

**SUBMISSIONS TO THE JOINT-SELECT COMMITTEE OF PARLIAMENT
CONSIDERING ABORTION
FROM THE COALITION OF LAWYERS FOR THE DEFENCE OF THE UNBORN**

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**Submissions to the Joint-Select Committee of Parliament Considering Abortion
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Introduction

1. As a Committee you have an awesome responsibility on your hands as you are now being called upon to review the Report of the Abortion Policy Review Advisory Group¹, hereinafter referred to as “the Report”, which if implemented would legalise the taking of the life of the unborn. True other countries have gone that way and other Committees in other countries have also done what you have been called upon to do. It may be that these countries have lost their corporate societal conscience in this area as in fact we have lost ours in other areas. It is not the first time in history that these developed-countries have demonstrated a lack of conscience where human life is concerned. So now our turn as a nation has come. In the end we must each take responsibility for the decisions which we have made in this life accepting that we are our brother’s keeper.

2. As we commence our presentation it may help us to remember that our laws have not prevented persons from committing murder and rape and other terrible crimes. We have not clamoured for these laws to be ameliorated, instead as a nation we would want to see these laws strengthened and enforced more rigorously. Our health system is reeling under the effects of violent crime yet we have not heard the Ministry of Health make any recommendations as to how to commit these violent crimes in a civilised manner making it less stressful on the health system- and rightly so because we value life. As a Committee then we would like to suggest to you that daily our laws are being broken with impunity in this country and that therefore the fact that this particular law is not being adhered to may not be enough reason by itself for you to amend the law. If we value the life of the unborn then we will have laws that protect such a life as we do now. It may also be true that abortions have been going on for ages but there are many things which went on in times past like infanticide and child-sacrifice which we would rather not see repeated.

3. While we accept that there are women who wrestled with the question of abortion and still decided to proceed in spite of the wrestling of the conscience, let us not forget that careful, weighty thought prior to commission of the act does not lessen the gravity of the offence.

Maternal Mortality

4. Regarding maternal mortality, which is dealt with more fully in Part 1 of this submission, we have been told that it is the desire to reduce its rate which is driving the move to decriminalise abortions. One of the disappointments with

¹ Ministry Paper 6/08 Report of the Advisory Committee on Abortion

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the Report is that there is no mention of how other countries like Nicaragua, Poland and Ireland who all have restrictive abortion laws have dealt with their maternal mortality rates. Is there a way of reducing the incidents of maternal mortality associated with complications arising from abortions even with our restrictive law? In a 2003 UNICEF report it was said that "the widespread provision of emergency obstetric care is the single most effective way to reduce maternal deaths".² In the Report emphasis was placed on the poor unemployed women in Olympic Way who made up 82% of the women who were admitted to the Victoria Jubilee Hospital in 2005 for attempting termination of pregnancy. It is stated that "all the women under review were single and unemployed with 82% having an Olympic Way address." (See Dr. Patterson's letter to Minister Junor of November 23, 2005, see also p. 1 of Tables Address by Postal Code.) Could it be that if these women were employed that they would not have fallen victims to sexual allurements? For surely it is no coincidence that all of them were unemployed! Isn't it the case that we need to empower women so that they can manage themselves without having to depend on handouts from men in return for sexual favours? Thankfully it would appear that many more women are taking up tertiary training but obviously there is need for intervention at the grass roots level.

5. Now that we know that there is a problem in Olympic Way has there been any type of crisis intervention? What about HIV/AIDS? It stands to reason that these same women would be at risk from HIV/AIDS. Has the Ministry of Health intervened with the aim of studying the underlying cause for the abortions in this community? Are there adequate facilities in the Olympic Way area which would provide all the medical facilities which would be a source of encouragement to these women to try to keep their pregnancies?

Enforcement of Law

6. What about the reach of the law? Does it extend to communities like Olympic Way and other such communities? Are abused women and girls free to make reports of the offence? And are the Police free to do investigations? In the Observer of August 3, 2008 under the heading "Crime triggering incest" the Jamaica Observer featured not only the rise of the problem of incest in the inner city areas but also the problem of criminal dons who prey on young girls. According to the report "criminal dons, claiming to be community benefactors have for years, demanded sexual favours from young inner city girls some of whom they have assisted in going to school. In some instances, as soon as the girls reach puberty the dons "send" for them for sexual initiation. The little girls are sometimes gone for days and are sexually assaulted." (Page 4). Abortion in

² <http://www.unicef.org/newsline/2003/03pr12women.htm>

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these circumstances may appear to solve a problem. However the real problem of men who are living beyond the reach of the law both in and out of the home, particularly within the inner city communities as was featured by the Jamaica Observer, will continue until these strongholds are dismantled allowing for the law to reach the actions of the predators. We therefore join voices with others in calling for the dismantling of the garrisons to allow for the enforcement of the law in its various forms, particularly to ensure that the protection which it offers to young girls is afforded to them wherever they may reside.

7. We look forward to the proposed amendments of the Offences Against the Person Act and the Incest Punishment Act. It is our conviction that the passage of this legislation along with appropriate use of the media to warn would-be offenders and the enforcement of the law will greatly assist us in this area. As a society we are not taking a strong enough stance against rape and incest. Rape and incest are heart-wrenching exploitative activities but to allow for abortion in these cases is to punish the innocent for the guilty. In cases of sexual abuse of whatever kind we recommend immediate medical assistance to deal with the possibility of both HIV/AIDS and pregnancy.

Abortion and the Disabled

8. Again we note that special provisions are recommended for the mentally disabled. We note that in the proposed legislation one of the stated indications for an abortion is where "if born the child would suffer such physical or mental abnormality as to be seriously handicapped." Just recently a prominent member of society told her story of how she was born without legs, abandoned as a baby, grew-up at Maxfield Park Children's Home but is still extremely thankful to be alive. We would also strongly recommend that you listen keenly to the voice of the Roman Catholic Church which has been active in the area of giving care to both physically and mentally disabled children. In this regard we refer to Part 3 of our submissions dealing with the "Convention on the Rights of Persons with Disabilities".

Abortion and Population Control

9. We note that among the organisations which were invited to participate in the work of the Advisory Committee was a representative from the Population Policy Advisory Committee. Is it that we are looking at culling the population in order to reduce its growth? Actual figures in this area seem to vary somewhat with a least one report stating that 'we are now down from a fertility rate of 4.5 births per woman during the 1970's to 2.0 births per woman.'³ We note that the

³ The Sunday Herald, November 18, 2007, p. 2a

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United Nations has indicated that the ideal fertility rate for a population is 2.1 births per woman. According to the Statistical Institute of Jamaica in its Report entitled Demographical Statistics 2007 the total fertility rate for the year 2005 was 2.49 and our projected fertility rate for 2010 is 2.39.⁴ It would appear that we have already surpassed our fertility rate goal and that we are now on the declining trend. As some have said this is setting us on a similar path to that of European countries. The report from the Statistical Institute of Jamaica shows a steady decline in the number of births from 56,937 in 1998 to 46,880 in 2006. We note that in Russia the falling birth rate is leading to a population crisis in the country, with an annual decline of 700,000 people. Abortion is one of the 3 main factors which contribute to this crisis.

10. In 2003, it was reported that Russia had “13 terminations for every 10 live births.”⁵ In an effort to counteract the plummet in birth rates, President Putin announced a ten-year national programme designed to encourage women to have more children. An increase in childcare benefits to support young mothers was a central element to the programme, especially for women having more than one child. We are not saying that Jamaica is currently in this crisis situation but certainly one of the lessons from this is that as we solve a problem today let us not create others for the future. The Report from our Statistical Institute projects, based on current trends, that we will achieve the desired fertility rate of 2.1 (which means zero population growth) by the year 2015 – some think we have already passed this point. If our fertility rate is declining so rapidly what is to stop us from going below 2.1 after that? We have also read that Russia, which was the first country to legalise abortions, has the highest rate of abandoned children in the world.

Abortion as a Solution to Teenage Pregnancy

11. The local rate of teenage pregnancy has been steadily decreasing. Statistics from the Registrar-General’s Department reveal that for the years 2001- 2003 the percentage of total live births attributed to mothers under 15 years old decreased from 20.4% in 2001 to 19.9% in 2002 to 19.4% in 2003. This is to be contrasted with the situation in England which has been experiencing an increase in teenage pregnancies. In 2005 there was an increase of 4% over 2004. The BBC has reported that “Britain has a poor track record on preventing teen pregnancies”.⁶ In England abortions are accessible to even minors under 16 without parental knowledge or consent.

⁴ Demographic Statistics 2007

⁵ geography.about.com/od/obtainpopulationdata/a/russiapop.htm

⁶ news.bbc.co.uk/2/hi/health/367422.stm

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Abortion and Social Conditions

12. Abortion has been made to appear by some as the road to improvement in our social conditions. We note that abortion has not helped the black race in the United States.

13. We have been told that in the USA roughly 38% of the abortions there are done by blacks but blacks comprise 13% of the population. In 2005 they accounted 49% of the estimated new HIV/AIDS cases in 33 states.⁷ You will recall that former President Clinton was quoted as having said at the recently-held XV11 International Aids Conference in Mexico City that “half of America’s AIDS population are blacks”.⁸ According to President Clinton quoted in the same article the rate of infection in African American women “is more than three times the infection rate in Senegal (Africa).” For the period 2001-2004 blacks accounted for 61% of the HIV/AIDS cases in persons under 25.⁹ In 2006 black men comprised 38% of the prison population with 1 in 33 black men being a sentenced prisoner.¹⁰

The Abortion Road.

14. The Committee needs to note that when the world formally started on the abortion path, for England that was in 1939 with the case of R. v. Bourne,¹¹ for the USA it was in 1973 with Roe v. Wade, medical technology was not as developed as it is now. By the time medical technology was able to tell us what was in a mother’s womb the societal consciences of the developed world had hardened making it now very difficult for developed countries to turn back on the road they had embarked on. Interestingly it is reported that later in his life Dr. Bourne of the case R. v. Bourne in opposition to the 1967 proposal to legalise abortion in England became the founding member of the Society for the Protection of Unborn Children. In regard to the Roe v. Wade decision we have attached a document in the appendix entitled “The Practice of Abortion since its Legalisation”. You will note in particular the section which is entitled “The Incorrect Assumptions of Roe v. Wade”. This document was taken from the South Dakota Task Force Report.

⁷ CDC HIV/AIDS Fact Sheet, June 2007

⁸ The Daily Observer, August 8, 2008.

⁹ Ibid. at note 7

¹⁰ U.S. Bureau of Justice Statistics Bulletin, December 2007, NCJ 219416

¹¹ [1939] 1 K.B. 687

Recommendations re: Adoption and Foster Care in Jamaica

- a. **More foster parents are needed.** The average person does not know how to become a foster parent. The Child Development Agency should make greater efforts to educate the public, to include frequent advertisements in the media.
- b. **The prejudices held by many Jamaicans must be addressed as they are a major obstacle preventing many children from being put into foster care.** We have discovered that many prospective foster parents specify physical characteristics, such as length of hair and complexion. Meanwhile several children miss out on having a family experience because they don't have the 'right' hair or skin-colour. These prejudices which seem to be deeply-rooted in the psyche of many Jamaicans need to be exposed and dealt with on a national level.
- c. **There needs to be a change in the current law regarding parental consent.** Many of the parents have given their children over to children's homes but have not signed away their parental rights. So there are children who have lived in homes for years and when prospective parents express interest in adopting them they are told they are not available for adoption. So the parent gets to keep custody while the child never has a home. This problem needs to be eliminated as it is unfair to the child. We have been informed that an amendment to our current laws allowing for a specific time-frame for parents to take the child back into custody after which the CDA may do away with parental consent is currently being worked on. This amendment needs to be completed and tabled in parliament. If this legislation were passed it could mean a major breakthrough for adoption in Jamaica.
- d. **Consideration needs to be given to the possibility of allowing private adoption agencies to participate in the adoption process and to actually place children with adoptive parents.** We are aware of the concern that the process could be abused but Jamaica is small enough for us to be able to make the necessary background character checks.
- e. **Enacting legislation which would enable women who do not want their babies to leave their babies at specified places only.** This would hopefully reduce the incidents of abandoned children. This we consider to be a lesser evil than that of aborting the unborn.

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- f. **Maternity leave for adoptive parents.**
For years we have tried to lobby for maternity leave for adoptive parents particularly mothers. Many women can testify to the hard times they had in the initial stages of the adoption as the opportunities to bond with the child were lost because of not being able to avail themselves of maternity leave. If we want to assist with solving this problem then we ought to seriously consider this proposal.
15. In your deliberations therefore you may want to appraise yourself on the following issues:
- a. When life begins.
 - b. What science currently knows about the unborn child.
 - c. The effects of abortions on women both in terms of health along with psychological effects -if any (for that you may want to hear the testimony of women who have had abortions).
 - d. What really happens in an abortion - we would recommend strongly that the Committee understands the abortion process - if you are going to recommend the legalisation of the process at least understand it.
16. We therefore hope that this Committee will open itself to all the available evidence. Maybe you will need to hear from experts from other countries.
17. During this debate we as Attorneys will use the language of a greatly esteemed English Judge Lord Denning in the case of 1981 English Court of Appeal case of **Royal College of Nursing of the United Kingdom v. Department of Health and Social Security**.¹² In that case the main issue was whether the nurses in the British health system in being involved in the abortion process were entitled to certain defences available under the 1967 Abortion Act. Lord Denning obstinately and deliberately referred to the foetus as “an unborn child.” This was what he had to say:
- Throughout the discussion I am going to speak of the unborn child. The old common law lawyers spoke of a child en vente sa mere. Doctors speak of it as a foetus. In simple English it is an unborn child inside a mother’s womb.¹³
18. Like Lord Denning we will many times throughout our presentation use the term the “unborn child.” Lord Denning also uttered other amazing words which are as follows:

¹² **Royal College of Nursing v DHSS** [1981] 1 All E.R. p. 545

¹³ Ibid.

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I can quite understand that many nurses dislike having anything to do with these abortions. It is a soul-destroying task. The nurses are young women who are dedicated by their profession and training to do all they can to preserve life. Yet here they are called upon to destroy it.¹⁴

19. The House of Lords reversed Denning's judgment on the issue in question but his words remain with us - abortion is a "soul-destroying task." It is both to oppose the practice of this "soul-destroying" task and the legalisation thereof that we are here today. We are concerned that changing the law to allow for abortions will change the ideal that having an abortion is wrong. We dare say that most women who have done abortions for whatever reason did so guiltily and rightly so - change the law and that guilt goes; only convenience will matter. Keeping a law that protects the life of the unborn would reflect our belief as a society that life is worth protecting. In this regard we refer to Bill Johnson's polls done January 12 & 13, 2008 which show that 77% of men and 69% of women are in favour of keeping abortions against the law. Granting an individual woman the choice will eventually erode this belief system. You then as a Committee would be responsible for the next adult generation of Jamaica growing up with the belief that to take the life of the unborn child is acceptable. That change in belief system and practice would be as a result of your decision taken on this matter.

Shirley Richards August 2008

¹⁴ Ibid.

PART 1

A CRITICAL EXAMINATION OF THE MINISTRY OF HEALTH'S TERMS OF REFERENCE, EVIDENCE ADDUCED TO SUPPORT CHANGES IN THE LAW AND CONSTITUTIONAL CONSIDERATIONS

Terms of Reference - The Abortion Review Advisory Group

1. The Report of the Advisory Committee on Abortion¹⁵ indicates that the Ministry of Health has been concerned with the issue of abortion for a number of reasons:
 - a. The safety of the women, and the possibility that an improperly conducted surgical procedure and inadequate after care can result in smaternal death.
 - b. The unregulated practice of medical and non-medical practitioners who may perform these procedures under poor conditions.
 - c. The current Law makes the practice of abortion, for the most part illegal resulting in most properly trained medical personnel and facilities being unable to provide the service thus leading women to resort to different measures to terminate an unwanted pregnancy.¹⁶
2. The Ministry therefore ostensibly in keeping with the Safe Motherhood programme and with a view of meeting the Millennium Development Goals for maternal mortality established an Advisory Group to examine this issue, with a mandate to make recommendations to the development of a comprehensive national policy of abortion.
3. In its terms of reference¹⁷ the Advisory group was advised that "Abortions and complications thereof are now the fifth leading cause of maternal deaths in Jamaica, affecting adolescents and women over 35 years who do not want any more children primarily. Among adolescents, adolescents it accounts for the leading cause of maternal deaths along with hypertension and haemorrhage. The overall incidence of abortions is (sic) a major contributor to maternal deaths has steadily increased over the past 8-10 years."¹⁸ These terms of reference were outlined in 2005.

¹⁵ Ministry Paper 6/08 Report of the Advisory Committee on Abortion

¹⁶ Ibid p. 1

¹⁷ Terms of Reference – Ministry of Health, Jamaica Abortion Policy Review Advisory Group 2005

¹⁸ Ibid p.1

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4. By letter dated February 19, 2007 the Advisory group wrote to the then Minister of Health Hon Horace Dalley indicating that “Our terms of Reference...provide a background to the issues involved:” as follows:
- “The high prevalence of abortion world-wide including Jamaica
 - The high toll in terms of maternal mortality and morbidity in countries where access to abortion is illegal”
 - (and makes the quantum leap to the conclusion) “the consequent need to develop systems and guidelines to ensure that abortion is safe and accessible for all, including the need for systems and centres to effectively manage abortion complications and provide pre and post abortion counseling, education and family planning services to prevent repeat abortions.¹⁹”

Critique

5. **It is submitted that this is a quantum leap to a solution because having enunciated a problem, the Advisory group is not given within its remit the scope to study and make recommendations as to other solutions (e.g. matters of public education, addressing values and attitude, protection from sexual predators, and values based education for children, etc.) It is told to develop a policy for safe abortions.**
6. The Advisory group first met on September 16, 2005 and in keeping with the terms of reference undertook the following activities:
- Review of the existing evidence of abortions and sequelae in Jamaica
 - Review of the existing legislation and policies on abortion in Jamaica as well as the wider Caribbean
 - Review of the existing legislation and policies on abortion worldwide e.g. South Africa.
 - Develop a draft policy on safe abortions for the Ministry of Health
 - Make recommendations for changes to the existing Offences against the Person Act in support of the draft policy.²⁰

Review of the existing evidence of abortions and sequelae in Jamaica

7. As regards the existing evidence of abortions and sequelae in Jamaica the group found the following:
8. Between March 1 and August 31, 2005, a six-month period, admissions to ward 5 of the Victoria Jubilee hospital, which deals with cases of abortions, which includes case of spontaneous abortions, commonly known as miscarriages, or

¹⁹ Ministry of Health, Jamaica Abortion Policy Review Advisory Group Final Report, February 19, 2007.

²⁰ Ministry Paper 6/08 Report of the Advisory Committee on Abortion

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induced abortions, that is, in which someone (a doctor, the woman herself, or a lay person), causes the abortion, numbered 641 patients.²¹ This figure of 641 patients on ward 5 has however, been unfortunately bandied about and misrepresented in various quarters as indicative of the number of cases of induced abortions at this hospital over this period. This is false.

9. Indeed, the evidence from this hospital is that of the 641 cases “seven per cent (45 persons) ...volunteered that they had attempted a termination of pregnancy.”²² There is no data however to indicate in what circumstances these were attempted, whether the persons who performed these were trained or untrained persons.
10. Data from the Cornwall regional hospital records indicate that between October 1 and December 31, 2005, 54 patients were admitted with a primary diagnosis of “incomplete abortions.” 11 % (or 6 persons) of the group was induced cases.
11. The data goes on the point out that there were three (3) maternal deaths recorded in the south east health region during 2005, one each occurring at the Spanish Town Hospital, the Kingston Public Hospital and the University Hospital.²³ We do not seem to have available current maternal mortality and morbidity rates.
12. **In summary, the data is sketchy and at best unclear as to the prevalence of unsafe abortions (back street abortions) and the rate at which complications attendant thereto occurs in Jamaica.**
13. Indeed in the terms of reference,²⁴ The Ministry of Health, speaking specifically to the Jamaican context opined as follows:

“Using WHO’s (World health Organization) estimate of 35 abortions per 1000 women aged 15-41 years, this indicates that Jamaica probably has some 22,000 abortions annually...”²⁵

This is deduced from WHO’s worldwide estimates.

14. **The data therefore does not support the conclusion that there is a high prevalence of maternal mortality due to unsafe abortions and we need to know what it is and if this rate is rising or falling in Jamaica in keeping with our Millennium Development goals.**

²¹ Ibid p. 4

²² Ibid p. 4

²³ Ibid p. 5

²⁴ Terms of Reference – Ministry of Health, Jamaica Abortion Policy Review Advisory Group 2005

²⁵ Ibid p.1

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15. The Millennium Development Goal is expressed in the Ministry of Health's Terms of reference as

"To reduce the maternal mortality...in Jamaica by three quarters by the year 2015..."²⁶

16. As regards morbidity rates it should be noted that even where abortions are performed by trained medical staff at appropriate facilities, there remain significant complication rates. Figures from Canada indicate complication rates of 10% in the immediate and short term. This figure rises well beyond 10% in the longer term and do not include the significant mental and emotional complications which frequently attend abortions.
17. As such the idea of safe and unsafe abortions needs to be thought through carefully and when one takes into account the physical, mental and emotional factors, abortions are always invariably a potentially dangerous thing for a woman. These complications will be addressed by those trained in the medical and other relevant fields of study.
18. In light of these factors, and in particular the lack of, or at best, paucity of evidence of unsafe abortions resulting in maternal deaths, it is extremely curious that the Abortion Policy Review Group in their Final Report could seriously contend that " As far as we can ascertain the complications of unsafe abortions constitute the eight leading cause of maternal deaths in Jamaica and the second in the adolescent age group."²⁷ Where is the evidence to support this finding?
19. Indeed, the allegation in the Terms of Reference given to the Advisory Group that "Abortions and complications thereof are now the fifth leading cause of maternal deaths in Jamaica, affecting adolescents and women over 35 years who do not want any more children primarily...(and) Among adolescents, ... it accounts for the leading cause of maternal deaths along with hypertension and haemorrhage (and) The overall incidence of abortions is (sic) a major contributor to maternal deaths has steadily increased over the past 8-10 years,"²⁸ is clearly unsupported by the evidence and is speculative at best and patently false at worst.

²⁶ Ibid p. 2

²⁷ Ministry of Health, Abortion Policy Review Advisory Group Final Report February 19, 2007 p 1

²⁸ Ibid p.1

Recommendations of the Abortion Policy Review Group

20. The recommendations of the Abortion Policy Review Group must therefore be viewed in light of these dubious premises. These are outlined in their Final Report,²⁹ which provides inter alia as follows:

“Repeal the relevant sections of the Offences Against the Persons Act, and substitute it with a Civil Law, title “Termination of Pregnancy Act”, stating the conditions under which medical termination of pregnancy will be lawful...

Pregnancies up to 12 weeks gestation ...can be performed in registered facilities by an authorized medical practitioner in consultation with the woman...

Pregnancies over 12 weeks gestation are to be performed by or under the supervision of an Obstetrician/Gynaecologist in the formal setting of a hospital... (appropriately quipped).

Termination of pregnancies over 22 weeks gestation is not recommended, except under exceptional circumstances agreed by the woman and two authorized medical practitioners and performed in an appropriate setting authorized by the Ministry...

Special provisions are recommended for minors, i.e. persons under age 18 years...

The right to conscientious objection is recognized...”

21. **This effectively provides for abortion on demand up to 22 weeks and over 22 weeks it is on demand subject to the agreement of two doctors.**
22. It is of significance to note that **the Nurses Council of Jamaica**, which was represented on the Advisory Committee, **did not sign the recommendations**, indicating its position which is abortion in cases of “life only, physical health, mental health and rape.”³⁰ **The churches representative also did not sign the recommendation.**

Procedural Irregularities

23. The Final Report indicated that “The Group has drafted a Act including Regulations (attachment 8) which the Hon. Minister may wish to give effect to the implementation services and schedules.”³¹

²⁹ Ministry of Health, Abortion Policy Review Advisory Group Final Report February 19, 2007 pp 6-7

³⁰ Nursing Council of Jamaica, Letter to The Chairman, Advisory Group on abortion February 20, 2007

³¹ Ministry of Health, Abortion Policy Review Advisory Group Final Report February 19, 2007 p 7

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24. Notwithstanding this, in February 2008, the Minister of Health at a G2K sponsored event held to discuss the topic of abortion, assured the audience that there was no draft legislation despite its mention in the Report.
25. However on July 10, 2008, at the second meeting of this Joint Select Committee, Dr. Joseph Hall having presented the Report of the Advisory Committee to Parliament disclosed that the Abortion Advisory Committee had already prepared draft legislation. This draft Bill has been in existence for quite some time and was submitted to the Joint Select Committee.
26. These facts speak eloquently for themselves and manifest a transparent attempt to deal with matters of great national importance without due process.
27. Indeed there has been general failure to comply with the Consultation Code of Practice for the Public Sector,³² in this matter.
28. These matters are highlighted to enable the Joint Select Committee to act appropriately, in accordance with due process as prescribed by the Consultation Code of Practice for the Public Sector and to provide opportunity for the Government to comply with their express representations made to the public as to how this matter will be addressed.

The Abortion Advisory Group recommendations - Termination of Pregnancy Act

29. The provisions of the proposed Act are, it is submitted, calculatedly and “strategically” cast in the broadest possible terms, way beyond the scope for abortions in any the territories in the Caribbean, even in Barbados and Guyana, which have the most “liberal” laws.
30. Thus, for example, it is noteworthy that whereas the Final Report, as already indicated above, effectively provided for abortion on demand up to 22 weeks and over 22 weeks it is on demand *subject to the agreement of two doctors*, the proposed Act goes even further.
31. Section 4 (1) c of the proposed Act provides for abortions in cases over 22 weeks where there are “ *some “special” indication determined by an authorized medical practitioner*”. No longer is there the need for the agreement of two doctors and in addition, the “Indications for termination of pregnancy” outlined in Section 4 (3) of the proposed Act include:

³² Consultation Code of Practice for the Public Sector January 2005

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(b)...an authorized medical practitioner shall take into account the interests of other children in the pregnant woman's family as well as her entire social and economic circumstances whether actual or foreseeable

(c) where there is substantial risk that if born the child would suffer such physical or mental abnormality as to be seriously handicapped...

(e) where there is clear evidence that the pregnancy resulted in spite of the use of recognized contraceptive method such as sterilization, the insertion of an intrauterine device or evidence of continuous contraceptive use

(f) where the pregnant woman is suffering from serious illness...

(g) such other indication as may become medically established.

32. Within the remit of an authorized medical practitioners arsenal to determine whether an unborn child over 22 weeks gestation should live is, his/her assessment of the socio-economic circumstances of the family, whether actual or foreseeable; the risk of handicap of the child; his/her assessment of whether there was failure of contraceptive methods, and broadly such indications as may be medically established.

33. **In light of this, the terms of the proposed Termination of Pregnancy Act are manifestly disingenuous and insidious.** This smacks of Nazi Germany in which the practice of eugenics was "mastered."

34. Alarming too, Section 5 (1) a of the proposed Act provides that

"the request and consent of a mentally competent minor shall be effective under this Act, notwithstanding the provisions of any other Act or regulations made hereunder."

35. In short, a minor may have an abortion without parental knowledge or consent.

36. To further illustrate, the depraved and decadent scope of the proposed legislation, it will be recalled that one of the recommendations outlined in the Final Report of the Group, was that:

"The right to conscientious objection is recognized..."

37. The Proposed Act provides at Section 6 as follows:

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1. *No person shall be under any legal duty to participate in any treatment of a patient directly related to the termination of a pregnancy to which he or she has a conscientious objection.*
38. However subsections 2 and 3 provide as follows:
2. *A medical practitioner who has a conscientious objection to the termination of pregnancy **has a duty** to inform a woman, guardian, next of kin or the Committee for person with a mental disability who requests the procedure, of an authorized medical practitioner and refusal or deliberate failure to give such information **shall constitute an offence under this Act.** (emphasis mine)*
 3. *In any legal proceedings the burden of proof of conscientious objection shall lie of the person claiming such objection.*
39. Section 14 of the proposed Act deals with Penalties. Subsection (5) thereof provides as follows:
1. *Where any midwife or medical practitioner or other health service provider who objects to termination of pregnancy on ground of conscience, refuses or deliberately fails to inform any woman seeking an abortion of a practitioner who provides the service, under sections 4 ad 15 he/she shall be liable on summary conviction, to a fine of up to two hundred and fifty thousand dollars and/or imprisonment for a period not exceeding three months.*
40. **These provisions propose a draconian about turn in our Laws. Indeed it is submitted that it would also create grave internal inconsistencies in our Laws.**

Charter of Rights-Promotion of Rights

41. A Joint Select Committee (JSC) to consider the Charter of Rights expressly dealt with the issue of the Promotion of Rights. The proposal before that Committee was that all persons should *promote* and observe the rights recognized in the Charter. (emphasis mine)
42. The JSC has however recommended to Parliament, that the requirement that all persons promote and observe the rights recognized in the Charter be omitted. Instead, that obligation has been placed on the State, **where it belongs**. This addresses a concern raised to the JSC that each individual ought to have the right not to promote rights with which one disagrees. The Charter therefore embraces an important philosophy for a plural society – *we should respect the rights of others, even where we may disagree with them, but we ought to be able to disagree.*

43. **The proposal in the Termination of Pregnancy Act shockingly violates the right not to promote rights with which one may disagree, on pain of penalties.**
44. **This proposal to bring the sanction of Law by way of fine and/or imprisonment in circumstances where one conscientiously objects to that which for many Jamaican on moral grounds is indefensible, and which is presently illegal, is revolting to the extreme.** Further it must be observed that our Constitution protects the right to life. This will be addressed more fully later.
45. One therefore questions how the Advisory Group was able to make such an abominable proposal having regard to the scope of their terms of reference. This teaches a salutary lesson as to our capacity for evil if we are not guided by principles of respect for life and in particular for humanity, truth, justice and morality.
46. In light of the suspect terms of reference given to the Advisory Group, the faulty premises informing the Advisory Group's recommendations and the dubious recommendations as illustrated above, it is submitted that we must reframe the relevant issues as regards the reduction of maternal mortality and morbidity.

The Broader Issues

47. We should ask ourselves and study why are there so many unwanted pregnancies in Jamaica? What are the solutions to this? And also, whether there are circumstances in which the procurement of an abortion should be permitted? This has legal, medical, ethical and moral considerations.

Legal Considerations

48. Of relevance here is the Constitution, legislation, the common law (cases determined by the courts) and International Law.

The Constitution

49. The Constitution has no express statement on abortion, but section 14 may be relevant and provides as follows:

No person shall intentionally be deprived of his life save in execution of the sentence of the Court in respect of a criminal offence of which he has been convicted.

50. The provision goes on to indicate other circumstances in which this right to life may be vitiated, such as in cases of self-defence, lawful arrest, riot-suppression, and the prevention of a criminal offence. These however are not pertinent to the issue at hand.

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51. The question, which arises from the Constitutional provision, is whether a “person” includes a foetus (the unborn child)? If it does, then the Constitution prohibits any law that would seek to allow abortions. This question (whether a person includes a foetus/unborn child) as far as the writers are aware has not been explicitly decided in the Jamaican Courts.
52. It is signal however to observe that the relevant portion of The Offences against the Persons Act (section 72) dealing with abortions, speaks of “*Every woman being with child*”. This explicitly recognizes and affirms that, that being within the woman is a child. The question then is, whether this child is entitled to the right to life?

Is a foetus (unborn child) entitled to the right to life?

53. As noted earlier this right is given to any person (Constitution).
54. Medical evidence however indubitably establishes that *the foetus is human life*, albeit in early developmental stages. Any attempt to discount this as such at whatever stage would therefore be arbitrary and unfounded at best.
55. In light of this and in any event, it is submitted that it may cogently be argued that the right to life includes a foetus/unborn child, in light of inter alia, the terms of “The Offences Against the Persons Act.”
56. This Act speaks to “Offences Against the Person.” Having regard to this title it is reasonable to conclude that the person contemplated by the legislators as being the subject of the offence is the foetus/unborn child.
57. Further, if constitutionally a company may be deemed to be a legal person, it would be specious to suggest that an unborn child, a living human being, is not such.
58. If, the foetus/unborn child is a “person” as contemplated within the Constitution, then it follows that any legislation impacting the right to life, which is not already enunciated in the Constitution, must be struck down.
59. Relevant case law and legislation worldwide indicate that, “The tide is changing, as many countries which have sought to legalize abortion have now embarked on a legal campaign to recognize the rights of the unborn child where the unborn child is killed with the requisite intentional act.” (See Part 2 p. hereof)
60. I find insightful and challenging the following statement of a friend of mine who said:

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“This skill of dehumanizing others who we have disinvested all affinity with...because they do not belong to our group identity, or because of some grievance, real or imagined, we have associated them with, is the skill of the murderer.

We don’t often associate ourselves with the killers in our society whom we blame for our crime problem, but our thought structures resemble theirs even if our outward mannerisms do not. In order to kill someone, I must first disconnect my thinking and emotional self from their common humanity and therefore their pain and their desire.” ³³

I agree!

61. **Indeed, it is our conviction that the legalizing of abortion as proposed, will only serve to reinforce in our collective psyche the legitimacy of killing for convenience in the context of a society which grossly and violently dishonours life.**
62. In light of these premises it is eminently prudent to endorse and affirm the right to life of persons, as enunciated in our Constitution, to include the life of the foetus. This is in the best interest of our common humanity.

Finally

63. There are clearly much broader issues than the provision of safe abortions, which should guide government policy. There is a prevalence of unwanted pregnancies. We must ask ourselves, what are root causes for this? These include, values and attitudes towards sexual behaviour (ultra promiscuous culture- pornography; cable content; breakdown in community and family life; prevalence of sexual predators grey back men who love very young girls). The answer to these root causes cannot be to wholesale permit abortions. This would be disingenuous. We have to get back to transforming cultural norms, values and attitudes; we need for example to unashamedly promote abstinence and purity and promote the restoration of communities and families. We need to arrest and punish sexual predators.
64. These are tough issues to tackle but we must face and tackle them if we are to see the kind of society, which is healthy and wholesome for us and our children and generations to come.

David C. Henry August 2008

³³ Yekengale

PART 2

1. The Current Law

- i) Section 72 of the Offences Against the Person Act (OAPA) criminalizes “unlawful” abortions.
- ii) No statutory provision on what is a “lawful” abortion.
- iii) Generally speaking, whenever statute or common law speaks to what is “unlawful” it is only “lawful” where there is a general defence such as necessity or self-defence. (e.g. Unlawful killing is illegal but killing may be lawful if done due to necessity or self-defence. The same may be said of “unlawful abortion”).
- iv) *Dudley v Stephenson* (1884) 14 QBD 273 makes it clear that you cannot use “necessity” as a defence where the defendants “put to death a weak and unoffending boy upon the chance of preserving their own lives by feeding upon his flesh and blood after he was killed and with the certainty of depriving him of any possible chance of survival.....was it more necessary to kill him than one of the grown men? The answer must be ‘No.’”
- v) *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] 4 All ER 961 established that “According to Sir James Stephen, there are three necessary requirements for the application of the doctrine of necessity: (i) the act is needed to avoid inevitable and irreparable evil; (ii) no more should be done than is reasonably necessary for the purpose to be achieved; (iii) the evil inflicted must not be disproportionate to the evil avoided.”
- vi) The heading of Section 72 states “Attempts to Procure Abortion” and the side-note states “Administering drugs or using instruments to procure abortion”. The heading and side/marginal notes should be taken into account in determining what is outlawed. The law on the use of headings and side notes as aids for statutory interpretation is found in the House of Lords decision of *R v Montila and others* where it was stated that headings and side notes are part of the contextual scene and may be considered in construing a provision in an Act of Parliament and “provide the context for an examination of those parts of the Bill that are open for debate.”

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- vii) There is no reported Jamaican case that states when abortion is “lawful” and the English case of *R v Bourne* [1938] 3 All ER 615 is of limited use in that the case was decided based on the U.K. Infant Life Preservation Act (1929) in order to decide that the exceptions were:
- a) To save the life of the mother;
 - b) To save the physical health of the mother;
 - c) To save the mental health of the mother (and in that case this was based on rape).

In *Re A (Children) (Conjoined Twins: Surgical Separation)* the House of Lords stated that “...Macnaghten J. in the case of *R v Bourne* derived a ‘necessity’ defence out of the word ‘unlawfully’ in Section 58 of the Offences Against the Person Act 1861 (‘Any person who unlawfully uses an instrument with intent to procure a miscarriage shall be guilty of felony’). Macnaghten J. said at p. 691 that he thought that the word ‘unlawfully’ imported the meaning expressed by the proviso in s 1(1) of the Infant Life Preservation Act 1929 (‘Provided that no person shall be 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’).

In any event *Bourne* is only a first instance decision of the English Court. Since then, the decision in *Bourne* has been heavily criticized in the House of Lords by Lord Diplock who felt that the judgment leaves “plenty of loose ends and ample scope for clarification” (*Royal College of Nursing of the United Kingdom v Department of Health and Social Security*(1981) 1 All ER 545. In fact, Dr. Bourne, although acquitted by the jury, felt that “necessity” was the only circumstance under which abortions should be lawful. **Dr. Bourne was so alarmed at the effect of his case on the development of English law that he resigned from the Abortion Law Reform Association and became a founding member of the Society for the Protection of Unborn Children. “He was strongly opposed to the U.K. 1967 Abortion Act and predicted that it would lead to ‘the greatest holocaust in history’.”** (cmf.org.uk-Abortion Law Reform (Nucleus, October 2004).

- viii) Australian cases suggest that the principle of “necessity” should be the basis of what is “lawful” abortion. (*R v Davidson* [1969] VR 667). Justice Menhennitt in *R v Davidson* stated that “necessity” as a defence for a crime is available where:
- a) It was done to avoid otherwise inevitable consequences;
 - b) The consequences would have inflicted irreparable evil;
 - c) That no more was done than was reasonably necessary; and

d) That the evil inflicted by the act was not disproportionate to the evil avoided. This principle contains two elements, one of necessity and one of proportion, which require that a pregnancy pose a certain danger to a woman's health before its termination will be lawful. (Cica N. "The Inadequacies of Australian Abortion Law" Australian Journal of Family Law Vol. 5 No.1 march 1 1991 p39)

ix) **Australian cases suggest that *Bourne* should not equate to *carte blanche* and that the State should rightly use its authority to see that abortion on whim or caprice does not insidiously filter into our society." (R v Bayliss and Cullen [1986] 9 Qld Lawyer Reps 8).**

"...It would be wrong indeed to conclude that Bourne equates to carte blanche. It does not. On the contrary, it is only in exceptional cases that the doctrine can lawfully apply. This must be clearly understood. The law in this State has not abdicated its responsibility as guardian of the silent innocence of the unborn. It should rightly use its authority to see that abortion on whim or caprice does not insidiously filter into our society. There is no legal justification for abortion on demand."

Judge McGuire, R v Bayliss and Cullen.

With the greatest of respect, Section 4 of the proposed "Termination of Pregnancy Act" which outlines the indications for termination of pregnancy clearly shows that "abortion on whim or caprice" may "insidiously filter into our society." There are stated here, every possible situation (many of which have been categorically rejected in many jurisdictions) for the termination of pregnancy. Everything but the proverbial "kitchen sink" in the hope that many of these stick. To add insult to injury, the catch-all phrase of "such other indications as may become medically established" confirms the dangers of section 4 as suggested above.

x) Arguments in favour of abortion, deceptively framed as "pro-choice", are based on the fact that a woman has a right over her own body. Neither medically nor legally is the foetus a part of the woman's body. The foetus exists in the woman's body and is nourished by the woman.

"There was, of course, an intimate bond between the foetus and the mother, created by the total dependence of the foetus on the protective physical environment furnished by the mother, and on the supply by the mother through the physical linkage between them of the

nutriments, oxygen and other substances essential to foetal life and development. The emotional bond between the mother and her unborn child was also of a very special kind. But the relationship was one of bond, not of identity. The mother and the foetus were two distinct organisms living symbiotically, not a single organism with two aspects. The mother's leg was part of the mother; the foetus was not." Per Lord Mustill in *Attorney General's Reference (No. 3 of 1994)* [1997] 3 All ER 936

2. International Legal Developments to Preserve the Life of the Unborn

It has long been held on the basis "...of the well-established rule that English Law (like Canadian law, but here differing markedly from the teaching of the Roman Catholic church) does not regard even a viable full-term fetus as a human being until fully delivered." Per Robert Walker L.J, *Re A (Children) (Conjoined Twins: Surgical Separation)*. This has clearly informed the need for a separate crime of "Abortion" due to the fact that a foetus could not be the victim of homicide. The law therefore recognizes, that although the foetus is not a "person in being" for purposes of homicide, it is still a "person" under the Offences Against the Person Act worth protecting.

The tide is now changing, as many countries which have sought to legalize abortion, have now embarked on a legal campaign to recognize the rights of the unborn child where the unborn child is killed with the requisite intentional act. The "foetus" is now therefore recognized as a "person in being" for the purpose of homicide in many of these countries.

The following are examples of the recognition of the unborn child as a person in being:

- i) The U.K. Infant Life (Preservation) Act makes it a criminal offence for any person to destroy the life of a "child capable of being born alive" with the necessary intent and willful act "before it has an existence independent of its mother".
- ii) The various laws in 35 states of the United States of America which recognize the unlawful killing of an unborn child as homicide in at least some circumstances and The Unborn Victims of Violence Act 2004 (a federal law which covers unborn victims of federal and military crimes.) For a list of these states see: www.nrlc.org/Unborn_victims/Statehomicidelaws092302.html.

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The People of the State of California v Scott Peterson 2003 no.1056770 and *People v Davis* 7 Cal 4th 797 (1994) and more recently *Flores v Texas* (Under the Texas Pre-Natal Protection Act 2003, are examples where there were convictions of murder for the murder of an unborn child, which did not depend on the “viability” of the foetus.

- iii) The Unborn Victims of Crime Bill C-484 in Canada which was passed in the Upper House and is being debated in the Lower House. Most Parliamentarians support the Bill which should be passed into law in the fall of 2008.
- iv) Legislation in some states in Australia which criminalizes child destruction similar to that of the U.K. Infant Life (Preservation) Act.

It is recommended that:

1. Abortion is retained as a criminal offence and that the exception is clearly stated as preservation of the life of the mother, i.e. necessity within the legal definition of “necessity”.
2. Further legislation to protect the life of the unborn is introduced following legislation in the U.K.; USA and Canada.

Suzanne Ffolkes Goldson July 2008.

PART 3

INTERNATIONAL LAW AND ABORTION

Our International Obligations

1. Much has been made of our need to comply with international obligations relating to “reproductive rights”, by legalising abortion in this jurisdiction. However, is this really the case? What does our international law obligations require us to do?
2. To begin with, let us be reminded that as a dualist state no international law creates any legal rights or obligations within the island of Jamaica until it is given expression in Jamaican law through an Act of Parliament, the representatives of the people. International treaties that we sign and ratify are binding on us only in the sense that they create an international obligation and consequently Jamaica could face sanctions on the international plane. However, for international treaties to become law in Jamaica, Parliament must first give effect to them through Parliamentary procedures, unless our existing law is already compatible. Where no changes to domestic law are made either our law was already compatible or, regardless of our ratification, the incompatible domestic law will trump whatever international law we may have agreed to.
3. It is submitted that our international law obligations do not impose any international duty on us to legalise abortion.

JAMAICA’S INTERNATONAL LAW OBLIGATIONS

International Treaties

4. It must be noted that there are no international treaties that Jamaica has ratified, which imposes an obligation to permit liberal abortion. On the other hand, by virtue of the importance placed on the right to life in the various international treaties, the question arises as to whether it is necessarily implied by these treaties that abortion must be restricted in order to safeguard this right.

The Right to Life

5. Jamaica has ratified the following four international treaties that impose an obligation to protect the right to life: -

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(1) International Covenant on Civil and Political Rights (ICCPR) [ratified on October 3, 1975]

Article 6: "1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

(2) American Convention on Human Rights (IACHR) [ratified on July 19, 1978]

Article. 4.1: "Every person has the right to have his life respected. This right shall be protected by law and, in general from the moment of conception. No one shall be arbitrarily deprived of his life."

(3) Convention on the Rights of the Child (CRC) [ratified on May 14, 1991]

- Preamble: "Bearing in mind that...the child, by reason of his physical and mental immaturity, needs special safeguards, and care including appropriate legal protection, before as well as after birth."
- article 1: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."
- article 6.1: "States Parties recognize that every child has the inherent right to life"
- article 6.2: "State Parties shall ensure to the maximum extent possible, the survival and development of the child."

(4) Convention on the Rights of Persons with Disabilities (CRPD) [ratified on March 30, 2007].

Article 10: "States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with other."

6. Only the IACHR and to some extent (in its preamble) the CRC, sets out at what point the right to life begins for the purposes of protection under international law.

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7. Both the IACHR and the CRC, recognize that the right to life is to be protected from the moment of conception. This is consistent with the medical evidence as to when life begins.
8. It is interesting to note that the negotiating history for the ICCPR indicates that several States proposed a draft of the right to life provision that would include the words "from the moment of conception" but this was opposed by other states, the final vote being 31 states against, 20 in favour and 17 abstentions³⁴.
9. The IACHR is in fact a later document in time than the ICCPR and is regional whereas the ICCPR is international. The significance of these two facts is that the IACHR, which protects life in general from the moment of conception, better reflects our region's attitude towards the sanctity of life and, because of the timing, it is submitted, it qualifies the more general right set out in the ICCPR. Indeed, this is the international law that requires Jamaica to protect life from conception.
10. The use of the word, "*in general*" in the IACHR has raised the argument that there may be exceptions to the protection of the right to life from the moment of conception. However, it is submitted that the use of the word, "*in general*" also raises the compelling argument that there must be restrictions on abortion as to permit abortion in every case would be to deny protection of the right to life, in general, from the moment of conception.
11. Professor Stephene Vascianne states in his article Abortion in Jamaica and International Law³⁵

"On its face, the effect of Article 4(1) is that from the moment of conception, the foetus is entitled to have its life respected, this right shall be protected by law, and no one may be arbitrarily deprive the foetus of life."
12. Support for this interpretation is found in the case commonly referred to as the Baby Boy Case³⁶ where the Inter-American Court of Human Rights found that the use of the words "in general" permitted States to enact domestic law allowing abortion only in exceptional circumstances.

Implementing Legislation?

³⁴ United Nations General Assembly, Report of the Third Committee, Draft International Covennats on Human Rights, UN Doc. A/3762 and Add. 1 (1957), paragraph 119 (c).

³⁵
³⁶ Human Rights Law Journal, Vol. 2, No. 1-2 (1981), p.110.

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13. The fact that no Parliamentary action has been taken indicates that the current provisions in the law were felt to be congruent with Jamaica's obligation as a State to incorporate the provisions of the ICCPR and the IACHR into Jamaican law. It could therefore well be argued that we currently have protection of life in general from the moment of conception and, we submit, this ought not to change even in spite of a customary international law on the issue, of which there is none (see discussion below at paragraph 16).

14. Indeed, the Offences Against the Person Act, as argued earlier in these submissions, limits abortions to cases where the mother's actual life is at risk. And as previously stated, this is consistent with the interpretations that have been given to the IACHR by the Inter-American Court of Human Rights when they placed emphasis on the "in general" qualification as permitting States to have or enact domestic laws that allow abortions only in exceptional circumstances.

How should one determine the extent of any exception?

15. It is submitted that the answer is to be found in the nature of the right to life itself. The right to life is regarded as the most fundamental of human rights. It is basic or fundamental because "the enjoyment of the right to life is a necessary condition of the enjoyment of all other human rights." It has been said to be the "supreme right of the human being." All other rights must be subject to and exercised in a way consistent with the supremacy of the right to life. Therefore, one should only permit qualifications to its protection in exceptional circumstances.

16. It is submitted, for these purposes, that these exceptional circumstances would only arise when life itself is threatened. Abortion should only be permitted where the life of the pregnant woman is at risk and in such case the aim should be, to the extent possible, to save both lives.

Customary International Law

17. There can be no customary international law unless all states adopt a specific practice because they believe it is required by law. There must therefore be uniform and consistent state practice as well as the general belief that this practice is required by law. Regarding abortion the first hurdle has not even been cleared yet. As of May 2007 a majority of countries (69) either prohibit abortions altogether (35) or allow them only to save the life of the mother (34). Significantly less (56) allow abortion on demand. Thirty-four (34) countries allow abortions to preserve the woman's physical health, twenty-three (23)

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include preservation of the woman's mental health and fourteen (14) incorporate economic grounds³⁷. This falls drastically short of uniform state practice and confirms that the abortion issue is fraught with division based on cultural values.

What of the (1) "reproductive rights" of women (2) the right to liberty and security of the person and (3) right to privacy?

18. It has been argued by many bodies on the international plane that the above rights, in particular reproductive rights give women, the right to an abortion and therefore impose an international obligation on States which have ratified treaties containing these rights to have liberal abortion laws. But is this really the case?

Reproductive Rights

19. The term "reproductive rights" emerged from the 1994 International Conference on Population and Development (ICPD) in Cairo and was adopted at the 1995 Fourth World Conference on Women held in Beijing (Beijing Platform).

20. The ICPD's Programme for action states at paragraph 7.2 and 7.3 -

"7.2. Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the rights of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant. In line with the above definition of reproductive health, reproductive health care is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems. It also includes sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counselling and care related to reproduction and sexually transmitted diseases.

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7.3. Bearing in mind the above definition, reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents. In the exercise of this right, they should take into account the needs of their living and future children and their responsibilities towards the community. The promotion of the responsible exercise of these rights for all people should be the fundamental basis for government- and community-supported policies and programmes in the area of reproductive health, including family planning. As part of their commitment, full attention should be given to the promotion of mutually respectful and equitable gender relations and particularly to meeting the educational and service needs of adolescents to enable them to deal in a positive and responsible way with their sexuality. Reproductive health eludes many of the world's people because of such factors as: inadequate levels of knowledge about human sexuality and inappropriate or poor-quality reproductive health information and services; the prevalence of high-risk sexual behaviour; discriminatory social practices; negative attitudes towards women and girls; and the limited power many women and girls have over their sexual and reproductive lives.

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Adolescents are particularly vulnerable because of their lack of information and access to relevant services in most countries. Older women and men have distinct reproductive and sexual health issues which are often inadequately addressed.”

21. This was adopted by the Beijing platform at paragraphs 94 and 95 and paragraph 96 states

“96. 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.

Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences.”

22. Neither of these documents is legally binding on Jamaica, in the sense of being international treaties, but are persuasive recommendations adopted by the General Assembly of the United Nations.

23. On October 19, 1984 some ten years previously, Jamaica ratified *The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, which though not using the term reproductive rights encapsulates much of what the ICPD and Beijing Platform regard as reproductive rights. The relevant articles are article 12 and 16(1)(f) which state –

Article 12

1. States 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.

2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 16

1. *States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*

(a).....

(e) *The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;*

24. These two articles have been argued to be the basis upon which a women's right to an abortion exists in international law. However, it is submitted that this is not the case and that the rights conferred in these articles must be interpreted in light of the most fundamental right conferred on all human beings, which is the right to life and in particular in light of Jamaica's obligations under the IACHR, to protect life from the moment of conception

25. It is noted that the *United Nations Committee on the Elimination of Discrimination against Women (The Committee)*, which has the mandate to monitor the implementation of national measures taken by States to fulfil their obligations under the treaty, has in recent times (between 1995 to 2006) applied pressured on several countries to implement liberal abortion laws³⁸. The Committee has been interpreting CEDAW as giving a woman a right to an abortion as part of women's reproductive rights.

26. However, the explicit language of the treaty does not support such an interpretation of the treaty and to argue that these rights impose an obligation on Jamaica to have liberal abortion laws is to say that these rights supersede the most fundamental and inherent right of a human being – the right to life. It would seem that the Committee's interpretation is a recent interpretation and the treaty is being interpreted in this manner so as to impose the views of the majority of the members of the Committee, who seem to be in support of abortion, on countries that do not share this view.

27. It is submitted that when Jamaica ratified this treaty it did not become obligated in any way to implement liberal abortion laws but rather to provide for the protection of women during and after pregnancy by ensuring the existence of an adequate health care system to protect both mother and child.

³⁸ <http://www.un.org/womenwatch/daw/cedaw/reports.htm>

28. Support for this point of view is to be found in the ICPD's Programme of Action recommended some ten years after CEDAW the contents of which has been reaffirmed in the Beijing Platform.
29. It is interesting to note that the very document which is often relied upon to establish a woman's right to an abortion states at paragraph 8.25 -

"8.25. In no case should abortion be promoted as a method of family planning. All Governments and relevant intergovernmental and non-governmental organizations are urged to strengthen their commitment to women's health, to deal with the health impact of unsafe abortion as a major public health concern and to reduce the recourse to abortion through expanded and improved family planning services. Prevention of unwanted pregnancies must always be given the highest priority and all attempts should be made to eliminate the need for abortion. Women who have unwanted pregnancies should have ready access to reliable information and compassionate counselling. Any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process. In circumstances in which abortion is not against the law, such abortion should be safe. In all cases women should have access to quality services for the management of complications arising from abortion. Post-abortion counselling, education and family planning services should be offered promptly which will also help to avoid repeat abortions."

(emphasis added)

30. Therefore, it is submitted that Jamaica's international law obligations under CEDAW does not in any way impose on her an obligation to have liberal abortion laws. It instead imposes an obligation on Jamaica to provide a health system that includes widespread family planning services and which is poised to deal with the challenges often faced in pregnancies to ensure the highest standard of care.

Right to liberty and security of the person and The right to privacy

31. Jamaica has ratified the following treaties, which speak to the above rights -

International Covenant on Civil and Political Rights

Article 9

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1. *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*

Article 17

1. *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
2. *Everyone has the right to the protection of the law against such interference or attacks.*

Inter-American Convention on Human Rights

Article 7. Right to Personal Liberty

1. *Every person has the right to personal liberty and security.*

Article 11. Right to Privacy

1. *Everyone has the right to have his honour respected and his dignity recognized.*
2. *No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honour or reputation.*
3. *Everyone has the right to the protection of the law against such interference or attacks.*

32. It is generally accepted that the above rights (rights to privacy, liberty and security of the person) must be exercised in such a way that they do not infringe on the right to life.

33. By ratifying the IACHR, Jamaica (unlike the United States of America) has accepted that the unborn child is a person having the right to life, "*in general from the moment of conception*".

34. One therefore cannot argue that Jamaica's international legal obligation to protect the rights to privacy, liberty and security of the person gives a woman a right to have an abortion as the very nature of a right to an abortion (without any

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qualifications) is that it infringes on the right to life of the unborn “*in general from the moment of conception*” which is of paramount importance.

The Draft Bill

35. It is submitted that the provisions of the draft Bill relating to the circumstances when an abortion will be lawfully permissible (section 4) are in clear, and quite frankly, appalling breach of our international law obligation to protect the right to life, “*in general from the moment of conception.*”
36. The provisions of section 4 of the bill completely disregard the right to life of the unborn child who is of 22 weeks gestation or less. Further, the special indicators required for termination of pregnancies over 22 weeks gestation are not much of a barrier to the termination of such pregnancies. Though not completely disregarding the right to life of the unborn child over 22 weeks gestation the provisions nonetheless amount to a serious erosion of such right.
37. Section 4(3)(c) which permits abortion where –

“there is substantial risk that if born the child would suffer such physical or mental abnormality as to be seriously handicapped”

ignores the right to life of persons who are disabled.
38. Jamaica recently ratified the *Convention on the Rights of Persons with Disabilities (CRPD)* [ratified on March 30, 2007].
39. Persons with Disabilities are defined in the CRPD to include “*those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.*”
40. Article 5 of the CRPD requires state parties to the Convention to prohibit all forms of discrimination on the basis of disability. Article 5(1) and (2) state –

***Article 5
Equality and non-discrimination***

1. *States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.*

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2. *States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.*

41. It is submitted that the provisions of section 4(3)(c) would fall squarely within the definition of "Discrimination on the basis of disability". "Discrimination on the basis of disability" is defined in the CRPD as –

"any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;"

42. To permit abortion on the sole basis of disability is to deny the unborn disabled the right to life, without exception, from the moment of conception. This is discrimination on the basis of disability and therefore breaches the international obligation Jamaica only recently undertook to be bound by.

Conclusion

43. The inflammatory language of "rights" has been used to try to capitalise on the human rights movement that grew out of the atrocities of World War II in an effort to force the international community to accept various value-laden positions as "rights", which unlike the inalienable right to life, reflect cultural norms and values. It is submitted that Jamaica should stand firm. Where there are inalienable rights such as the right to life or the right not to be tortured there tends to be customary international law, dependent on universal acceptance indicated by state practice. There is not the case with abortion, precisely because it depends largely upon a society's own sacred values.

44. It is submitted that the IACHR is the international document which ought now to be given full effect in Jamaica's laws as it conforms to the values of the majority of the Jamaican people. Let us not be pawns in the international chess game of human "rights" where other cultures' majority values are being pushed on the rest of us as a result of our comparative weakness in the international arena. Instead, let us be true to ourselves and our society's values, even as the Honourable Prime Minister has set the tone by standing up to international pressure on other values our society holds dear.

PART 4

A JURISPRUDENTIAL AND PHILOSOPHICAL ASSESSMENT OF THE FACTS

Introduction

1. “What are states without justice but robber-bands enlarged?”³⁹ Indeed, in our country where the perennial refrain, “We Want Justice” is echoed throughout every stratum of society in response to murder, corruption and perceived prejudice, it is Parliament’s duty to ensure that our laws provide justice in the deepest sense of being fair, impartial and for the good of the body politic.
2. H. L. A. Hart, while concluding that law and morality are united by the principle of justice, distinguishes justice from morality and affirms it as a valid basis for critiquing the law in his famous book The Concept of Law.⁴⁰

A man guilty of gross cruelty to his child would often be judged to have done something morally wrong, bad or even wicked or to have disregarded his moral obligation or duty to his child. But it would be strange to criticize his conduct as unjust... ‘Unjust’ would become appropriate if the man had arbitrarily selected one of his children for severer punishment than those given to others guilty of the same fault, or if he had punished the child for some offence without taking steps to see that he really was the wrongdoer (157-158).

3. We will show below how this logic can and must be applied to unborn children. They are innocent human beings worthy of protection under the law and undeserving of severer punishment or lesser protection than others guilty of the same fault of being human.
4. Hart goes on to say that:

In most civilised countries there is a great measure of agreement that both the criminal law...and the civil law...would be unjust if in the distribution of these burdens and benefits they discriminated between persons, by reference to such characteristics as colour or religious belief. And if, instead of these well-known foci of human prejudice, the law discriminated by reference to such obvious irrelevancies as height, weight or beauty it would be both unjust and ludicrous (161-162).

³⁹ St. Augustine, Confessions, IV

⁴⁰ Oxford University Press, Second Edition, 1994.

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5. Hart thus confirms the importance of equality under the law for all human beings and decries arbitrary discrimination by reference to irrelevancies. **It is submitted that size, level of development, environment and degree of dependency are all obvious irrelevancies making legalisation of abortion not only unjust but, in the words of H. L. A. Hart, ludicrous.**
6. Hart concludes by stating that, “justice constitutes one segment of morality primarily concerned not with individual conduct but with the ways in which classes of individuals are treated. It is this which gives justice its special relevance in the criticism of law and of other public or social institutions” (167).
7. While our criticism today of the proposed law is concerned with individual conduct and the goodness or badness of it (*morality*), our primary critique of the proposal to legalise abortion is based on the *injustice* of the law and to this extent is therefore *not* an attempt to legislate morality.
8. The gravity of the decision this Committee faces requires full and frank disclosure of the facts and a reasonable assessment of the logic to ensure that our laws are just, in the sense of exhibiting equality in the ways in which classes of individuals are treated.
9. To justify these assertions we will look at the definition of a human being, the ultimate question in the abortion debate of when human life begins, and the concepts of personhood and choice in the context of the government’s role. Finally, we will review certain fallacious arguments put forward to justify abortion.

What is a Human Being?

10. This question, despite often being answered in purely functional terms, is a matter of plain, objective science. Indeed, a functionalist definition cannot be relied on. What functions would be regarded as truly human and who would decide that question? Would movement define humanity? If so, what are we to do with the completely paralysed? Is intelligence to define mankind? If so, what degree of it? Therefore, the common argument that reason separates man from beast is fundamentally flawed as it denies true humanity to those who, through some organic defect, are incapable of carrying out certain rational activities.
11. History has (or should have) taught us that our definition of humanity is of the utmost importance. To determine the worth of a life by its functionality or utility to us, as determined by us at this point in history, would be to fall into the same trap that whites fell into during slavery, that the Nazis fell into during the Third Reich and that the Hutus fell into during the Rwandan genocide. Objective,

scientific, rational decisions need to be heralded at this time rather than subjective determinations based on our current limited and finite view of the world. Indeed, this is a slippery slope which we cannot afford to follow to its inescapable conclusion – a society in which the powerful (or the older), for their own self-interest (or “choice”), determine which human beings will live and which will die.

12. Man is not man because of what he does or accomplishes. In fact, the modern science of genetics makes it very clear that **a human being exists when there are forty-six (46) chromosomes.** Like *infant* and *adult*, *toddler* and *adolescent*, the terms *embryo* and *foetus* do not refer to nonhumans but to humans at particular stages of development. Foetus is a latin word variously translated “offspring”, “young one” or “little child”. It is scientifically and objectively inaccurate to say that a human embryo or foetus is not a human being simply because he’s at an earlier stage of development than an infant. This is like saying that a toddler isn’t a human being because he’s not yet an adolescent. Certainly nobody would argue that adults are more human than children. **Something nonhuman does not become human by getting older and bigger or changing environment or becoming less and less dependent; whatever is human is human from the very beginning.**
13. University of Chicago biologist Dr. Leon Kass says, concerning the direction of modern science and medicine, “We are already witnessing the erosion of our idea of man as something splendid or divine, as a creature with freedom and dignity. And clearly, if we come to see ourselves as meat, then meat we shall become.”⁴¹
14. This is the world being shaped by the rhetoric of the abortion rights movement – because rhetoric it is. It is filled with anecdotal evidence, appealing to our superficial compassion without giving us a chance to see the extreme incompassion of its message. It lacks substantiation in scientific fact and evidence which is undeniable – **the unborn child is a living human being and discriminating against it for its size, location, level of development or dependency or choosing against it because of inconvenience, financial hardship, or disability, would lead to moral inconsistencies in our laws which would in turn undermine the foundation of those laws, which are rooted (or should be) in the justice of the equal distribution of universal human rights.**

⁴¹ Quoted by George Will, *The Pursuit of Happiness and Other Sobering Thoughts* (New York: Harper Colophon, 1978), 62-63.

When Does Human Life Begin?

15. Ultimately, the question that must be answered in a debate about the legitimacy and legality of abortion is: **When does human life begin?** The onus to prove that the unborn is not a human life should really be on those advocating a change in the law relating to the protection of the unborn. However, because many still, sadly, subscribe to the deeply engrained and out-of-date belief that the beginning of human life is incapable of being ascertained by science and determinative only by subjective religious and philosophical argument, we will show that this has in fact been contradicted by decades of scientific evidence.
16. With the significant advancement of medical technology we now know that brain waves are detected in the unborn as early as at 40 days. This is before most women even realise that they are pregnant and long before the majority of abortions take place. One scientifically accepted definition of death is the absence of a heartbeat and brainwaves. The presence of a heartbeat (at 21 days) and brain waves (at 40 days) must then, logically, be life.
17. But even without this information it is very obvious that there is absolutely nothing about birth that makes a baby essentially different than he was before birth. There's no magic that changes a child's nature when she moves twenty inches, from inside her mother to outside. There is, however, a fundamental difference between a sperm and an egg prior to fertilisation and fertilised eggs or zygotes. The difference is genetic. Sperm and unfertilised eggs in themselves are not complete. Like cells of one's hair or heart, neither egg nor sperm has the capacity to become other than what it is. If left alone they will die in a few days, never developing into anything other than what they are. It is only the combination of the 23 chromosomes from the woman in the egg with the 23 chromosomes from the man in the sperm that, through fertilisation, forms a new, dynamic, biologically distinct and genetically unique human being. Indeed, the fertilised egg is a newly conceived human being. It is a person, with a life of its own, and its genetic blueprint in all its complexity is present. This one fertilised cell contains all the information necessary for a lifetime of human growth, including the child's sex, hair, skin and eye colour and even the child's eventual height. Take that single cell of the zygote, put it next to a chimpanzee cell and "a geneticist could easily identify the human. Its humanity is already that strikingly apparent."⁴²
18. Indeed, members of the medical community all over the world have recognised the beginning of life:

⁴² *Preview of a Birth* (Norcross, GA: Human Development Resource Center, 1991), 4.

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- a. Dr. Alfred M. Bongioanni, professor of obstetrics at the University of Pennsylvania, stated, "I have learned from my earliest medical education that human life begins at the time of conception...human life is present throughout this entire sequence from conception to adulthood...any interruption at any point throughout this time constitutes a termination of human life."⁴³
 - b. Dr. Jerome LeJeune, then genetics professor at the University of Descartes in Paris stated, "After fertilization has taken place a new human being has come into being." He said, this "is no longer a matter of taste or opinion. Each individual has a very neat beginning, at conception."⁴⁴
 - c. In 1991 when the Nobel-Prize winners for Physiology or Medicine made certain breakthroughs the Nobel Assembly asserted that "life itself begins...as the sperm merges with the egg cell at the instant of fertilisation."⁴⁵
19. Finally, if you aren't already convinced, what's left behind after an abortion clinches the argument. It is not an undefined mass of cells but instead there are small but perfectly formed body parts – arms and legs, hands and feet, torso and head. The physical remains indicate the end not of a potential life but of an actual life. **To interrupt a pregnancy at any stage is like cutting the link of a chain; the chain is broken no matter where the link is cut. Indeed, every abortion ends a human life.**
20. If you're going to decide whether abortions are legitimate and legal then we urge you, in the spirit of full and frank disclosure, to have a look at what you would be allowing by viewing a video of an abortion during your deliberations. It is impossible, having seen an abortion and the remains of the unborn baby afterwards, to not recognise that abortion is killing a human life. While there may be exceptional circumstances when killing a human life is justified, as there currently are in our law, **the recognition that the unborn is a human life worthy of protection must restrain us from sanctioning the Report's recommendation for what is essentially abortion on demand.**
21. That life begins at the very beginning is clear when one considers the joy a woman who wants her baby experiences when she sees the ultrasound, when she hears the heartbeat, when she feels the movement. This is why surgeries are now performed on babies in the womb to save their lives – because their mothers

⁴³ Subcommittee on Separation of Powers to Senate Judiciary Committee S-158, Report, 97th Cong., 1st Session, 1981.

⁴⁴ Ibid.

⁴⁵ http://nobelprize.org/cgi-bin/print?from=%2Fnobel_prizes%2Fmedicine%2Flaureates%2F1991%2Fpress.html

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(and their doctors) are well-aware of what they truly are. Are we really willing to live with the immoral and unjust inconsistency of doing foetal surgery on a baby in the womb to save life and, at a similar stage of development, killing an unborn baby down the hall? In prenatal surgeries, the unborn, still connected to her mother by the umbilical cord, is removed, given anaesthesia, operated on, and reinserted into her mother. The child is called a patient, is operated on, and has her own medical records, indicating blood type and vital signs.

22. What differentiates the two babies, down the hall from one another, one being killed, the other being saved? The mother's "choice"; the mother's decision that she "wants" her baby? Are you willing to live with the moral implications of making a person's "being wanted" the criterion of his right to life?

Personhood

23. Personhood is essentially a legal term used to describe when a human being is worthy of being protected by the law. It is a dangerous concept as by definition it allows a stronger group to exert force on a weaker group by virtue of definitions the stronger group imposes on the weaker group. History clearly shows us how this has been used to visit all manner of atrocities upon weaker humans who, despite a stronger group's definition of them, are no less human than those who defined them.
24. The concept of personhood factors into the abortion debate in the following way: Should unborn babies be recognised as persons under the law? It has already been established that the embryo/foetus is an individual human with 46 chromosomes from the moment of fertilisation. A person is defined as a human being. A human being has been established as a being with 46 chromosomes. This should be enough to put the matter to bed – the intrinsic humanity of unborn babies, by definition, makes them persons and should therefore guarantee their protection under the law.
25. However, where one dominant group wants to extinguish a weaker group, history has shown that the first thing to be attacked is the weaker group's inclusion in the definition of human personhood. Sadly, therefore, a number of reasons have been put forward to justify the non-inclusion of unborn babies in the concept of personhood. These have been conveniently turned into the acronym SLED by Scott Klusendorf:
- i. Size – Does how big you are determine what and who you are as a human being?

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- ii. Level of Development – Are 21 year olds more human than 10 year olds because they’re smarter and stronger?
 - iii. Environment – Does being inside a house make you more or less of a person worthy of protection under the law?
 - iv. Degree of Dependency – Is someone with Alzheimer’s, on kidney dialysis or dependent on insulin less of a person?
26. The answer to all of these questions is obvious. It should therefore be just as obvious that unborn babies are living human beings just as worthy of protection under the law as a one month old baby, a homeless person, a person with Alzheimer’s, a person on dialysis or a diabetic. In fact, **in order to protect all of these classes of individuals it behoves us now to protect the life of the unborn.**
27. A three month old in an incubator is smaller than a ten year old, far less developed and just as dependent and incapable of taking care of himself as an unborn, yet nobody is advocating for a mother’s right to choose to kill that child. This is where the fundamental injustice of abortion comes out. **There is nothing to justify the unequal treatment meted out to the unborn as opposed to babies or other human beings.**
28. Using variable timelines such as the trimester system used in *Roe v Wade*, the concept of viability, and birth as the moments at which personhood ought to be bestowed is arbitrary because there is nothing magical that happens at any of these points in the unborn’s development that changes his essential human nature, which is present in the complexity of his genetic code from the very moment of fertilisation.
29. Some people argue that the concept of a “meaningful life” should determine personhood. Again this is an appeal to our superficial compassion. But, “if we take any living member of the species *Homo sapiens* and put them outside the realm of legal protection, we undercut the case against discrimination for everyone else. The basis for equal treatment under the law is that being a member of the species is sufficient to be a member of the human community, without consideration for race, gender, disability, age, stage of development, state of dependency, place of residence or amount of property ownership.”⁴⁶
30. Hidden beneath much of the discussion of what constitutes a meaningful life is utilitarianism. Are mentally and physically disabled or disadvantaged people useful to the healthy and powerful, or are they a burden to us? Once something

⁴⁶ *Feminists for Life Debate Handbook* (New York: Cambridge University Press, 2003), 5-9.

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is regarded as morally permissible because it may appear to produce happiness, there is nothing that cannot qualify. But who defines overall happiness and why is it a goal to be pursued above all else?

31. Pro-abortionists are therefore simply taking us down history's lane without learning from our mistakes. Whites decided that blacks were less human. Men decided that women had fewer rights. Nazis decided that Jews' lives weren't meaningful. Now, big people are arguing for you to decide that little people are not meaningful enough to have rights.
32. **Personhood is not something to be bestowed on human beings by the powerful. Personhood is an inherent value that comes from being a member of the human race. We therefore implore you to give full legal effect to the personhood of the unborn.**
33. This is crucial because pro-choice logic starts with abortion, but it does not stop there. Once it is acceptable to kill unborn children, because they are not persons, no one who is weak or vulnerable will be safe. Does the handicapped person have a meaningful life? How about the elderly? If those who cannot think don't deserve to live, what about those who think incorrectly?

Euphemisms, Choice and The Role of the Government

34. Two years before abortion was legalised in America, a pro-choice advocate instructed nurses in a prominent medical journal, "Through public conditioning, use of language, concepts and laws, the idea of abortion can be separated from the idea of killing."⁴⁷ That same year a Los Angeles symposium offered this training: "If you say, 'Suck out the baby,' you may easily generate or increase trauma; say instead, 'Empty the uterus,' or 'We will scrape the lining of the uterus,' but never, 'We will scrape away the baby.'"⁴⁸ This is despite the fact, as you will see if you watch a video of an abortion, that scraping away the baby, with its head and limbs, is exactly what they are doing.
35. What these quotes show is that language is not just the expression of our thoughts but the shaper of them. Indeed, "how words are used influences our receptivity to an idea - even an idea that, communicated in straightforward terms, would be abhorrent."⁴⁹ That this is true is proven in our own context in

⁴⁷ Leonide M. Tanner, ed., "Developing Professional Parameters: Nursing and Social Work Roles in the Care of the Induced Abortion Patient," *Clinical Obstetrics and Gynecology* 14 (December 1971): 1271.

⁴⁸ Paul Marx, *The Death Peddlers: War on the Unborn* (Collegeville, MN: St. John's University Press, 1971), 21.

⁴⁹ Randy Alcorn, *Why Pro-Life? Caring for the Unborn and Their Mothers* (Sandy: OR: Eternal Perspective Ministries, 2004), 32.

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the conclusions of the Final Report of Public Opinion Survey on the Legalization of Abortion, referenced in the Report.

Most Jamaicans hold to the view that abortion is wrong. It is considered a sin and just over a half of those surveyed reject the idea of legalizing it (53%). It should be noted however that this view dominates when the word "abortion" is used.

In contrast a more flexible position emerges when the question was phrased as "Should a pregnant woman have the legal right to *terminate* a pregnancy?" In this instance the majority (54%) agreed that *termination* of pregnancies should be allowed *under certain circumstances*.

36. No doubt this survey has influenced the terminology "termination of pregnancy" used in the draft legislation proposed by the Report. However, **regardless of what you call it, be aware that what is at stake is the termination of a human life.**
37. The greatest euphemism, however, in the abortion debate is the use of the term "choice", which has become a euphemism for abortion. But what choice are we talking about? If it's abortion then the question is: Do you think people should have the right to choose to kill human life?
38. The fact is that all laws aimed at preserving human life and maintaining peace in society are "anti-choice". Laws against rape, murder, assault, theft, speeding, and drunk-driving all fly in the face of individual choice. They take away legal protection from one particular choice in order to protect a more foundational freedom. And, while it is self-evident that people have the freedom to make choices, even illegal choices, that does not mean that they have the right to make them. Indeed, all such laws are in fact "legislating morality". Rape, murder, kidnapping, child abuse - we all agree that these are immoral but nobody is arguing for these crimes to be legalised because our view of morality offends another's "right to choose".
39. A man isn't permitted to expose himself. There are laws against public urination, and drug use, irrespective of whether a personal choice infringes on the life or livelihood of another human being. Indeed, most of us agree with these laws, though they restrict freedom to do certain things with our bodies. Therefore, anyone who defends legal abortion by simply arguing that people must be free to make their own choices is either ignorant or dishonest because **not all choices are legitimate.**

40. Nobody argues that a man should be free to choose when the context is sexual assault. What a fool he would be to try and justify rape by saying, "My body, my choice." Why? Because rape is a violent assault which involves more than one body. So is abortion. The heart of the issue is not choice. The real question is humanity. No one who considers a preborn child a full-fledged person can rationally defend abortion's legality, unless they also defend legalising the killing of other innocent human beings. Indeed, every argument that can be made for abortion that appeals to a mother's inconvenience, stress and financial hardship can also be made just as persuasively about her husband, twelve year old or parents.
41. Slave owners were pro-choice. They emphasised physical differences to justify their superiority over the enslaved. They said, "you don't have to own slaves, but don't tell us we can't choose to." Those who wanted slaveholding to be illegal were accused of being anti-choice and anti-freedom and of imposing their morality on others. Doesn't this sound familiar? However, as history has proven, **the pro-choice position always overlooks the victim's right to choose. Blacks did not choose slavery. Jews did not choose the ovens. Women do not choose rape. And babies do not choose abortion.**

Competing Rights

42. Women often claim they should have a right over their bodies and that unborn babies are essentially parasites that they should be allowed to get rid of. The claim that the unborn is part of the mother's body has also been made by many who feel that this takes the issue of abortion out of the public domain and into the sphere of privacy - the freedom to do as one pleases in all matters that do not injure others or the public welfare. These arguments are fallacious on a number of levels.
43. Firstly, **a baby in his mother's womb is not a part of his mother's body** the way that an arm or leg is. A body part is defined by the common genetic code it shares with the rest of its body. Every cell of the mother's body shares the same genetic code. The unborn child, however, has its own unique genetic code, distinct from the mother's. Every cell of his body is uniquely his and different from every cell of his mother's body. Often even his blood type is different, half the time his gender is different, and from very early on his distinct heartbeat can be heard. Indeed, an unborn child may die and the mother live or the mother may die and the child live, proving that they are two separate individual lives.
44. Secondly, **privacy is never an absolute right, but is always governed by other rights.** Nobody would think of defending a man who abuses his child by saying that what he does privately is nobody else's business.

45. Finally, without accepting that an unborn baby is a parasite, but recognising its dependence on the mother, there needs to be an appropriate assessment of the competing rights. Whose right – the mother’s to choose or the unborn child’s to live – should be paramount? If a baby is not aborted then the pregnant mother remains pregnant and may go through sickness, fatigue, reduced mobility, an enlarged body and a new wardrobe. But this is not a permanent condition. An abortion, however, costs the unborn child his very life and is a thoroughly permanent condition.
46. It is ultimately, therefore, not an issue of who is more important. The question is who has more on the line. Indeed, any time the rights of two people are in opposition to each other, the government must protect the more fundamental right. Abortion permanently takes away the life of the unborn. Pregnancy temporarily takes away some of the freedoms of the mother. Since **there is far more at stake for the child the more fundamental right to life must be upheld.**

Unwantedness and Abuse

47. One of the most misleading aspects of the pro-choice argument is making it appear that abortion is in the best interests of the baby. Again this is an unlearned history lesson: slave owners also argued that slavery was in the best interest of blacks. Again this is an appeal to our superficial compassion. We hear, “every child should be a wanted child” and that abortion will decrease child abuse. However, this cannot be a basis for changing criminal laws which ought to be based on principle rather than convenience, on justice and equality rather than irrelevancies.
48. “Unwanted” describes not the child but an attitude of some adults towards the child. The real problem is not unwanted children but unwanting adults. “Wanting” is simply one person’s subjective and changeable feeling toward another. The “unwanted” child is a real person regardless of anyone else’s feelings toward her. A woman’s worth was once judged by whether or not a man wanted her. A child’s worth is now judged by whether or not her mother wants her. Both of these are tragic injustices.
49. How can we live in a society where someone’s right to life is established or removed based simply on their “wantedness”? Wouldn’t this justify the killing of the homeless? Are any of you willing to allow what happened some years ago to the Montego Bay Street People, whose human rights were essentially stripped from them because of their homelessness, to become not a scandal but the norm? The thought is reprehensible, and yet, if you sanction abortion on demand, as essentially proposed in the draft legislation, Jamaica may be led to this point.

50. The matter gets more complex when you consider that many children, wanted at birth, are not wanted when they are crying at 2:00 in the morning six weeks later. Shall whether or not the parents still want the baby determine whether she deserves to live? If that is a legitimate standard before birth, why not after? Again, the issue is justice – equality under the law. **There is no compelling reason to not guarantee unborn children the same protection under the law as their born counterparts, because nothing has been shown that legitimately undermines the human life and person of the unborn.**
51. While all alternatives to abortion (and there are many) are challenging, and we have no intention of understating just how challenging they are, abortion is not the only way of dealing with what is a global crisis of unwanted pregnancies.
52. At the end of the day, the question is humanity, not wantedness. And in the end though there are unwanted pregnancies, there really are no unwanted children. Even if the biological parents want nothing to do with their offspring, there are millions of infertile couples waiting to adopt children and we should be doing more to make this a viable alternative.
53. Contrary to the popular argument, child abuse has increased in places where abortion is legalised. The argument that aborting a child prevents child abuse is true only in the same sense that killing a wife prevents wife abuse. Dead people can no longer be abused. But preventing their abuse by killing them is convoluted logic. For society, abortion has changed the way we think about children – they are now expendable, inconvenient, and burdensome. Perhaps this is why child abuse has risen in America since the legalisation of abortion. “If it was alright to kill him before he was born, surely it’s alright to slap him around now.” Indeed, FBI crime statistics show that in 1999 American parents were responsible for 57% of child murders in that country.⁵⁰ There’s a pervasive notion that children belong to their parents. Adults think they have the same right to dispose of their children that society assured them they had before the children were born.
54. Perhaps Jamaica, as a nation, needs to consider how we are going to revalue life in this society where it is so often taken for granted. And, in doing that, we need to take special care with the life of the unborn. We need to address these social concerns, but killing the weak is not a way to encourage love, compassion and a respect for human life.

⁵⁰ Dahlia Lithwick. *When Parents Kill*, <http://www.slate.com/id/2063086/>

Poverty

55. Like wantedness, people often resort to the issue of poverty as a reason for justifying abortion. We are told about a woman who cannot afford the expenses of a child while also taking care of herself. This is admittedly heart wrenching and nobody is out to understate the profound trauma that women go through in coming to these decisions. However, how is the solution to that problem to be found in taking from the child the only life he has? Why aren't we dealing with the issue of poverty in our nation? Why aren't we providing resources and health care and support services to these desperate women? Why don't we make adoption an easier option? Why are we so eager to fix one problem by creating another?
56. Essentially, the poverty argument comes down to a belief that if a baby is going to be too expensive or not adequately taken care of the mother has a right to kill him. Why do we take birth as the arbitrary line? What if at six weeks the mother loses her job and decides she cannot afford to keep her born child? Should she then be allowed to kill him?
57. An unborn baby, even one who will be born into poverty, is still a human life worthy of protection. Who are we to determine which of these babies, filled with unlimited potential, should die? Who are we to say that they will not have a meaningful life if allowed to live? Who are we to say that that child will not be the one to help lift his mother out of poverty, as has often been the case?
58. We underestimate the capacity of the human spirit to reach for noble goals and to overcome the most unfavourable odds when we fail to hold onto ideals out of concerns for convenience. Until abortion advocates can demonstrate that children are not human beings before they are born, all such appeals to financial hardship have no foundation for the determination of law. Poverty, though obviously a national issue that must be addressed, is not the issue when we are debating abortion. The real issue, for the purposes of law-making, is the humanity of the unborn child and the need for our laws to be just.

Disability

59. The argument that mothers should be able to abort disabled unborn babies is, again, often made as an appeal to our compassion. However, in reality it is shocking that anyone can make the argument that poverty, unwantedness, or disability could strip a person of their fundamental right to live and relegates them to a life of misery. Such a suggestion is barbaric, inhumane and has no place in a just society. There are children of all ages, and adults too, who are alive today and are living through all manner of disease and disability. Do these

physical limitations make them less human, less worthy of protection under the law? Is killing everyone who is sick really an acceptable way to treat illness? Again I urge you to consider the history of Nazi Germany.

60. Is it in fact cruel to let a handicapped child be born to “a miserable and meaningless life” as people have argued? What do the disabled think about their own lives? Why do we watch with joy and get inspired when we watch the Special Olympics? Even more fundamentally, does dehumanising people because of disability change who they are – people who have a right to life and who should not be discriminated against? A person’s nature and worth is not changed by a handicap.
61. Suppose your six year old becomes blind or paraplegic, God forbid. He’s now a burden. Raising him is expensive, inconvenient, and hard on your mental health. Should you put him to death? Why not? Because you know him. But killing an unborn child just because you haven’t held him in your arms and can’t hear his cry doesn’t change his value or reduce his loss. It’s one thing to know a child will probably die and entirely another to choose to take his life. Many families have had precious experiences naming, holding and bonding with an anencephalic baby after birth. When he dies they grieve at the natural death of their family member. This is in stark contrast to the unhealthy grief and guilt that comes from denying a baby’s place in the family and taking his life.
62. Let us not forget that the quality of a society is largely defined by how it treats its weakest members. Killing the innocent is never justified because it relieves others of a burden. It’s not a solution to inflict suffering on one person in order to avoid it on another. If we abort children because of their handicaps, it jeopardizes all handicapped people.

Rape and Incest

63. The admittedly very hard cases of rape, carnal abuse and incest require careful consideration. While these cases are all regrettable and require the utmost care and compassion to be given to the victims, they are dramatic anecdotes of a minority position. The fact is that only 1% of abortions worldwide are requested for situations of rape and incest. The vast majority of pregnancies are the result of consensual sex; however, the 1% does present a unique moral dilemma. If a woman does not choose to engage in sex in the first place, should she carry to term a child that was the result of a forced union?
64. It is submitted that if our laws are to be based on justice, equality and the supreme value of human life then the issue at the heart of that very difficult

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question is humanity. The humanity of the unborn child demands protection, regardless of the circumstances.

65. Whether or not abortion is legalised, a woman put in this terrible situation will have the trauma not only of the rape but of working out her feelings towards the unborn child. We urge you to consider what we can do as a society to support this woman and to protect her from ever having to deal with this situation. Again, instead of "curing" one problem through death, let us focus on eliminating the problem and embracing life. Let us ensure that sexual predators are caught and punished. Let us provide counselling and support services to victims. Let us get victims compassionate care and medical help at the earliest possible opportunity so that no woman ever has to face the suffering involved in being violated and in considering violating another.
66. While the argument is that it is in the best interests of the mother and eventually of the child for him to be aborted, the truth is that it can never be in anyone's best interest to kill a child because it is impossible to separate a woman's welfare from her child's. It is the identity of the first victim, the child, that brings harm to the second victim, the mother. Because he is a child the consequences of killing him are severe. In fact many rape victims who have aborted their children suffer a lifetime of guilt as a result of what they often perceive to be their more violent action.
67. Indeed, abortion, regardless of the circumstances, is an act of violence that kills a living human being. The circumstances surrounding the conception do not change this simple reality. If it is not legitimate to kill a person conceived in rape after they're born then it is no more legitimate to kill that same person before they're born.
68. Like rape, incest is a horrible crime. Offenders must be punished, and decisive intervention must be taken to remove a girl from the presence of a relative who has sexually abused her. The abuser, not the girl or her child, is the problem. Intervention, protection and ongoing personal help for the girl, not killing an innocent child, is the solution because, ultimately, creating a second victim never undoes the damage to the first.

Women Will Do It Anyway

69. If you're inclined to agree with all that's been said but think that abortion should be allowed simply because women will do it anyway and therefore, for public health reasons (maternal mortality rates), it should be legalised anyway, then I want to say that that is a very dangerous way to argue public policy and that as

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- the vanguard of our democracy I personally, as a citizen, expect more from my Parliament.
70. Jamaica has a mammoth murder rate. The laws on the books are being violated left, right and centre. I do not however hear any of you representing that we should simply change the law since everyone is doing it anyway.
71. Indeed, every form of lawless behaviour imaginable could be rationalised with this same argument, “people are doing it anyway”. Laws against anti-social behaviour do not eliminate such behaviour altogether, but they do drive the numbers way down. The numbers from other countries show that legality of abortion plays a huge role in establishing a woman’s willingness to choose abortion.
72. Ostensibly the argument is made in the name of safety (maternal mortality rates). It will be more dangerous for women to get illegal abortions, is the argument. While this claim is not true, even if it were, nothing would change. Abortion would still be unjustified. Wouldn’t it be absurd to try and legalise armed robbery by arguing that granting such measures would make it safer for the burglars to obtain what they’re trying to steal? Ultimately, there are certain rights which need to be protected – like the right to property and the right to life. Laws must protect the potential victim, not the potential assailant.
73. Some believe that being personally opposed to abortion while believing others have the right to choose is some kind of compromise between pro-abortion and pro-life positions. I was in this camp up to very recently. But the truth is, it isn’t. The only good reason to oppose abortion is a reason that compels us to oppose others doing it as well – there’s a human life at stake. Therefore, being personally against abortion but favouring another’s right to abortion is self-contradictory and inconsistent with the rest of the views we share about criminal laws. It’s the same as saying I’m personally against child abuse but I defend my neighbour’s right to abuse his child if that is his choice. Or I’m personally against slave-owning but if others want to own slaves that’s none of my business.
74. Abortion is a difficult subject. Often when people feel that it’s not their right to tell another not to have one this is because of their understandable concern for the difficult decision that any woman thinking of an abortion must make. In short, people think that difficult circumstances should be left to the woman’s choice. However, as we lawyers often say, hard cases make bad law. The simple fact of the matter is that there is no reason good enough for killing a living human being other than the already acceptable reasons of self-defence and necessity, for only then are two equal rights at risk. To answer the cry “We Want

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Justice” the Jamaican Parliament must therefore give the same dignity and respect given adults, adolescents, toddlers, babies and newborns to the unborn.

Alexis Robinson August 2008