cruel, inhuman or degrading way.
- (2) Everyone has the right to bodily and psychological integrity, which includes the right-
 - (a) to make decisions concerning reproduction;

- (b) to security in and control over their body; and
- (c) not to be subjected to medical or scientific experiments without their informed consent.

13 SLAVERY, SERVITUDE AND FORCED LABOUR

No one may be subjected to slavery, servitude or forced labour.

14 PRIVACY

Everyone has the right to privacy, which includes the right not to have-

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.

15 FREEDOM OF RELIGION, BELIEF AND OPINION

- (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Religious observances may be conducted at state or state-aided institutions, provided that-
 - (a) those observances follow rules made by the appropriate public authorities;
 - (b) they are conducted on an equitable basis; and
 - (c) attendance at them is free and voluntary.
- (3) (a) This section does not prevent legislation recognising-
 - (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
 - (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
- (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

16 FREEDOM OF EXPRESSION

- (1) Everyone has the right to freedom of expression, which includes-
 - (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to-
 - (a) propaganda for war;
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

17 ASSEMBLY, DEMONSTRATION PICKET AND PETITION

Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

18 FREEDOM OF ASSOCIATION

Everyone has the right to freedom of association.

19 POLITICAL RIGHTS

- (1) Every citizen is free to make political choices, which includes the right-
 - (a) to form a political party;
 - (b) to participate in the activities of, or recruit members for, a political party; and
 - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right-
 - (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
 - (b) to stand for public office and, if elected, to hold office.

20 CITIZENSHIP

No citizen may be deprived of citizenship.

21 FREEDOM OF MOVEMENT AND RESIDENCE

- (1) Everyone has the right to freedom of movement.
- (2) Everyone has the right to leave the Republic.
- (3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.
- (4) Every citizen has the right to a passport.

22 FREEDOM OF TRADE, OCCUPATION AND PROFESSION

Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

23 LABOUR RELATIONS

- (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right-
 - (a) to form and join a trade union;
 - (b) to participate in the activities and programmes of a trade union; and
 - (c) to strike.
- (3) Every employer has the right-
 - (a) to form and join an employers' organisation; and
 - (b) to participate in the activities and programmes of an employers' organisation.
- (4) Every trade union and every employers' organisation has the right-
 - (a) to determine its own administration, programmes and activities;
 - (b) to organise; and
 - (c) to form and join a federation.
- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation

may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

- (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36 (1).

24 ENVIRONMENT

Everyone has the right-

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

25 PROPERTY

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application-
 - (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including-
 - (a) the current use of the property;
 - (b) the history of the acquisition and use of the property;
 - (c) the market value of the property;
 - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
 - (e) the purpose of the expropriation.
- (4) For the purposes of this section-
 - (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
 - (b) property is not limited to land.
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

- (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
- (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).
- (9) Parliament must enact the legislation referred to in subsection (6).

26 HOUSING

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

27 HEALTH CARE, FOOD, WATER AND SOCIAL SECURITY

- (1) Everyone has the right to have access to-
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

28 CHILDREN

- (1) Every child has the right-
 - (a) to a name and a nationality from birth;
 - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
 - (c) to basic nutrition, shelter, basic health care services and social services;
 - (d) to be protected from maltreatment, neglect, abuse or degradation;
 - (e) to be protected from exploitative labour practices;
 - (f) not to be required or permitted to perform work or provide services that-
 - (i) are inappropriate for a person of that child's age; or
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
 - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
 - (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

- (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
- (2) A child's best interests are of paramount importance in every matter concerning the child.
- (3) In this section 'child' means a person under the age of 18 years.

29 EDUCATION

- (1) Everyone has the right-
 - (a) to a basic education, including adult basic education; and
 - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.
- (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-
 - (a) equity;
 - (b) practicability; and
 - (c) the need to redress the results of past racially discriminatory laws and practices.
- (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that-
 - (a) do not discriminate on the basis of race;
 - (b) are registered with the state; and
 - (c) maintain standards that are not inferior to standards at comparable public educational institutions.
- (4) Subsection (3) does not preclude state subsidies for independent educational institutions.

30 LANGUAGE AND CULTURE

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

31 CULTURAL, RELIGIOUS AND LINGUISTIC COMMUNITIES

- (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-
 - (a) to enjoy their culture, practise their religion and use their language; and
 - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

32 ACCESS TO INFORMATION

- (1) Everyone has the right of access to-
 - (a) any information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights.
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

33 JUST ADMINISTRATIVE ACTION

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must-
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.

34 ACCESS TO COURTS

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

35 ARRESTED, DETAINED AND ACCUSED PERSONS

- (1) Everyone who is arrested for allegedly committing an offence has the right-
 - (a) to remain silent;
 - (b) to be informed promptly-
 - (i) of the right to remain silent; and
 - (ii) of the consequences of not remaining silent;
 - (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
 - (d) to be brought before a court as soon as reasonably possible, but not later than-
 - (i) 48 hours after the arrest; or
 - (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
 - (e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
 - (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.
- (2) Everyone who is detained, including every sentenced prisoner, has the right-
 - (a) to be informed promptly of the reason for being detained;
 - (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
 - (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
 - (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
 - (f) to communicate with, and be visited by, that person's-
 - (i) spouse or partner;
 - (ii) next of kin;
 - (iii) chosen religious counsellor; and
 - (iv) chosen medical practitioner.
- (3) Every accused person has a right to a fair trial, which includes the right-

- (a) to be informed of the charge with sufficient detail to answer it;
 - (b) to have adequate time and facilities to prepare a defence;
 - (c) to a public trial before an ordinary court;
 - (d) to have their trial begin and conclude without unreasonable delay;
 - (e) to be present when being tried;
 - (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
 - (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
 - (i) to adduce and challenge evidence;
 - (j) not to be compelled to give self-incriminating evidence;
 - (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
 - (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
 - (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
 - (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
 - (o) of appeal to, or review by, a higher court.
- (4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.
- (5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

36 LIMITATION OF RIGHTS

- (1) 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, including-
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

37 STATES OF EMERGENCY

- (1) A state of emergency may be declared only in terms of an Act of Parliament, and only when-
 - (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and
 - (b) the declaration is necessary to restore peace and order.
- (2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only-
 - (a) prospectively; and
 - (b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.
- (3) Any competent court may decide on the validity of-
 - (a) a declaration of a state of emergency;
 - (b) any extension of a declaration of a state of emergency; or
 - (c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.
- (4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that-
 - (a) the derogation is strictly required by the emergency; and
 - (b) the legislation-
 - (i) is consistent with the Republic's obligations under international law applicable to states of emergency;
 - (ii) conforms to subsection (5); and
 - (iii) is published in the national Government Gazette as soon as reasonably possible after being enacted.
- (5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise-
 - (a) indemnifying the state, or any person, in respect of any unlawful act;
 - (b) any derogation from this section; or
 - (c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.

Table of Non-Derogable Rights

1 Section number	2 Section title	3 Extent to which the right is non-derogable
9	Equality	With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language
10	Human dignity	Entirely
11	Life	Entirely
13	Slavery, servitude and forced labour	With respect to slavery and servitude
28	Children	With respect to: - subsection (1) (d) and (e); - the rights in subparagraphs (i) and (ii) of subsection (1) (g); and - subsection (1) (i) in respect of children of 15 years and younger.
35	Arrested, detained and accused persons	With respect to: - subsections (1) (a), (b) and (c) and (2) (d); - the rights in paragraphs (a) to (o) of subsection (3), excluding paragraph (d); - subsection (4); and - subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair.

- (6) Whenever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, the following conditions must be observed:
- (a) An adult family member or friend of the detainee must be contacted as soon as reasonably possible, and informed that the person has been detained.
 - (b) A notice must be published in the national Government Gazette within five days of the person being detained, stating the detainee's name and place of detention and referring to the emergency measure in terms of which that person has been detained.
 - (c) The detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner.
 - (d) The detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative.
 - (e) A court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.
 - (f) A detainee who is not released in terms of a review under paragraph (e), or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention at any time after 10 days have passed since the previous review, and the court must release the detainee unless it is still necessary to continue the detention to restore peace and order.
 - (g) The detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention.
 - (h) The state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

- (7) If a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.
- (8) Subsections (6) and (7) do not apply to persons who are not South African citizens and who are detained in consequence of an international armed conflict. Instead, the state must comply with the standards binding on the Republic under international humanitarian law in respect of the detention of such persons.

38 ENFORCEMENT OF RIGHTS

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

39 INTERPRETATION OF BILL OF RIGHTS

- (1) When interpreting the Bill of Rights, a court, tribunal or forum-
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

NURSES PLEDGE OF SERVICE

I solemnly pledge myself to the service of humanity and will endeavour to practice my profession with conscience and dignity.

I will maintain by all the means in my power the honour and noble traditions of my profession.

The total health of my patients will be my first consideration.

I will hold in confidence all personal matters coming to my knowledge.

I will not permit considerations of religion, nationality, race or social standing to intervene between my duty and my patient.

I will maintain the utmost respect for human life.

I make these promises solemnly, freely and upon my honour.

Democratic Nursing Organisation of South Africa – DENOSA

HIPPOCRATIC OATH: MODERN VERSION

I swear to fulfill, to the best of my ability and judgment, this covenant:

I will respect the hard-won scientific gains of those physicians in whose steps I walk, and gladly share such knowledge as is mine with those who are to follow.

I will apply, for the benefit of the sick, all measures which are required, avoiding those twin traps of overtreatment and therapeutic nihilism.

I will remember that there is art to medicine as well as science, and that warmth, sympathy, and understanding may outweigh the surgeon's knife or the chemist's drug.

I will not be ashamed to say "I know not," nor will I fail to call in my colleagues when the skills of another are needed for a patient's recovery.

I will respect the privacy of my patients, for their problems are not disclosed to me that the world may know. Most especially must I tread with care in matters of life and death. If it is given me to save a life, all thanks. But it may also be within my power to take a life; this awesome responsibility must be faced with great humbleness and awareness of my own frailty. Above all, I must not play at God.

I will remember that I do not treat a fever chart, a cancerous growth, but a sick human being, whose illness may affect the person's family and economic stability. My responsibility includes these related problems, if I am to care adequately for the sick.

I will prevent disease whenever I can, for prevention is preferable to cure.

I will remember that I remain a member of society, with special obligations to all my fellow human beings, those sound of mind and body as well as the infirm.

If I do not violate this oath, may I enjoy life and art, respected while I live and remembered with affection thereafter. May I always act so as to preserve the finest traditions of my calling and may I long experience the joy of healing those who seek my help.

Written in 1964 by Louis Lasagna, Academic Dean of the School of Medicine at Tufts University, and used in many medical schools today.



WOMEN'S LEGAL CENTRE