



SUBMISSION TO THE SPEAKER OF PARLIAMENT ON THE NOTICE OF INTENTION TO INTRODUCE A PRIVATE MEMBER BILL ON THE CHOICE OF TERMINATION OF PREGNANCY ACT 92 OF 1996

SUBMISSIONS PREPARED BY:

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LEGAL COMPLIANCE BY ACDP OF THE CHOICE OF TERMINATION OF PREGNANCY BILL

1. On 10 July 2017, pursuant to section 73(2) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), Mrs C Dudley MP of the African Christian Democratic Party (ACDP) gave notice of her intention to introduce the Choice on Termination of Pregnancy Amendment Bill, as a private member's bill into Parliament. The notice also stated that she had complied with Rule 276(l)(c) of the Rules of the National Assembly (9th edition).
2. Our submission will focus on whether the Assembly member has complied with the Rules of the National Assembly in attempting to get the Bill introduced into Parliament. We note to the Speaker that we align ourselves with the submissions made on this Bill by Sexual and Reproductive Justice Coalition (SRJC). This submission must therefore be read as incorporating the SRJC submission.
3. We want to note to the Speaker that the issues raised in the Bill have come before Parliament previously. The same Assembly member has sought to amend the current Choice of Termination of Pregnancy Act 92 of 1996 (Principal Act) in substantively the same manner with this draft Bill and the Bill as introduced by the same member in 2010. Substantively both the current draft and the 2010 Bills propose amendments that aim to effect changes to Section 3 and Section 4 of the principal Act in the following manner:
 - 3.1 With regards to section 3 of the Principal Act, the Bill seeks to add to the criteria applicable for a place that can terminate a pregnancy. This is proposed by the addition of section 3(1)(cA) and 3(1)(cB) which seek to mandate such a place to give access to ultrasound equipment and ultrasound examinations and counselling respectively.
 - 3.2 In terms of Section 4, the Bill seeks to make counselling mandatory to every woman wishing to terminate a pregnancy before the termination is performed.

Compliance with Rule 272 of the Rules of the NA

4. When a member of the National Assembly, who is not a member of Cabinet or Deputy Minister, intends to initiate or prepare legislation they must comply with Rule 272 of the National Assembly Rules. Rule 272 requires such a member to:
 - 4.1 prepare a draft Bill and a supporting memorandum setting out the objects of the Bill, in a form and style that complies with any prescribed requirements, including those set out **in Rule 279**; and
 - 4.2 comply with **Rule 276** or if it is a proposed constitutional amendment, to comply with Rule 295.
5. There appears to be *prima facie* compliance with Rule 272.

Compliance with Rule 276 of the Rules of the NA

6. Rule 276 of the National Assembly deals with prior notice and publication of the proposed draft legislation, which provides that a copy of the draft legislation along with an explanatory summary is published in the the Government Gazette. We have seen this publication in Gazette number 40970, dated 10 July 2017.

7. There appears to be *prima facie* compliance with Rule 276. We assume that the Speaker has received a copy of the Bill in terms of Rule 271 as envisaged by Rule 276(2) of the Rules of the NA. We assume further that the Speaker has complied with Rule 276(3) by submitting the necessary documents to the relevant Portfolio Committee.

Compliance with Rule 279 of the Rules of the NA

8. In terms of Rule 279(1), a Cabinet member or Deputy Minister or an Assembly Member or committee introduces a Bill (other than a constitutional amendment bill or money Bill mentioned in Subrule (8)) by submitting the following documents to the Speaker:
 - 8.1 *a copy of the Bill or, if the Bill as it is introduced was published in terms of Rule 276(1)(c), a copy of the Gazette concerned;*
 - 8.2 *the explanatory summary referred to in Rule 276(1)(c), if a draft of the Bill itself was not published; and*
 - 8.3 *a supporting memorandum*
9. Assuming that the Speaker has received the draft Bill, Rule 279(1)(c) lists what the supporting memorandum of the Bill should address. It is emphasized that Rule 279(1)(c) is pre-emptory and therefore the contents of the memorandum cannot deviate from what is stipulated in this Rule. This is supported by the word **must** in Rule 279(1)(c) before listing the requirements of the supporting memorandum.
10. The mandated items of the memorandum are listed as following (we have only listed those that apply to Bills introduced by members of the National Assembly in their individual capacity):
 - 10.1 State whether the Bill is introduced as a proposed Section 75 Bill, a Section 76(1) Bill, or a money Bill: This has been complied with in terms of Paragraph 7 of the Memorandum, although this submission did not engage with the accuracy of the proposed method of introduction.
 - 10.2 Explain the objects of the Bill: This has been complied with in Paragraph 3 of the Bill, although this submission has not engaged with the accuracy of the objects as listed in the draft Bill.
 - 10.3 Give an account of the financial implications of the Bill for the state: Paragraph 5 of the Memorandum simply states that ***“[M]ajor financial implications are not expected. The costs involved should be covered by the general budget allocation, however a cost analysis is recommended.”*** We submit that this statement falls short of the requirement in this Rule as the member is required to account for the full financial implications of the Bill. We submit that, in fact, this Bill has significant financial implications for the state. We submit that the member is incorrect in stating otherwise, and should have disclosed the extent of the financial implications in order to comply with this Rule.
 - 10.3.1 The Bill proposes two major components that will have financial implications for the state, namely ultrasound equipment including skilled persons to operate the ultrasound and mandatory counselling.
 - 10.3.2 Currently both access to ultrasounds equipment and examinations are not readily available to pregnant women seeking terminations of pregnancies from public health designated termination centers. The implication of this

Bill is that all public health care service providers that offer termination of pregnancy services must have an ultrasound available to all women seeking to terminate pregnancies from 12 weeks until 20 weeks of pregnancy. Access to the ultrasound would have to be given efficiently to ensure that this requirement does not hinder women from terminating pregnancies should they meet the criteria set out in the principal Act. Further, these designated centers would also have to secure ultrasound technicians that must be trained and/or employed to provide this service. This has serious and extensive financial implications for the Department of Health. These financial implications have not at all been accounted for in the supporting memorandum of the Bill.

10.3.3 Secondly, the Bill seeks to make counselling mandatory for all women seeking to terminate their pregnancy at any of the stages allowed by the Act. The counselling envisaged here would likely have to be provided by the Department of Social Development (DSD). The DSD would have to employ more counsellors to ensure that this service is given efficiently to avoid delaying terminations of pregnancies for want of counselling consequently forcing women to carry fetuses against their will. These financial implications have not been accounted for in the memorandum thus this requirement has not been complied with.

10.4 Contain a list of all persons and institutions that have been consulted in preparing the Bill; provided that, in respect of Bills introduced by a member in his or her individual capacity, such a list may be included where consultations were conducted: We submit that the list is wholly inadequate as there has *not* been any consultation with key stakeholders that understand the socio-economic context of South Africa, nor with the Department of Health responsible for implementing this Bill. There is only formal, as opposed to substantive, compliance insofar as the member has listed the persons consulted.

10.5 If the Bill is introduced by a committee or an Assembly member, the supporting memorandum must include a legal opinion by a parliamentary legal adviser on the classification of the Bill and any other question in respect of which the JTM is required to make a finding in terms of Joint Rule 160: This has not been complied with

10.6 We submit that the supporting memorandum attached to the Bill does not comply with Rule 279 in three different ways, given that the Member did not meet the requirements of Rule 279(1)(c)(iii), (iv) and (vi).

11. Further, a Bill introduced by a committee or an Assembly member must be certified by the Chief Parliamentary Legal Adviser or a parliamentary legal adviser designated by him or her as being both consistent with the Constitution and existing legislation, and properly drafted in the form and style which conforms to legislative drafting practice. There is no indication in the Bill or its publication where this is stated. We therefore assume that there has not been certification in this regard by the Chief Parliamentary Legal Adviser or any parliamentary legal adviser designated. However, Rule 279 goes on to state that if the Bill is not certified as above then it must be accompanied by a report or legal opinion by a parliamentary legal adviser on why it

has not been certified. The Assembly Member has not complied with this Rule as the Legal Opinion from the parliamentary legal adviser has not been included in the supporting memorandum. It is noted again that Rule 279(4) and (5) are pre-emptory and must therefore be complied with.

Constitutional Obligation of the Speaker

12. The rules leave very little room for discretion by the Speaker. This is in line with the Constitutional Court judgment of *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* (CCT 16/12) 2012 (6) SA 588 (CC) that affirmed the important place of individual members and their legislative power in Parliament. This is in accordance with the idea of deliberative democracy and the open deliberation of important issues. Thus Rule 276(3) seems to require the Speaker to refer the Bill to the relevant committee:

The Speaker must refer the explanatory summary of the Bill, or the draft Bill, as appropriate, contemplated in Subrule (2) to the responsible portfolio committee in order

(a) to assist the committee in planning its work; and

(b) to enable the committee members to acquaint themselves with and to develop their positions with regard to the proposed legislation.

13. However, this does not mean that the Speaker has no discretion. First, there must be compliance with the other Rules of Parliament, including Rule 279. If a Bill is not properly submitted in terms of these Rules, then it may be turned away. As we have suggested above, there are three separate instances of procedural non-compliance by the Member in respect of this Bill. The Speaker is therefore entitled to turn it away.
14. It is less clear whether the Speaker has any residual substantive discretion. As we point out above, the Bill brings matters to Parliament that are not new, and have previously been canvassed in its committees and debates. Accordingly, we ask the Speaker to consider whether there is compliance with the spirit of the Rules when a member uses this process to introduce matters that are constitutionally suspect (in limiting women's reproductive rights), and that have previously been the subject of deliberation by Parliament.

Compliance with the Public Participation Framework

15. The Public Participation Framework (Framework) states that it is aimed at and applicable to Parliament and Provincial Legislature in South Africa. As there is call for public participation in this notice of intention to introduce the Bill, which is part of the parliamentary function, this Framework applies.
16. The Framework states that once the need for written submissions or public hearings is identified, the minimum timeframe for written submissions or public hearings to be made should be 6 weeks. The need for publication participation is clearly stated in Rule 276(4) of the Rules of the NA.
17. The Notice of this Bill was gazetted on 10 July 2017 and only gave 30 days to those seeking to provide written submissions or comments on the Bill. The Framework notes that once the need

is identified then the minimum time that must be given is 6 weeks.¹ Given the impact this proposed Bill will have on women, specifically those seeking termination of pregnancy from public health facilities, much more time should have been given to ensure that there is public participation. The timeframe provided in this Gazette therefore does not comply with the minimum timeframes set out in this Framework.

18. We take this opportunity to remind you that one of the founding values of the Republic of South Africa, as set out in the Constitution, is a system of democratic government to ensure accountability, responsiveness and openness. Additionally, the Constitution of South Africa makes provisions for public participation in the National Assembly, the National Council of Provinces and the provincial legislatures in Sections 59, 72 and 118 respectively. These entrenchments are crucial to the effective functionality of democracy.

Organisations making this submission:

1. Lawyers For Human Rights

Lawyers for Human Rights is an independent human rights organisation with a 38-year track record of human rights activism and public interest litigation in South Africa. LHR uses the law as a positive instrument for change and to deepen the democratisation of South African society. To this end, it provides free legal services to vulnerable, marginalised and indigent individuals and communities, both non-national and South African, who are victims of unlawful infringements of their constitutional rights. LHR launched its Gender Equality Programme in 2016.

2. Sex Workers Education and Advocacy Taskforce

SWEAT is South Africa's leading sex worker human rights organisation. It was registered as a nonprofit organisation in 2002 but has been providing services to sex workers since 1996. The organisation exclusively works with adult sex workers on issues of health and human rights. Its services include providing safer sex education, crisis counselling, legal advice, and skills development for sex workers. SWEAT advocates for the protection, promotion and fulfilment of sex workers human rights through human rights defence and in advocating for law reform for the decriminalisation of sex work in South Africa.

3. Women's Legal Centre

The Women's Legal Centre (the Centre) is an African feminist legal Centre that advances women's rights and equality. Established in 1999 by a group of committed women lawyers to realize the promise of South Africa's Constitution. Exercising their constitutional rights is a major obstacle for women. The Centre will provide, free of charge, strategic legal services to vulnerable and marginalized women within the following key areas i.e. Violence against Women b) Women's Rights in Personal Relationships c) Women's Rights to Land and Tenure Security d) Women's Rights in their Places of Work (Vulnerable Women Workers) e) Women's Rights to Sexual Health and Reproductive Rights. The Centre has since its inception relied on multiple interventions strategies to ensure substantive development of women's rights which will ensure a responsive justice system and implementation of due diligent standards in respect of all forms of violence against women, recognition of all

¹ Framework, Pg 51.

religious customary and permanent relationships, effective, non-discriminatory, non-coercive implementation of reproductive health legislation and policies, access to justice and effective protection for vulnerable workers, Through its litigation and legal advocacy, the Centre contributes towards the development of feminist jurisprudence relating to the promotion of the rights of women to reproductive choice, freedom from violence, equitable access to land and security.

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