Letters

lustrate: When parents who have used IVF donate the remaining embryos after a successful pregnancy to scientific research, I seriously doubt that these parents allocate the same value to these freely donated embryos as they would have if they still had plans to use these embryos to have a child. And then of course some prospective mothers opt to take the morning-after pill to terminate their prospective offspring, which indicates a negative extrinsic value allocation to the pre-embryo.

Dr Donkin mentions that there are alternatives to research with human embryonic stem cells. This is a dangerous half-truth. It should also have been mentioned that, for some important research areas, none of these alternatives is as useful and effective as using human embryonic stem cells. For example, research areas such as human fertility require human embryos with which to experiment. And even in research areas where there are alternatives to human embryos, the obvious question is: Why not use human embryos? In the absence of sound and rational reasons, scientists should not be prohibited, or bogged down in excessive red tape, to use such embryos. To hinder the progress of science in the absence of sound, rational reasons is profoundly unethical.

To conclude, I believe that hypocrisy and prejudice are proper objects of ridicule. And to erect steep regulatory barriers around the use of pre-embryos for research, but simultaneously allowing such embryos to be aborted at will and simultaneously not blinking an eye at the millions of pre-embryos that are naturally excreted, constitutes hypocrisy and prejudice against science. Moreover, irrational beliefs that cause suffering of real persons by hindering the progress of medicine are not only proper objects of ridicule, but also of contempt and condemnation.

1. Jordaan DW. Pre-implantation genetic screening and selection: An ethical analysis. Biotechnology Law Report 2003;22(6):586-601.
2. Jordaan DW. The legal status of the human pre-embryo in the context of the genetic revolution. South African Law Journal 2005;122:137-149.
3. Jordaan DW. Science versus antiscience: the law on pre-embryo experimentation. South African Law Journal 2007;124:618-634.
4. Jordaan DW. Criteria for pre-embryo research in South Africa: an analysis within the paradigm of respect for the pre-embryo. Medicine and Law 2008;27(2):417-437.

State doctors, freedom of conscience and termination of pregnancy revisited

To the Editor: May I comment on the article by David McQuoid-Mason relating to freedom of conscience in abortion cases, which appeared in your December 2010 issue?[1]

By failing to refer to the Regulations made under the Principal Act, the writer makes this issue extraordinarily complicated. It is, of course, trite law that regulations are subordinate legislation that have the same force of law as the Act of Parliament from which they emanate. The statutory duties imposed on a practitioner consulted about an abortion are explicitly set out in the Regulations.

Regulation 9 of the *Regulations under Choice of Termination of Pregnancy Act 92 of 1996* (gazetted 31 January 1997) reads as follows:

> Information concerning the termination of a pregnancy:
>
> A woman requesting the termination of her pregnancy shall be informed –
>
> (a) that she is entitled to the termination of her pregnancy upon request during the first 12 weeks of the gestation period;
>
> (b) that, under the circumstances determined by section 2(1)(b) of the Act, her pregnancy may be terminated from the 13th up to the 20th week of the gestation period;
>
> (c) that only her consent is required for the termination of her pregnancy;
>
> (d) that counselling contemplated in section 4 of the Act shall be available; and
>
> (e) of the locality of facilities for the termination of pregnancies.

Quite clearly, sub-paragraph (e) is designed to amplify, clarify and specify the statutory duty that arises under section 6 of the Principal Act when a woman requests an abortion from a doctor who is not prepared to carry out the procedure personally. Such a duty does NOT include any responsibility to refer to another doctor. It goes no further than a duty to name an alternative hospital or clinic.

I find it extraordinary that so many lawyers as well as practitioners have failed to read this regulation. After extensive and heated debate on this very topic (see Hansard), Parliament decided to specify in its subordinate legislation exactly what the duty amounted to. It follows that David McQuoid-Mason's fascinating and indeed erudite discussion about the relevance of the Limitation Clause in the Constitution and about comparisons with English law, and indeed section 10(c) of the Principal Act, all become otiose.

In the light of Regulation 9(e), there can be no doubt that a court would reject out of hand the suggestion that section 10(c) ('preventing the lawful termination of a pregnancy or obstructing access to a facility') criminalises a doctor who refuses to refer to another doctor; it would choose in favour of the clear and obvious intention of Parliament, namely that the section was designed to criminalise violent behaviour outside clinics intended to prevent patients lawfully entering the facility.

I would respectfully submit that it is most important that those doctors who wish to exercise their constitutional right of conscientious objection should not be intimidated by threats and fears quite unfounded in law.

John J Smyth

Consultant in SA Constitutional Law

Director, Justice Alliance of South Africa

1. McQuoid-Mason D. State doctors, freedom of conscience and termination of pregnancy revisited. South African Journal of Bioethics and Law 2010;3(2):75-78.