

## Freedom of conscience, termination of pregnancy and the duty to refer and not to prevent or obstruct access to termination of pregnancy under the Choice on Termination of Pregnancy Act: A clarification

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It has been stated in a letter to the Editor that the contention by the present writer that doctors who rely on their constitutional right to freedom of conscience, and who refrain from referring a female patient requesting a termination of pregnancy to another doctor prepared to undertake the procedure, may be seen as 'preventing' or 'obstructing' a termination of pregnancy is 'quite unfounded in law'. The statement in the letter is based on the wording of Regulation 9 in terms of the Choice on Termination of Pregnancy Act, which it is said was ignored by the present writer. In this article the statement is tested by considering the relationship between the Constitution, the Choice Act and its Regulations; how the courts interpret statutes; the meaning of the words 'facility' and 'locality of facilities'; and the meaning of the words 'prevent' and 'obstruct'. Thereafter the present writer provides reasons for why – until the courts pronounce finally on the issue – it would be ill-advised for doctors to regard his contentions in respect of the prevention and obstruction of terminations of pregnancy as 'unfounded in law'.

John J Smyth has stated in his letter to the Editor<sup>1</sup> that 'by failing to refer to the Regulations<sup>2</sup> made under the Principal Act<sup>3</sup> the writer makes this issue [freedom of conscience and termination of pregnancy]<sup>4</sup> extraordinarily complicated'. He goes on to say that the present writer's 'fascinating and indeed erudite discussion about the relevance of the Limitation Clause in the Constitution<sup>5</sup> and about comparisons with English law, and indeed section 10(c) of the Principal Act, all become otiose'<sup>1</sup> (footnotes added).

Smyth also asserts that:

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.<sup>1</sup>

Finally, Smyth concludes 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'.<sup>1</sup>

In order to test the veracity of Smyth's comments it is necessary to consider: (i) the relationship between the Constitution, the Choice Act and its Regulations; (ii) how the courts interpret statutes; (iii) the meaning of the words 'facility' and 'locality of facilities'; and (iv) the meaning of the words 'prevent' and 'obstruct'.

### The Constitution, the Choice Act and its Regulations

It is trite that the Constitution is the supreme law of the country<sup>6</sup> and any Acts or regulations must be consistent with it. Smyth correctly points out that 'regulations are subordinate legislation which

have the same force of law as the Act of Parliament from which they emanate'.<sup>1</sup> However, this is subject to two provisos: (i) the regulations must be consistent with the Principal Act; and (ii) the regulations must be consistent with the Constitution.<sup>6</sup>

The Choice Act is designed to give effect to the constitutional requirement regarding the accessibility of reproductive health care. Indeed the Preamble to the Choice Act recognises, *inter alia*, that: (i) women have the right of access to appropriate health care services to ensure safe pregnancy and childbirth; (ii) the decision to have children is fundamental to women's physical, psychological and social health, and 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; and (iii) 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.<sup>7</sup> The courts may have regard to the Preamble to an Act to assist in its interpretation, and not only if the language of the Act is not clear.<sup>8</sup>

The Regulations<sup>2</sup> under the Choice Act are consistent with the information mentioned in the Principal Act, and the wording is similar except that Regulation 9 uses the word 'facilities' while the Act refers to 'facility'. The Regulations are also consistent with the constitutional provisions dealing with reproductive health.<sup>9</sup> The difficulty lies in the interpretation of the words 'localities of facilities' in Regulation 9, which states that a woman requesting a termination of pregnancy shall be informed, *inter alia*, 'of the locality of facilities for the termination of pregnancies', and is intended to amplify the information a female seeking a termination of pregnancy is required to receive in terms of the Act.<sup>10</sup> Similarly the word 'facility' in the Act also needs to be interpreted. Any interpretation of these words must be within the context of the Act<sup>11</sup> and consistent with the Constitution.<sup>6</sup>

## How the courts interpret statutes

The golden rule of interpretation of statutes is that where the meaning of words is clear the courts must give effect to their ordinary meaning.<sup>12</sup> However, this must be done within the context of the statute.<sup>11</sup> Where necessary, if the words are not defined in a statute a reputable dictionary may be used to guide the court in determining the meaning of particular words, although the meaning of the words within the context of the statute must be the decisive factor.<sup>11</sup> If the meaning of the words is not clear and may lead to 'some absurdity, inconsistency, hardship or anomaly', the court will try to ascertain what the intention of Parliament was, measured against the fundamental values in the Constitution.<sup>13</sup> The Constitution states that when interpreting any legislation the courts 'must promote the spirit, purport and objects of the Bill of Rights'.<sup>14</sup>

The Constitution provides that when interpreting any legislation the court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.<sup>15</sup> Furthermore, when interpreting the provisions of the Bill of Rights the courts: (i) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (ii) must consider international law; and (iii) may consider foreign law when interpreting similar provisions.<sup>16</sup> As previously mentioned by the present writer,<sup>4</sup> when interpreting the freedom of conscience clause and terminations of pregnancy the courts may consider the World Medical Association's Declaration of Oslo,<sup>17</sup> because although it is not law and merely an ethical code, South Africa is a member of the World Medical Association and the South African medical profession should subscribe to its provisions. The Declaration is clear that doctors may refuse to advise or perform an abortion only if they 'withdraw while ensuring continuity of care by a qualified colleague'.<sup>17</sup>

Likewise, the South African courts may also be guided by foreign practices such as the British medical guidelines regarding the interpretation of the freedom of conscience clause in respect of health care practitioners. In the UK the British Medical Association takes the view that failure to refer a patient to another doctor who is prepared to terminate a pregnancy could give rise to legal liability if a delay or refusal results in an inability to obtain a termination.<sup>18</sup>

## The meaning of the words 'facility' and 'locality of facilities'

According to the *Oxford Advanced Dictionary of Current English* the word 'facility' means 'a quality which makes ... doing things easy or simple' and 'facilities' means 'aids, circumstances, which make it easy to do things'.<sup>19</sup> A 'locality' means 'a place' or 'a place in which an event occurs'.<sup>20</sup> Therefore, in the context of termination of pregnancy a 'facility' that undertakes such terminations would be a place where it is easy to have a termination of pregnancy, and the 'locality of facilities for the termination of pregnancies' would be places where such terminations can be done easily.

In terms of the Choice Act<sup>3</sup> only a medical practitioner or a registered midwife or a registered nurse who has completed the prescribed training course may undertake terminations of pregnancy – depending on the length of the pregnancy at the time the request is made.<sup>21</sup> During the first 12 weeks of pregnancy the termination may be undertaken by a medical practitioner, a registered midwife

or a registered nurse who has completed the prescribed training course.<sup>21</sup> However, after the first 12 weeks a termination of pregnancy may only be undertaken by a doctor.<sup>21</sup>

Depending on the length of the female patient's pregnancy the termination may be done by a doctor, registered midwife or registered nurse who has completed the prescribed training course. Therefore, if a doctor wishes to exercise his or her right to freedom of conscience in a hospital where there are other doctors, or suitably trained midwives or nurses prepared to undertake terminations of pregnancy, the former doctor would be legally obliged to refer a patient seeking a termination of pregnancy to the place where the other health practitioners are to be found. It would not be consistent with the Preamble to the Choice Act or the spirit, purport and values of the Constitution to interpret Regulation 9 to mean that the first doctor can prevent the patient from being seen by available practitioners in the hospital or obstruct her access to them by referring her away from the hospital's doctors, or trained midwives or nurses prepared to do terminations of pregnancy, to some other institution that undertakes terminations of pregnancy. After 12 weeks of pregnancy the locality in the hospital to which the patient must be referred by the first doctor is where there is a doctor prepared to do the procedure – not a doctor in some other facility outside of the hospital. In any event, in cases involving pregnancies of 12 weeks or more, even if the first doctor wished (unlawfully) to direct the patient away from his or her hospital, he or she will be legally obliged to refer the patient to a locality where there is a doctor who is prepared to do the procedure – in other words to another doctor.

## The meaning of the words 'prevent' or 'obstruct'

It is true, as Smyth states, that section 10(c) of the Choice Act clearly criminalises 'violent behaviour outside clinics intended to prevent patients lawfully entering a facility'<sup>1</sup> – a practice that is probably far more common in the USA than in South Africa. However, the words 'prevent' and 'obstruct' also have other ordinary meanings that are completely consistent with the Preamble of the Choice Act and the spirit and values of the Constitution. According to the *Oxford Advanced Dictionary of Current English* the word 'prevent' means 'to stop or hinder',<sup>22</sup> and the word 'obstruct' means 'to make difficult'.<sup>23</sup> Therefore, section 10(1)(c) of the Choice Act can also be interpreted to mean that it is an offence to 'stop or hinder' a lawful termination of pregnancy, or to 'make it difficult' to access a facility for a termination of pregnancy. In the example given above, if doctors rely on their conscience to turn away patients from their own hospital facilities that undertake terminations of pregnancy, and instead refer patients to some other outside facilities that do such procedures, it is submitted that the doctors concerned could be charged with preventing (by stopping or hindering) a lawful termination of pregnancy at their hospital. Likewise, such doctors would also be obstructing 'access to a facility for the termination of a pregnancy' in terms of the Choice Act by making it more difficult for patients to access their constitutional right to termination of pregnancy services.

## Conclusion

It is clear that Regulation 9 of the Choice Act must be interpreted in the light of the Choice Act itself and the Constitution, both of

which are designed to make access to terminations of pregnancy easy for women who qualify in terms of the law. To achieve this, doctors, and trained midwives and nurses, have to play a role that is not only consistent with their right to freedom of conscience but also with the patient's right to reproductive health care. When interpreting statutes the courts will generally give words their ordinary meanings. When interpreting sections in the Bill of Rights the courts will adopt a purposive approach that reflects the spirit, purport and values of the Constitution, but must also have regard to public international law and may consider approaches in foreign democratic legal systems.

The narrow meaning of the words 'prevent' and 'obstruct' contended by Smyth cannot be sustained on four grounds. Firstly, the dictionary meaning of the words indicates that the word 'prevent' means 'to stop or hinder', and the word 'obstruct' means 'to make difficult'. Such conduct may take place not only through violence but also through an intentional act or omission by a doctor opposed to termination of pregnancy on the grounds of conscience. Secondly, the Preamble to the Choice Act is clear that it is designed to make lawful terminations of pregnancy easier for women who qualify, and the Act should be interpreted to achieve this. Thirdly, South African doctors who are members of the South African Medical Association, which is a constituent member of the World Medical Association, should follow the Declarations of the Association concerning terminations of pregnancy in the context of freedom of conscience. Finally, when interpreting the Bill of Rights section dealing with freedom of conscience, the courts may have regard to interpretations of similar provisions in other free, open and democratic societies, and the British model is a very relevant example in this respect because of the close relationship between medical practice in South Africa and the UK.

Until the courts make a final ruling on what it means to 'prevent' or 'obstruct' a termination of pregnancy, it would therefore be ill-advised for doctors to rely on the contention by Mr Smyth that the arguments by the present writer in the article previously cited are 'quite unfounded in law'.

1. Smyth JJ. State doctors, freedom of conscience and termination of pregnancy revisited (Letter to the Editor). *South African Journal of Bioethics and Law* 2011;4(1):

2. Regulations under the Choice on Termination of Pregnancy Act 92 of 1996, GN 168 of 31 January 1997.
3. Choice on Termination of Pregnancy Act No. 92 of 1996 (the Choice Act).
4. 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.
5. Section 36 of the Constitution of the Republic of South Africa, 1996.
6. Section 2 of the Constitution of the Republic of South Africa, 1996.
7. Preamble to the Choice on Termination of Pregnancy Act No. 92 of 1996.
8. *National Director of Public Prosecutions v Seevnanayan* 2003 (2) SA 178 (C) par 58.
9. Section 27(1)(a) of the Constitution of the Republic of South Africa, 1996.
10. Section 6 of the Choice on Termination of Pregnancy Act No. 92 of 1996.
11. *S v Makhubela* 1981 (4) SA 210 (B).
12. *Commissioner, SARS v Executor, Frith's Estate* 2001 (2) SA 261 (SCA) 273.
13. *Poswa v Member of the Executive Council of Economic Affairs, Environment and Tourism, Eastern Cape* 2001 (3) SA 582 (SCA) par 10.
14. Section 39(2) of the Constitution of the Republic of South Africa, 1996.
15. Section 233 of the Constitution of the Republic of South Africa, 1996.
16. Section 39(1) of the Constitution of the Republic of South Africa, 1996.
17. World Medical Association Declaration of Oslo adopted by the 24th World Medical Assembly, Oslo, Norway, August 1970 and amended by the 35th World Medical Assembly, Venice, Italy, 1983 and the 57th WMA General Assembly, Pilanesberg, South Africa, October 2006. <http://www.wma.net/en/30publications/10policies/a1/index.htm/> (accessed 5 May 2011).
18. British Medical Association. *Medical Ethics Today: Its Practice and Philosophy*. London: British Medical Association, 1996:108.
19. Hornby AS. *Oxford Advanced Dictionary of Current English*. Oxford: Oxford University Press, 1974:305.
20. Hornby AS. *Oxford Advanced Dictionary of Current English*. Oxford: Oxford University Press, 1974:499.
21. Section 2(2) of the Choice on Termination of Pregnancy Act No. 92 of 1996.
22. Hornby AS. *Oxford Advanced Dictionary of Current English*. Oxford: Oxford University Press, 1974:661.
23. Hornby AS. *Oxford Advanced Dictionary of Current English*. Oxford: Oxford University Press, 1974:580.