MCH91-33-3-8

18 May 1994

Dot Cleminshaw
2 Buchan Road
NEWLANDS
7700

Dear Dot

Thank you very much for the draft Bill and commentary. I trust that you will make a copy available to the new Minister of Health. I will try to come round some time to discuss the matter with you.

With love.

Albie Sachs

Tel. 64.2901

2 Buchan Rd., Newlands 7700
6 May 1994

Prof. A.L. Sachs

Dear Albie,

Thank you for your phone-call to wish me a happy new year - so far, so very good - and for you too! Congratulations on the outcome of the election. It is an incredible reversal to hear of Dullah Omar's appointment as Minister of Justice. I have an indelible recollection of his sensitivity as he spoke on the platform of the United Congregational church hall in Rondebosch about his experience in solitary confinement. Every good wish to the new government.

In my ARAG capacity, I and other ARAG members have been sitting down with a lawyer and trying to draft a proposed Freedom of Choice Bill. Despite many enquiries, we have been unable to discoveer whether anyone else is doing any practical work on such a bill. Enclosed is ARAG's motivation and draft proposals, which we have already faxed to ANC's Mavivi Manzini at her request. Marj Dyer met her at the recent Freek Robinson AGENDA TV discussion on abortion. As you will know, Mavivi serves on the TEC sub-council on women and was very keen to have this draft. We are also sending the draft to other interested people in the hope of getting consensus.

I shall be very grateful if you would take time to read the draft and send me your comments and any criticisms or suggestions.

Yours sincerely,

Dot

Dot Cleminshaw

P.S. Let's change the laws now - & let the opponents take the new laws to the Constitutional Court if they want to!

A.R.A.G. NATIONAL
- the abortion reform movement
CAPE BRANCH: P.O. Box 11486, Vlaeberg 8018.

FREEDOM OF CHOICE BILL

MOTIVATION AND DISCUSSION

ABORTION RIGHTS ACTION GROUP, CAPE TOWN MAY 1994

SUMMARY

Noting the failure of the Abortion and Sterilisation Act, No 2 of 1975, to provide adequately for the health and wellbeing of women who wish to terminate unwanted pregnancy, as illustrated by the small number of legal abortions, the high number of legal removals of residues of pregnancy and the unrecorded but estimated vast numbers of illegal terminations performed every year; and bearing in mind women's entitlement to the recognition of their human rights to life, health, dignity, privacy, equality, freedom of religion and protection against any harmful aspects of customary law and practice, all of which are necessary to uphold the principle of moral autonomy and bodily integrity, a motivation and discussion document is presented for a Freedom of Choice Bill.

There is a clear need for new abortion legislation in South Africa in the form of the bill proposed below, in order to free women from unsafe abortion which has been defined as abortion without optimal technology, counselling, emotional support, after-care and freedom of decision making, and in order to finally establish their right to make their own decisions about their own lives.

It is proposed that the Freedom of Choice Bill shall be enacted at NATIONAL level and that no Regional Government shall enact legislation which would have the effect of denying women access to legal abortion.

MOTIVATION FOR NEW ABORTION LEGISLATION

PRESENT LEGISLATION

The South African Abortion and Sterilisation Act of 1975 is very restrictive. Abortions are obtained according to narrowly defined clauses so that the highest number of legal abortions since the act came into force was 1449 in 1992, when there were 5½ million women in the fertile age-group, 15-49.

WORLD TRENDS

Meanwhile the world-wide trend has been towards liberalisation of abortion laws and by 1990 40% of the world's population lived in countries where induced abortion is permitted on request (eg China, Turkey, Austria, Denmark, France, Greece, Netherlands, Norway, Russia, Sweden, Canada, USA etc). and 23% where abortion is available for social or socio-medical reasons and where as a result abortion is available virtually on request(eg Australia, Finland, Great Britain, Japan, Taiwan etc).

REASONS FOR LIBERALISATION

The main reason for the liberalisation of abortion laws has been to protect women's health by giving them the option of safe medically performed abortions rather than backstreet operations. The International Planned Parenthood Federation states that for too long the issue of unsafe abortion and women's reproductive health has been clouded by cultural, religious and political opposition to safe abortion. It is now apparent that the decision by a woman to terminate a pregnancy is largely independent of tradition, religion, legal status of abortion or medical risks involved. The restrictive SA abortion act has resulted in thousands of backstreet abortions, thousands of abandoned children and infanticides and in abortion being unequally available, depending on economic status. (It is known that more SA women are aborted overseas annually than legally in South Africa.)

World-wide there are still about 55 million abortions annually, half of them illegal and 200,000 abortion-related deaths. There are also many other serious complications leading to expensive hospital treatment, chronic ill-health and infertility.

FACILITIES

The need for abortion is directly related to good family planning services and sex education. There is an urgent need to extend these facilities and in 1991/92 less than 50% of the target population for family planning were protected by the family planning services.

However even with good services, at the present stage of our knowledge and given the fallibility of contraceptives, failures will occur and abortion will for the foreseeable future be necessary as a back-up to family planning services and also for population programmes.

In addition it will not be sufficient to liberalise the law without providing good information and hospital/clinic facilities for the women involved.

RESTRICTIONS

Even where abortion is available on request certain restrictions apply as they do to other types of medical or surgical care, eg in most if not all countries abortion services may be provided only by licensed medical practitioners.

Many countries have gestational limits which may be at the stage of viability or after a specified number of weeks, most commonly 24 weeks.

Some insist on counselling , waiting periods and/or parental notification for minors

Arag recommends that counselling be available before, during and after abortion but that it should not be obligatory or directive;

that there be no obligatory waiting period; and

that doctors shall advise minors to discuss the abortion decision with a parent or guardian or other responsible adult, providing that abortions shall not be withheld.

The reasons for these recommendations are that the experience of countries which have liberal laws shows that the simplest laws work the best, ie abortion on demand, and that where women are subjected to interviews with committees and therefore to delays and invasions of their privacy, to obligatory counselling and to special consent, they revert to the backstreets.

PUBLIC OPINION

Opinion polls and referenda have been used in some countries to gauge the attitudes of populations towards abortion. Where there are people fanatically opposed to a woman's right to choose, these may generate considerable animosity and inaccurate if not purposely misleading information. Where, as in South Africa, abortion is severely restricted, the reaction

to questions on abortion is influenced by the punitive atmosphere around the issue and by guilt associated with the difficulty in obtaining abortions.

An essential for an unprejudiced result to a poll or referendum is free distribution of unbiased information beforehand about the effects of a restrictive versus a liberal law. Similarly the findings of a commission of enquiry on abortion depends on the composition of such a commission and on the willingness of women to give evidence and of the ruling government to accept and act on findings of such a commission. If such a commission be appointed ARAG has always recommended that it should not be a commission on abortion per se, but on the workings of the SA abortion act, in the same way as the Lane Commission which reported on the British Abortion Act's workings in 1974.

ARAG feels that both opinion polls and commissions would cause unacceptable delay in freeing women from the ill effects of the SA Abortion and Sterilisation Act of 1975.

TYPES OF LEGISLATION

There are mainly two types of law.

1. A law in which the emphasis is on the woman's health and well-being, e.g. the British law which has two main clauses as follows:

A pregnancy may be terminated if two registered medical practitioners are of the opinion (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or

(b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Criticism is being levelled at this law firstly because of the requirement of the opinion of two doctors and secondly because of the need to prove stress which threatens a woman's mental health and well-being. The right to choose is therefore qualified and uncertain while abortion on demand in the first trimester enables abortion to be done earlier when the methods are straightforward and uncomplicated.

2. A law in which a woman's right under the Bill of Rights is emphasised, to claim freedom of choice.

We quote the American Freedom of Choice Bill as follows:

A Bill: To protect the reproductive rights of women.

Section 1: Short Title:

This Act may be cited as the Freedom of Choice Act of 1993

Section 2: Right to Choose:

(a) In general- Except as provided in subsection (b) a state may not restrict the right of a woman to choose to terminate pregnancy (1) before fetal viability; or (2) at any time, if such termination is necessary to protect the life or health of the women.

(b) Medically necessary requirements: A state may impose requirements medically necessary to protect the life or health of women referred to in subsection(a).

(c) Rules of Construction: Nothing in this Act shall be construed to prevent the State (1) from requiring a minor to involve a parent, guardian or other responsible adult before terminating a pregnancy or

(2) from protecting unwilling individuals from having to participate in the performance of abortions to which they are conscientiously opposed.

ARAG does not believe that South Africa, going from very restrictive legislation, is likely to accept abortion on demand up to viability and therefore proposes different gestational limits. See below in draft bill.

It is postulated that the Right to Life clause in the SA Bill of Rights excludes the fetus as it states that every person shall have the right to life and according to our law the fetus is not regarded as a person till 26 weeks of gestation - before that, if a pregnancy "miscarries" there is no legal requirement for registration of birth or for burial.

However ARAG is doubtful about constitutional challenges to decide this matter and to establish the woman's right to abortion, as the composition of the court may include elderly conservative men and as challenges could be lengthy, time-consuming and expensive as in America.

REPORTING

At present statistics on abortions performed are not accurately kept in many countries where abortion is legal.

An attempt should be made to do so either by doctors involved in the procedures or from hospital statistics. Statistics on legal abortions are important as they enable trends to be discerned, problems to be addressed and unfounded claims and accusations to be refuted eg about late abortions by anti-choice organisations, as has happened in Britain.

LEVEL OF LEGISLATION

Arag proposes that the Freedom of Choice Bill be enacted at National level.

No Regional government should enact legislation which would have the effect of denying women access to legal abortion.

DRAFT

FREEDOM OF CHOICE BILL

To protect the reproductive rights of women.

Be it enacted by the National Assembly and the Senate of the Republic of the South Africa in Parliament assembled,

1. Definitions.-

"abortion" means the separation and expulsion of the contents of the pregnant uterus before the twenty-fourth week of pregnancy;

"medical practitioner" means a person registered as such under the Medical, Dental and Supplementary Health Service Professions Act No. 56 of 1974.

2. Abortion shall be available.-

(1) On request in the first 14 weeks of pregnancy-

(a) The decision to terminate a pregnancy shall be the woman's.

(b) A registered medical practitioner may perform an abortion.

(2) After the 14 week period up to viability (24 weeks)-

~~(a)~~ The decision to terminate her pregnancy shall be taken in consultation with the medical practitioner subject to special considerations affecting the life or health of the woman or that of the fetus.

3. Provision of services.-

(1) All state hospitals shall provide the facilities for abortion on the same scale of benefits as other medical procedures.

(2) Registered private hospitals and clinics shall also be entitled to provide this service.

4. Counselling.- The state shall provide or facilitate the provision of adequate information and non-directive pre- and post- abortion counselling, including sex education and contraceptive usage.

5. Reporting.-

(1) The registered medical practitioner who performs the abortion or the hospital department concerned shall within 14 days after the abortion, by registered post, report confidentially to the Director-General of the Ministry of Health the following-

(a) the name,age and marital status of the patient concerned;

(b) the place where and the date on which the abortion was performed;

(c) the name and qualification of the medical practitioner who performed the abortion;

(d) where the consent of any person other than the patient was given and the capacity in which he/she granted his/her consent.

(2) The Director-General may call upon the medical practitioner to furnish such additional information as he/she may require.

(3) The person in charge of the institution where an ~~operation connected with an~~ abortion or the ~~removal~~ termination of a pregnancy is performed, shall keep or cause to be kept a record of the prescribed particulars in respect of any such operation in that institution, and shall-

(a) when called upon to do so, make such a record available, for inspection, to the Director-General; and

(b) transmit to the Director-General at the time prescribed the prescribed information with reference to any such operation.

6. Conscientious objection to participation in an abortion.-

(1) Subject to subsection (2) of this section, no person shall be under any duty, whether by contract or by any statutory or any other legal requirement, to participate in an abortion to which he/she has a conscientious objection:

Provided that in any legal proceedings the onus of proof of conscientious objection shall rest on the person claiming to rely on it.

(2) Nothing in subsection (1) of this section shall affect

any duty to participate in treatment which is necessary to save the life or to prevent ~~grave permanent~~ serious injury to the physical or mental health of the pregnant woman.

(3) A registered medical practitioner who has such an objection shall be obliged to refer the woman to another registered medical practitioner willing to perform the abortion or to the relevant statutory service.

7. Penalties.- Any contravention of this Act shall be regarded as a criminal offence.

8. Short title.- This Act shall be called the Freedom of Choice Act, 1994.