

# A Legal Interpretation of the Trinidad & Tobago Abortion Law



B R I D G I N G T H E G A P

# FOREWORD

The Family Planning Association of Trinidad and Tobago provides sexual and reproductive health services and information to women, men and young people in the country. We are committed to respecting, protecting and defending the sexual and reproductive rights of the people that we serve including their right to decide freely and responsibly the number and spacing of their children. We also support a woman's right to have control over and decide on matters related to her sexuality and reproductive health.

According to the Beijing Platform for Action, Fourth World Conference on Women 1995: "The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence." The Platform also states "Further women are subject to particular health risks due to inadequate responsiveness and lack of services to meet health needs related to sexuality and reproduction. Complications related to pregnancy and childbirth are among the leading causes of mortality and morbidity in women of reproductive age in many parts of the developing world.....Unsafe abortions threaten the lives of a large number of women, representing a grave public health problem as it is primarily the poorest and youngest who take the highest risk."

Research has shown that unsafe abortions continue to be a major public health problem for many women in this country. The law of Trinidad and Tobago related to termination of pregnancy was inherited from Section 58 of the 1861 UK Offences against the Person Act, as it was in much of the Commonwealth. This law has been changed in the United Kingdom and revised in many Commonwealth countries, including inter alia Barbados, Guyana and St. Lucia. The interpretation of the law even as it stands allows that there are circumstances under which access to termination of pregnancy may be legal. We here present a realistic and moderate legal opinion that considers the Trinidad and Tobago law. It looks at some of the successful challenges that have been made to the same laws in other jurisdictions and the judgments and developments which have informed the application of these laws and which could reasonably be used locally as well.

We are presenting this interpretation and legal opinion in the hope that it will serve to set out more clearly the circumstances under which a woman may have access to safe and legal terminations of pregnancy in Trinidad and Tobago and so guide actual practice in this important matter of women's health.

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## In re: **Law on abortion in Trinidad and Tobago**

1. I am asked to provide an update on the interpretation of the law as it relates to abortion in Trinidad and Tobago.
2. Sections 56 and 57 of the Offences Against the Person Act Chap 12:01 are the only provisions which are relevant. They provide as follows:
  56. Every woman, being with child, who, with intent to procure her own miscarriage, **unlawfully** administers to herself any poison or other noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent, and any person who, with intent to procure the miscarriage of any woman, whether she is or is not with child, **unlawfully** administers to her or causes to be taken by her any poison or other noxious thing, or **unlawfully** uses any instrument or other means whatsoever with the like intent, is liable to imprisonment for four years.
  57. Any person who **unlawfully** supplies or procures any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be **unlawfully** used or employed with intent to procure the miscarriage of any woman, whether she is or is not with child, is liable to imprisonment for two years. (Emphasis added)
3. Section 56 criminalises the acts of a woman who, being pregnant and intending to procure her own miscarriage, either **unlawfully** administers to herself a poison or other noxious thing or **unlawfully** uses any instrument or other means whatsoever. The offence is committed even though she may not have been successful in procuring her miscarriage. Section 56 also criminalises the acts of any person who, intending to procure the miscarriage of a woman, **unlawfully** administers or causes to be administered a poison or noxious thing to the woman or **unlawfully** uses any instrument or other means whatsoever on the woman. Again, the offence is committed even if the person does not succeed in carrying out his or her intention, but even more, it is committed even if the woman is in fact not pregnant. Where an abortion is carried out on a woman by a third party, it is nevertheless possible that the woman herself may be guilty of aiding or abetting the commission of the offence by that third party.
4. Section 57 criminalises the acts of a person who **unlawfully** supplies or procures the poison or other noxious thing or the instrument or other means, whether or not the woman is in fact pregnant, but the person must know that the poison etc. is intended to be used or employed **unlawfully** with intent to procure the miscarriage.
5. Each offence requires that the poison, noxious thing, instrument or other means be administered, used, supplied or procured, as the case may be, **unlawfully**. This naturally suggests that there may be circumstances in which it would be lawful to bring about an abortion.

## THE POSITION IN ENGLAND

6. In England, from which our statutory provisions are copied, it had been generally accepted ever since the enactment of their legislation in 1861 that an abortion would be lawful where it was necessary to save a woman's life. But the precise effect of the use of the qualifying word "unlawfully" was not examined until the case of *R v Bourne* [1939] 1 KB 687. In that case, the defendant was an obstetrician who was charged with having procured the miscarriage of a 14-year-old girl contrary to section 58 of the 1861 Act. The girl was pregnant as a result of a rape of great violence in circumstances which would have been most terrifying to any woman, let alone a child of fourteen, by a man who was in due course convicted of the crime. The defendant gave evidence that, having examined the girl, it was his opinion that the continuance of the pregnancy would probably cause serious injury to her. An expert witness called on his behalf gave evidence that, if the girl gave birth to a child, the consequence was likely to be that she would become a mental wreck. In the course of his charge to the jury, MacNaghten J referred to section 1 (1) of the Infant Life (Preservation) Act, 1929 which made it an offence to cause a child capable of being born to die before it has an existence independent of its mother, subject to the proviso that "no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother." He pointed out that the proviso did not in fact appear in section 58. He went on to say this, however (at p. 691):

"... but the words of that section [i.e. section 58 of the 1861 Act] are that any person who "unlawfully" uses an instrument with intent to procure miscarriage shall be guilty of felony. In my opinion the word "unlawfully" is not, in that section, a meaningless word. I think it imports the meaning expressed by the proviso in s. 1, sub-s. 1, of the Infant Life (Preservation) Act, 1929, and that s. 58 of the Offences Against the Person Act, 1861, must be read as if the words making it an offence to use an instrument with intent to procure a miscarriage were qualified by a similar proviso."

In other words, a person who procures an abortion in good faith for the purpose of preserving the life of the mother is not guilty of an offence. On the issue of what is meant by "preserving the life of the mother" the judge said this to the jury (at p. 693-694): -

"... those words ought to be construed in a reasonable sense, and, if the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor who, under those circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the mother."

7. So stated, the law did not prohibit abortions in all circumstances, nor did it permit abortion on demand. The judge continued (at p.693):

Some there may be, for all I know, who hold the view that the fact that a woman desires the operation to be performed is a sufficient justification for it. Well, that is not the law: the desire of a woman to be relieved of her pregnancy is no justification at all for performing the operation. On the other hand there are people who, from what are said to be religious reasons, object to the operation being performed under any circumstances. That is not the law either. On the contrary, a person who holds such an opinion ought not to be an obstetrical surgeon, for if a case arose where the life of the woman could be saved by performing the operation and the doctor refused to perform it because of his religious opinions and the woman died, he would be in grave peril of being brought before this Court on a charge of manslaughter by negligence ..... I mention these two extreme views merely to show that the law lies between them. It permits the termination of pregnancy for the purpose of preserving the life of the mother.

8. In the circumstances, the judge left the jury with the following direction (at p. 691):

...the burden rests on the Crown to satisfy you beyond reasonable doubt that the defendant did not procure the miscarriage of the girl in good faith for the purpose only of preserving her life. If the Crown fails to satisfy you of that, the defendant is entitled by the law of this land to a verdict of acquittal. If, on the other hand, you are satisfied that what the defendant did was not done by him in good faith for the purpose only of preserving the life of the girl, it is your duty to find him guilty.

Mr Bourne was duly acquitted.

9. The *Bourne* approach was later applied in *R v Newton and Stungo* [1958] Crim LR 469 where the law was stated to be as follows:

The law about the use of instruments to procure miscarriage is this: 'Such use of an instrument is unlawful unless the use is made in good faith for the purpose of preserving the life or health of the woman.' When I say health I mean not only her physical health but also her mental health. But although I have said that 'it is unlawful unless,' I must emphasise and add that the burden of proving that it was not used in good faith is on the Crown.

10. The legal principles established by these cases were applied in England and Wales until the enactment of the Abortion Act 1967.<sup>1</sup> Because that Act governed all the circumstances in which an abortion could be lawfully carried out, there have not been any further developments in the England and Wales on the application of the provisions of the Offences Against the Person Act. However, similar legislation continues to exist in Northern Ireland and Australia and it would be instructive to examine developments in those countries.

<sup>1</sup> See *Royal College of Nursing v Department of Health and Social Services* (1981) A.C. 800.

## THE POSITION IN NORTHERN IRELAND

11. Sections 58 and 59 of the Northern Ireland Offences Against the Person Act 1861 are almost identical in terms to the corresponding provisions in Trinidad and Tobago. But in Northern Ireland there is also section 25(1) of the Criminal Justice Act (Northern Ireland) 1945 which is relevant. It provides that“:

... Any person who, with intent to destroy the life of a child incapable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to penal servitude for life. Provided that no person shall be found guilty of an offence under this section ***unless it is proved that the act which caused the death of a child was no done in good faith for the purpose only of preserving the life of the mother.*** (Emphasis added)

12. The Courts in Northern Ireland have generally followed ***Bourne*** and ***Newton and Stungo*** but there have been subtle refinements of the principles in those cases.
13. In Northern Health and Social Services Board v F and G [1993] NI 268, K (a minor) was made a ward of court on the application of the Northern Health and Social Services Board when she was found to be thirteen weeks pregnant. She had a number of consultations with her psychiatrist in which she repeatedly stated that she would kill either herself or the baby unless she could have the pregnancy terminated. The psychiatrist concluded that the physical and mental risks to the minor if the pregnancy was continued were greater than those that would follow its termination. It was held that the established law in Northern Ireland in respect of termination of pregnancies was that such operations were unlawful unless performed in good faith for the purpose of preserving the life or health of the woman. The health of a woman constituted not only her physical health but also her mental well-being. Sheil J quoted with approval the passage from the direction of Ashworth J to a jury in ***Newton and Stungo*** which is quoted in paragraph 9 above.
14. In ***Northern Ireland Health and Social Services Board v A and Others*** [1994] NIJB1, a severely mentally handicapped woman was in the tenth week of a pregnancy that she wished to have terminated. The Board made an application for a declaration that it would be lawful to terminate the pregnancy. MacDermott LJ granted the declaration. In discussing the phrase ‘for the purpose only of preserving the life of the mother’ that appears in section 25(1) of the 1945 Act he said (at p. 5):-

“I am satisfied that the statutory phrase, ‘for the purpose only of preserving the life of the mother’ does not relate only to some life-threatening situation. Life in this context means that physical or mental health ***or well-being*** of the mother and the doctor’s act is lawful where the continuance of the pregnancy would adversely affect the mental or physical health of the mother. The adverse effect must

however be *a real and serious one and there will always be a question of fact and degree whether the perceived effect of non-termination is sufficiently grave to warrant terminating the unborn child.*" (Emphasis added)

15. MacDermott LJ's determination was significant because it appeared that he was extending the exception to cases where it was thought that the well-being only of the woman would be affected if the pregnancy continued, as opposed to her physical or mental health. He also explained that the adverse effect to the woman's physical or mental health had to be real and serious.
16. These points were addressed in *Western Health and Social Services Board v CMB and the Official Solicitor* (1995, unreported). In that case, Pringle J made a declaration that the termination of the pregnancy of a mentally handicapped 17 year old was lawful. Pringle J discussed the passage from the decision of MacDermott LJ cited above:

I consider that MacDermott LJ did not intend to mean by 'or well-being' to indicate that 'life' meant something more than physical and mental health such as happiness and these words could have been omitted by him without detracting from what was being said; I would point out that these words were omitted at the end of the same sentence when he again referred to the mental health and physical health of the mother. I also accept that the adverse effect must be permanent or long-term and cannot be short term; I consider that this is what MacDermott LJ was indicating when he spoke of the real and serious adverse effect which was sufficiently grave to warrant termination. Mr Weatherup further submitted that the adverse effect must be a probable rather than a possible risk if the pregnancy is not terminated; Mr Toner took much the same approach when he submitted that there must be a serious risk of a long-term adverse effect. I consider that, as indicated by MacDermott LJ, the seriousness of the perceived adverse effect cannot be separated from the chance of that effect occurring; in most cases the adverse effect would need to be a probable risk of non-termination but a possible risk might be sufficient if the imminent death of the mother was a risk in question.

17. These developments were more recently considered by the Northern Ireland Court of Appeal in *Family Planning Association of Northern Ireland v Minister for Health, Social Services and Public Safety* [2004] NICA 39. The Court held that the law as it then stood was that "it is unlawful to procure a miscarriage where the foetus is abnormal but viable, unless there is a risk that the mother may die or is likely to suffer long-term harm, which is serious, to her physical or mental health." In terms of the criminal law, the Court stated the law as follows (at para 75):

Procurement of a miscarriage (or abortion) is a criminal offence punishable by a maximum sentence of life imprisonment if the prosecution proves beyond any reasonable doubt to the satisfaction of a jury:-

- (1) that the person who procured the miscarriage did not believe that there was a risk that the mother might die if the pregnancy was continued; or
- (2) did not believe that the mother would probably suffer serious long-term harm to her physical or mental health; or
- (3) did not believe that the mother would probably suffer serious long-term harm to her physical or mental health if she gave birth to an abnormal child.....
- (4) a person who is a secondary party to the commission of the criminal offence referred to above is liable on conviction to the same penalty as the principal.
- (5) it follows that an abortion will be lawful if a jury considers that the continuance of the pregnancy would have created a risk to the life of the mother or would have caused serious and long-term harm to her physical or mental health.

18. There are some significant re-formulations of the test applied in **Bourne** which should be noted:

- i) Whereas in **Bourne** the burden is on the prosecution to establish that the person performing the abortion did not do so in good faith for the purpose only of preserving the mother's life (interpreted to include her physical and mental health), the Northern Ireland test requires the prosecution to prove that the defendant either did not believe that there was a risk that the mother might die if the pregnancy was continued, or did not believe that the mother would probably suffer serious long-term harm to her physical or mental health, or did not believe that the mother would probably suffer serious long-term harm to her physical or mental health if she gave birth to an abnormal child. Apart from stating the test in the alternative, there is probably little difference between not performing the abortion in good faith for the stated purpose and not believing the stated dangers. A person could not be performing an abortion in good faith if he or she did not believe that it was necessary to avoid the risk of death or the probability of serious long-term harm to physical or mental health. Nevertheless, the re-formulation is significant because it would be a defence to a charge of procuring an abortion that the defendant had the necessary belief, even though it may be established as a matter of fact that there was no risk of death and no threat of a serious nature to long-term physical and mental health. Of course, it would be for the jury to decide whether the defendant did in fact harbour the required belief despite the absence of the evidence supporting that belief. Conversely, where the jury considers that as a matter of fact the continuance of the pregnancy would have created a risk to the life of the mother or would have caused serious and long-term harm to her physical or mental health, it would more than likely also find that the defendant believed that the continuance of the pregnancy would have those consequences. But it is theoretically possible that such a belief could be found to be absent even in the face of compelling evidence of such risk and probabilities.

- ii) The Northern Ireland test makes a distinction between the risk of death, on the one hand, and the probability of long-term harm to physical or mental health. No such distinction is made in the *Bourne* test.

## THE POSITION IN AUSTRALIA

- 19. *R v Wald* (1971) 3 NSWDCR 25 is considered to be the leading case in Australia on the subject. In relation to provisions once again almost identical to ours, Levine DCJ formulated the following test (at p. 29):

...for the operation to have been lawful ... the accused must have had an honest belief on reasonable grounds that what they did was necessary to preserve the women involved from serious danger to their life, or physical or mental health which the continuance of the pregnancy would entail, not merely the normal dangers of pregnancy and childbirth; and that in the circumstances the danger of the operation was not out of proportion to the danger intended to be averted.....

It may be that an honest belief be held that the woman's mental health was in serious danger as at the very time when she was interviewed by a doctor, or that her mental health, although not then in serious danger, could reasonably be expected to be seriously endangered at some time during the currency of the pregnancy if uninterrupted. In either case such a conscientious belief on reasonable grounds would have to be negated before an offence under s83 of the Act could be proved.

- 20. This test is not too far different from the one earlier formulated by Menhennitt J in *R v Davidson* (1969) VR 667, at 672:

... the Crown must establish either (a) that the accused did not honestly believe on reasonable grounds that the act done by him was necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail; or (b) that the accused did not honestly believe on reasonable grounds that the act done by him was in the circumstances proportionate to the need to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail.

- 21. More recently, in *R v Sood* [2006] NSWSC 1141 (31 October 2006), Simpson J, applying *Wald*, stated the test as follows (at para 17):

Unlawfulness is thus established if the Crown proves, beyond reasonable doubt, one or more of the following:

- (i) that the accused person did not honestly and genuinely hold the requisite belief (i.e. that termination of pregnancy was necessary in order to protect the mother from serious danger to her life or health, whether physical or mental); or
- (ii) that, if and to the extent that, such a belief were held, it was not based upon reasonable grounds; or
- (iii) that a reasonable person in the position of the accused would have considered that the risk of termination was out of proportion to the risk to the mother of the continuation of the pregnancy.

22. There are again significant differences between the test as formulated in Australia and that in both England and Northern Ireland. The major difference is that in Australia even an honest and genuine belief in the requisite consequences of not performing the abortion would not be sufficient if the belief was not based on reasonable grounds. In other words, it appears that the test in Australia has an objective element not present in Northern Ireland.

23. Of significance also are the factors which a jury is allowed to take into account in deciding whether there are grounds for the requisite belief. These are not limited to medical factors but include economic and social considerations. In *Wald* Levine DCJ said (at p. 29):

It would be for the jury to decide whether there existed in the case of each woman any economic, social or medical ground or reason which in their view could constitute reasonable grounds upon which an accused could honestly and reasonably believe there would result a serious danger to her physical or mental health.

24. It is noteworthy that such an approach received the expressed approval of Kirby P in the Court of Appeal of New South Wales in *CES v Superclinics (Australia) Pty Limited* (unreported, 27<sup>th</sup> October 1995). Moreover, Kirby P. was careful to point out that the harmful effects to a woman's health which were relevant were not limited to those becoming apparent during the pregnancy alone but included harmful effects after the child was born as well. He said (at para 60):

The test espoused by Levine DCJ (in *Wald*) seems to assert that the danger being posed to the woman's mental health may not necessarily arise at the time of consultation with the medical practitioner, but that a practitioner's honest belief may go to a reasonable expectation that that danger may arise "at some time during the currency of the pregnancy, if uninterrupted" (emphasis added). There seems to be no logical basis for limiting the honest' and reasonable expectation of such a danger to the mother's psychological health to the period of the currency of the pregnancy alone. Having

acknowledged the relevance of other economic or social grounds which may give rise to such a belief, *it is illogical to exclude from consideration, as a relevant factor, the possibility that the patient's psychological state might be threatened after the birth of the child, e.g. due to the very economic and social circumstances in which she will then probably find herself.* Such considerations, when combined with an unexpected and unwanted pregnancy, would, in fact be most likely to result in a threat to a mother's psychological health after the child was born when those circumstances might be expected to take their toll. (Emphasis added)

## THE POSITION IN TRINIDAD AND TOBAGO

25. It can be asserted with confidence that, when a case does come to be considered by the courts of Trinidad and Tobago, a defence along the lines of *Bourne* will be accepted as part of our law. The defence developed on the basis of the use of the word "unlawfully" in England and Wales, Northern Ireland and Australia is now too firmly entrenched to be ignored. It is therefore clear that it is lawful in Trinidad and Tobago to carry out an abortion in the honest belief that it is necessary to protect the woman involved from danger to her life, or physical or mental health. What is not clear at this stage is whether any of the refinements which have taken place elsewhere will be adopted here. The most that can be said is that, like all cases from other common law jurisdictions, the views expressed in Northern Ireland and Australia will be given due consideration and will only be departed from with good reason.

And I so advise.



Douglas L Mendes S.C.

20<sup>th</sup> August 2007





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