



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990 on
the Contraception, Sterilisation, and Abortion
(Safe Areas) Amendment Bill

Presented to the House of Representatives pursuant to Section
7 of the New Zealand Bill of Rights Act 1990 and Standing
Order 269 of the Standing Orders of the House of
Representatives

1. I have considered whether the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. I have concluded that clause 5 of the Bill appears to be inconsistent with the right to freedom of expression as affirmed in section 14 of the Bill of Rights Act.
3. As required by section 7 of the Bill of Rights Act, I draw this apparent inconsistency to the attention of the House of Representatives.

Summary

4. Clause 5 inserts new ss 13A-13C into the Contraception, Sterilisation, and Abortion Act 1977 to provide for the declaration of safe areas around providers of abortion services, and the criminalisation of certain conduct ("prohibited behaviour") within those safe areas.
5. I have concluded that clause 5 is inconsistent with the right to freedom of expression, insofar as it criminalises "communicating" in a manner that is objectively emotionally distressing. The Bill is otherwise consistent with the rights and freedoms of the Bill of Rights Act.

Background

6. The safe area proposal contained in the Bill replicates, with amendments, the scheme in the Abortion Legislation Bill, as reported back to the House by the Abortion Legislation Committee.¹ The three clauses making up the "safe areas" proposal were removed from the Abortion Legislation Bill by the Committee of the whole House, voting on Supplementary Order Paper number 464.
7. The version of the safe area proposal reported to the House by the select committee has not yet been subject to scrutiny under s 7 of the Bill of Rights Act. The safe area proposal carried at the first reading of the Abortion Legislation Bill² was earlier vetted and found to be consistent with the Bill of Rights Act, in that limits on freedom of expression created by declaration of a safe area were capable of justification.³
8. The prohibited behaviour criminalised in a safe area is reflected in new s 13A(3) inserted by cl 5, which would provide that:

¹ See Abortion Legislation Bill (164-2).

² See Abortion Legislation Bill (164-1).

³ Crown Law "Abortion Legislation Bill – consistency with New Zealand Bill of Rights Act 1990" (1 August 2019, <https://www.justice.govt.nz/assets/Documents/Publications/bora-abortion-legislation-bill.pdf>).

prohibited behaviour means—

- (a) intimidating, interfering with, or obstructing a protected person—
 - (i) with the intention of frustrating the purpose for which the protected person is in the safe area; or
 - (ii) in a manner that an ordinary reasonable person would know would cause emotional distress to a protected person:
- (b) communicating with, or visually recording, a person in a manner that an ordinary reasonable person would know would cause emotional distress to a protected person

9. I agree with the previous vetting advice about the safe area proposal, but it is necessary to revisit that advice because the Bill would substantively change the “prohibited behaviour” in a safe area in two ways:

9.1 The prohibited behaviour of intimidation, interference or obstruction with the intention of preventing access or provision of abortion services is carried forward into the new proposal, but such behaviour would also be criminalised where it would objectively cause emotional distress to a protected person accessing or providing such services.

9.2 The prohibited behaviour of communicating or visually recording would no longer require any intention to cause emotional distress; instead, the offence would be complete if the behaviour is objectively distressing to a protected person accessing or providing abortion services.

10. The Abortion Legislation Committee considered that, as drafted in the Abortion Legislation Bill, the safe area offence provision was underinclusive because it would be difficult to prove a particular intention to cause emotional harm through anti-abortion activism within a safe area. I consider that the revised offence goes too far in the opposite direction, being overinclusive of expressive conduct unrelated to the policy intention. The Bill is inconsistent with s 14 of the Bill of Rights Act because it is not minimally infringing of the right to freedom of expression.

11. I suggest below a way in which the proposal might be drawn more narrowly in order to properly focus on the upsetting conduct of anti-abortion activists within safe zones, without capturing other forms of communication or having an unjustified chilling effect on freedom of expression within a safe area.

Intimidation, interference or obstruction

12. The addition of an objective emotional distress ground would expand paragraph (a) of the “prohibited behaviour” definition beyond that proposed in the original Abortion Legislation Bill. However, I do not consider that it raises any new Bill of Rights Act issue beyond those considered by officials in the previous vetting advice.

13. The proposed offence does not require an intention to cause emotional distress, but would require an intentional act of intimidation, interference or obstruction, directed

towards a protected person.⁴ The requirement for an intentional act means that despite there being no need to intend to distress a protected person, this offence does not appear to be capable of being committed by accident.

Visual recording

14. Breach of new s 13A by “visual recording” would require an intentional act with a tolerably clear ambit, and so much like the acts of intimidation, interference or obstruction, it is unlikely to occur inadvertently. In situations where visual recording has occurred inadvertently, for example by fixed security cameras within a safe area, it is unlikely a court would consider that a reasonable person would be emotionally harmed by such a recording. Accordingly I do not consider that this raises any fresh issue under the Bill of Rights Act.

Communication

15. I have concluded that para (b) of the definition of “prohibited behaviour” in new s 13A(3) is overly broad and not a justifiable limit on s 14 of the Bill of Rights Act.
16. While the courts are likely to distinguish between emotionally distressing conduct and merely annoying or irritating conduct, limiting the scope of the objective “emotional harm” element of the offence, the term “communicating” has an apparently broad scope because:
- 16.1 this term appears to cover any speech or behaviour with a communicative element, rather than focusing on the forms of communication common to anti-abortion activism;
- 16.2 the subject matter of the prohibited communication is not limited to abortion or related matters; and
- 16.3 it is doubtful there is any need to intentionally direct communication towards a protected person knowing that they are a protected person, rather it appears to be sufficient that the person’s speech or behaviour is communicative.
17. The term “communicating” is inherently vague and broad. It is not possible to predict in advance whether and how courts will seek to limit the scope of relevant communication. In the absence of a clear understanding of the forms of communication which would be criminalised by new s 13A, creation of the proposed offence is likely to have a chilling effect on all forms of communication within a safe area.
18. The policy rationale for the safe area proposal is to protect the safety, wellbeing, privacy and dignity of protected persons. But this rationale does not support a broad criminalisation of emotionally harmful communication within a safe area (for example, a discussion about the pros and cons of abortion between family members,

⁴ Defined in new s 13A(3) to include those people in a safe area for the purpose of accessing or providing abortion services, or seeking or providing advice or information about abortion services.

a clinician delivering bad news about the health of a foetus, or a person getting into an emotive argument with a protected person in a hospital carpark). And the lack of any intention to cause emotional harm is likely to lead to a broader range of communicative activity being criminalised, such as distant silent protest.

19. The original safe areas proposal ameliorated such impacts by requiring an intention to cause emotional harm to a protected person, but the proposal in this Bill does not. If requiring an intention to cause emotional harm would make the proposed offence difficult to enforce, it may be that the scope of prohibited conduct can be narrowed in another way.
20. For example, this could be done by deleting paragraph (b) of the proposed definition of “prohibited behaviour” and substituting an extended definition of “intimidation” which attempts to include the communicative acts typically engaged in by anti-abortion activists (such as sign-waving or the practice of seeking to dissuade people from obtaining abortions through “sidewalk counselling”) as well as other intimidating acts such as visual recording.
21. In terms of an analysis of justified limitations under s 5 of the Bill of Rights Act, while there is a sufficiently important reason to limit s 14 and a rational link between the proposed measure and the policy goal, the measure is not minimally impairing of the s 14 right and is therefore not proportionate.

Conclusion

22. I have concluded that clause 5 of the Bill appears to be inconsistent with the right to freedom of expression affirmed in section 14 of the Bill of Rights Act.
23. I consider that if the Bill substituted a narrower definition of the “prohibited behaviour” rather than all “communicating”, or if the offence of committing prohibited behaviour in a safe area required an intention to cause harm (as the original safe area proposal would have provided), clause 5 is likely to be consistent with the rights and freedoms affirmed by the Bill of Rights Act.



Hon David Parker
Attorney-General