

Submission to the Honorable Speaker Baleka Mbete

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Submitted by

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And endorsed by:

- Durban Lesbian and Gay Community Health Centre;
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- Gay and Lesbian Memory in Action (GALA);
- Gay and Lesbian Network, Pietermaritzburg;
- Iranti-Org
- Social, Health and Empowerment Feminist Collective of Transgender Women of Africa (SHE).

Dear Madam Speaker,

Objection to the Private Member's Bill of Mrs. Cheryllyn Dudley, MP.

1. Introduction

Triangle Project is an LGBTI human rights organization, based in Cape Town and working throughout the Western Cape. In over 30 years of work we have provided direct services to LGBTI people including psycho-social care, crisis responses and direct medical services.

We are very troubled by the attempts being made in this private members bill, which is the latest in a series of insidious attempts to restrict access to legal and safe medical procedures on the basis of religious ideology.

Previous attempts to amend the CTPA as well as case law have comprehensively demonstrated that access to termination of pregnancy is a right in South Africa; one which has roots in our Section 27 right to health care including reproductive health care, but also in linked rights to dignity, bodily autonomy and equality.

2. Legal context and obligations

There are multiple legal obligations on South Africa to promote and protect the right for women, transgender men and gender diverse persons to access safe abortions to access safe termination of pregnancy, and to enact and implement legislation to this effect. These obligations range from international and regional to domestic laws.

They include article 14 of the Maputo Protocol (the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa) which calls on state parties to ensure that a woman's right to sexual and reproductive health is respected, promoted and fulfilled. Article 12 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR)¹ recognizes the right to the highest attainable standard of mental and physical health. This has been interpreted to require parties to respect the reproductive rights and autonomy of women.² The General Comment on art 12 emphasises that a comprehensive sexual and reproductive health care system must be available, must be physically accessible, affordable, accessible, acceptable to the extent that this is not used to limit accessibility and the facilities offering termination of pregnancy must be of good quality. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is interpreted to mean that the denial of termination of pregnancy access is discrimination against women, transgender men and gender diverse persons. Further, parties are obliged to develop family codes that guarantee women's 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".

a. South Africa's Bill of Rights

Section 10 states that everyone has inherent dignity and the right to have their dignity respected and protected. O'Sullivan asserts that "[d]enying a woman the freedom to make and to act upon a decision concerning reproduction treats her as a means to an end and strips her of her dignity".

¹ United Nations, International Covenant on Economic, Social, and Cultural Rights, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

² Article 16.e. United Nations, *Right to sexual and reproductive health indivisible from other human rights - UN experts*, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17168&LangID=E>.

The right to reproduce, or not, is integral to the dignity and human worth of women, transgender men and gender diverse persons, and is protected by Section 10. The right to dignity is also closely linked to the right to privacy and not to have one's decisions interfered with, which is guaranteed in Section 14.

Section 12 of the Constitution protects reproductive rights and the right of access to reproductive health care. It guarantees everyone the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction. The right to make decisions was found to be "at the very heart and base of the Constitutional right to termination of pregnancy."³⁴

Section 27 finally guarantees everyone the right to have access to health care services, including reproductive health care. Access to safe and professional termination of pregnancy services that are affordable, accessible, and affirming is an essential element of the right to reproductive health care. It protects reproductive health by contributing to the reduction of maternal mortality and morbidity.

i. Equality

Equality is a right guaranteed in Section 9 of our Bill of Rights but is also a foundational principle of our constitution and constitutional democracy. While some may not see termination of pregnancy as an equality issue, Triangle Project views access to health care as a holistic and intersectional issue. Therefore, any restrictions which are placed on someone's ability to access reproductive health care will not restrict that access equally, but will rather make access more difficult for those people in South Africa already facing difficulty in accessing their rights. To this end, we submit that further limitations will serve to push black women in particular out of the regulated health care sector in this country and into the realm of dangerous and unscrupulous providers.

We further submit that LGBTI people already face challenges in accessing affirming reproductive health care. As mentioned above, further restrictions will place challenges unequally and aggravate existing inequalities in our health care system.

These international and domestic provisions all support the current the Choice on Termination of Pregnancy Act. Insofar as the suggested amendments limit and drastically curtail access these rights by limiting access to safe and legal terminations, Parliament is being asked to consider a Bill that violates our international and domestic rights obligations. We suggest that, under these circumstances, the Speaker has the authority to reject the Bill and we ask that she do so.

3. Public health funding and resources

South Africa's funding for public health is consistently under pressure from a growing population, complex and intersecting disease burdens and shrinking government budgets. With this in mind, incurring extra costs with the aims of not increasing access but rather to decrease it is completely irrational.

Despite assurances in section 5 of the Amendment Bill under consideration, that "major financial implications are not expected", the technology and training requirements set out in it counter this.

³ is O'Sullivan M "Reproductive Rights" in Woolman S *et al* (eds) *Constitutional Law of South Africa* (Juta Cape Town Revised Service 3 2011) 37-1-37-28

⁴ *Christian Lawyers Association v Minister Of Health and Others (Reproductive Health Alliance as Amicus Curaie)* 2005 (1) SA 509 (T) at 518.

Purchase and maintenance of the equipment required in the amendment would be considerable as would the training of staff to operate them. In light of this expense, what the Amendment would actually achieve is a drastic reduction in number of sites across the country where a termination of pregnancy could be performed.

As stated above in the discussion on equality, it would be highly unlikely if this requirement affected all potential users equally. It would be likely that service users in rural settings and other areas that continue to live with inadequate health infrastructure investment would be hardest hit.

4. Patients' rights

We are most concerned with the suggestion of mandatory counselling of patients seeking a termination of pregnancy. First, mandatory counselling is a contradiction in terms which will violate the rights of patients to willingly enter into counselling processes. Second, in light of the dire shortage of therapists, social workers and others involved with the provision of psycho-social care, it is doubtful whether this requirement can be met – and that it can be met by staff who have received the ongoing training and support necessary for them to do this work. Third, it is a transparent attempt to pressure patients into not undergoing a medical treatment which they are actively seeking. Again, these restrictions will not affect all patients equally. Those who are able to access services in the private sector and who have the social and other capital to insist on service provision, will be much more likely than others to access the service they are seeking.

5. Conclusion

The Amendment bill under discussion is a clear attempt to restrict access to termination of pregnancy rather than to regulate it or to ensure the rights of patients who seek it. We are deeply concerned that this attempt – the latest in a series of similar attempts – uses many of the same discredited or unsubstantiated claims in order to further reduce access to the right to reproductive health care.

We hope that the Speaker will not proceed with the Private Member's Bill and will continue to work with the public, civil society and health care providers to protect and further reproductive rights.

Our sincere thanks for your consideration.