JUSTICE SELECT COMMITTEE

Submission on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill

28 April 2021

Equal Justice Project (EJP) is a non-partisan pro bono charity operating out of the University of Auckland. We apply Law students' legal training and knowledge to promote social equality, inclusivity and access to justice in our local and wider community.

Members of the EJP Communications Team (Samantha Putt, Sarah Shanahan, Andrew O'Malley-Shand, Renee Wells and Alexander Campbell), as authorised and edited by the Communications Team Managers (Bronwyn Wilde and Sam Meyerhoff), have considered the Submission on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill. *We broadly support the passage of this Bill, with more detailed commentary below.*

Contents

Introduction

This Bill[1] is not about the legality of abortion. Parliament has already made it abundantly clear that abortion is legal and a human right.[2] This Bill is about ensuring that legal right is exercisable, not only in theory, but in practice.

EJP notes that safe areas were originally part of the Abortion Legislation Bill 2020 before being removed by supplementary order paper.[3] We express concern at the rushed

[1] Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2021 (310—1) (Safe Areas Bill).

[2] Abortion Legislation Act 2020.

[3] Yvette McCullogh "MPs vote to remove abortion clinic safe zones from Bill" RNZ (online ed, New Zealand, 11 March 2020).

manner in which the vote to remove safe areas was conducted.[4] While we commend member Louisa Wall for introducing this current Bill, we regret that such an action was even needed.

We acknowledge the concerns of members of Parliament about the effect of this Bill on freedoms of speech, expression, and assembly. Balancing rights and justified limitations is a task for the Legislature. We do not pretend that this is a simple exercise. Morality and policy both play an important role in any decision. Hence, the Select Committee and Public Submissions process are a crucial part of this Bill.

The Importance of Safe Areas

1.1 The importance of establishing safe areas for reproductive health cannot be overstated. This legislation will effectively stop harassment outside abortion facilities. Such harassment by protestors impinges on the right to choose, medical autonomy, and accessibility. Creating safe areas also destigmatises the remaining prejudice surrounding abortion in New Zealand.

1.2 The right to choose is established in the recent reform to the Crimes Act 1961, in which Sections 182A to 187A were repealed and replaced with Section 183 which formally decriminalised abortion.[5] Allowing protestors outside of abortion clinics impedes on this right. Pro-life protestors often use manipulation, bullying or guilt-based tactics to convince women to change their minds regarding their reproductive procedure. This can often be based on polarising religious or spiritual

[4] McCullogh, above n 3.

[5] Abortion Legislation Act 2020.

ethics regarding the sentience of an unborn child.[6] These measures are rarely effective: few women regret their abortions, and protesting outside does very little to change the minds of patients.[7] It is effectively harassment for exercising the right to choose.

1.3 Differing opinions on a controversial issue are expected. However, after the decriminalisation of abortion, the question of its legality is no longer up for debate in the justice system. Abortion is legal. Individuals should have the right to make a medical decision without physical or psychological interference from protestors. Having safe areas allows for pro-life discourse to continue, just at enough of a distance that the right to choose is not infringed upon. The current lack of safe areas has two implications on the right to choose:

1.4 Firstly, individuals are limited in their medical autonomy. The choice to have an abortion is trusted upon the individual who is pregnant. In making their decision, they are informed of the possible risks of the procedure by trained professionals at abortion facilities. Their mind is not likely to be changed due to harassment outside the clinic. A last-ditch attempt to change an individual's mind through guilt tactics undermines the patient's medical autonomy, and thus, their legal rights. Legislating safe safes would mean that individuals are not limited when making their choice, and are empowered to exercise their medical autonomy freely.

1.5 Secondly, the lack of government restriction on pro-life protestors does little to destigmatise the remaining prejudice regarding abortion in New Zealand. The current approach means that individuals are left to deal with the mental

[6] New York Times Editorial Board "The Doctors Who Put Their Lives on the Line" The New York Times (online ed, New York, 25 May 2019).

[7] Ariana Eunjung Cha "Five years on, most women don't regret their abortions – study" New Zealand Herald (New Zealand, 14 Jan 2020).

repercussions of protestors by themselves. Individuals are expected to brush off or ignore harassment when they are already in a vulnerable state. Creating safe areas both supports individuals exercising their right to choose and condemns pro-life harassment within a close proximity to clinics.

1.6 The current offences are not sufficient. Several provisions under the Summary Offences Act 1981 create offences for intimidation, offensive language and behaviour, and public obstruction.[8] The penalties for the offences listed and those under the proposed Bill are the same; a $1000 fine issued under a warrantless power by the Police. However, these are likely designed for sporadic instances of harassment, rather than the procedural mass harassment created outside abortion clinics. The law should be more specific, designed to target a specific type of harassment occurring outside abortion facilities to both formally destigmatise abortion, and protect medical autonomy. This affirms the doctrine of fair labelling, and the need to differentiate different offences.

Recommendations

- That this Bill is passed in order to uphold the right to choose, medical autonomy, and accessibility.
- That this Bill is passed to further destigmatise abortion, which Parliament has already affirmed is legal and a human right.

[8] ss 4(1), 21(1), 22.

Safe Areas in Other Jurisdictions

2.1 Several other jurisdictions have provided for 'safe access zones' around abortion clinics and facilities. In Canada, the provinces of Ontario[9] and British Columbia[10] have legislated to automatically establish such zones around every abortion clinic and facility. These zones are defined as including the "property on which the clinic is located" and an additional distance of no more than a 150 metre radius, with a minimum distance of 50 metres in Ontario.[11] In both provinces, these zones also protect the residences and offices of abortion service providers.

2.2 Similarly, Australia also provides broad protections for women and abortion service providers. Nearly every Australian state has legislated to establish safe access zones of within 150 metres around abortion clinics (50 metres for Australian Capital Territory).[12] In Queensland, the default distance is 150 metres, unless there is regulation that specifies otherwise or if the Governor in Council feels it is inappropriate for the individual clinic.[13] By contrast, this current Bill does not automatically establish a safe area or provide a minimum distance, which could cause confusion. Queensland's approach gives clarity for everyone involved (protected persons as well as protestors), while still allowing discretion to adjust the distance on a case-by-case basis if needed.

[9] Protecting a Woman's Right to Access Abortion Services Act 2017.

[10] Access to Abortion Services Act 1995.

[11] Section 6(2)(a) Protecting a Woman's Right to Access Abortion Services Act, 2017.

[12] Western Australia is the only state that has yet to establish safe access zones, however a bill introducing these zones was passed by the Legislative Assembly in November last year.

[13] Termination of Pregnancy Act 2018, s 14(2).

2.3 This Bill is lacking in the level of detail seen in the Canadian and Australian legislation. The definition of prohibited behaviour is limited to "intimidating, interfering with, or obstructing a person" that frustrates the purpose for which the protected person is in the area, or "in a manner that an ordinary reasonable person would know would cause emotional distress."[14]

2.4 Canadian law is very specific on what behaviour is prohibited within these safe access zones. Such prohibited behaviour includes (and is not limited to):[15]

a) Advising, persuading, or attempting to advise or persuade a person to refrain from accessing abortion services;

b) Performing or attempting to perform an act of disapproval;

c) Besetting (continuously or repeatedly observing);

d) Intimidating;

e) Physically interfering;

f) Harassing;

g) Graphically recording in any way;

This specificity avoids concerns around broad, catch-all phrases such as "communicating"[16] in the current Bill.

2.5 The inclusion of "communicating" has been argued to impede too far onto freedom of expression.[17] However, both South Australia and Victoria contain very similarly

[14] Safe Areas Bill, above n 1, cl 13A(3)(a).

[15] Protecting a Woman's Right to Access Abortion Services Act, above n 8, s 3(1).

[16] Safe Areas Bill, above n 1, cl 13A(3)(b).

[17] (10 March 2021) 750 NZPD (Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill – First Reading, David Seymour).

worded provisions.[18] Australia's highest court found that these provisions were not in breach of the freedom of political communication doctrine.[19]

Recommendations

- Prescribe a default distance of 150 metres while allowing discretion to alter the distance if needed.
- Provide greater specificity and clarity in regard to what is "prohibited behaviour".

Freedom of Expression

3.1 There are concerns that this Bill poses threat to protestors' rights to freedom of expression. EJP submits that while this Bill is a limit on freedom of expression, it is not an unjustified one and is proportionate to the rights it seeks to protect.

3.2 The right to freedom of expression is one of the most essential elements of a democratic society.[20] However, rights enshrined under the New Zealand Bill of Rights Act 1990 are not absolute and can be subject to 'such limitation as is reasonably justified in a free and democratic society.[21] These rights should not be derogated from lightly. The restrictive measures must be appropriate to advance their protective function, the least intrusive measures available, and proportionate to the interest being protected.[22]

[18] Health Care (Safe Access) Amendment Act, s 48B(d); Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015, s 185B.

[19] Clubb v Edwards; Preston v Avery [2019] HCA 11 at [107].

[20] Wall v Fairfax New Zealand Ltd [2017] NZHRRT 17 at [166.1].

[21] New Zealand Bill of Rights Act 1990, s 5.

[22] Wall v Fairfax, above n 20, at [166.2].

3.3 The International Covenant on Civil and Political Rights permits limitation of freedom of expression under Article 19(3), it may be restricted:

a) For respect of the rights or reputations of others;

b) For the protection of national security or of public order, or of public health or morals.

As discussed above at 1.1, presently, the respect of the rights and reputation of protected people are threatened by targeted protest against legal healthcare.

3.4 There is concern that the wording of the Bill goes further than is necessary to achieve its purpose. Clause 13A(3)(b) includes the broad term "communicating" as prohibited behaviour inside a safe area. The Attorney-General's s 7 report found that this term is an unjustified limit on freedom of expression and should be substituted or removed entirely from the Bill.[23] Likewise, ardent advocate for freedom of expression, Mr David Seymour MP, has acknowledged that he would support a second reading of the Bill if the term "communicating" was removed.[24]

3.5 Simply removing the word "communicating" from the Bill with no further amendments will not be sufficient in achieving the purpose of the Bill, which is to protect and respect the safety, well-being, privacy, and dignity of protected people.[25] This is because prohibited behaviour including "intimidation, interference, and obstruction", as defined in clause 13A(3)(a), may not include alternative passive forms of protest which could be equally as distressing for the protected

[23] David Parker Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill (House of Representatives, Wellington, 2021).

[24] (10 March 2021) 750 NZPD (Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill – First Reading, David Seymour).

[25] Safe Areas Bill, above n 1, Explanatory note.

person. One solution could be to add more specificity to "prohibited behaviour" as in Canada (see 2.4).

3.6 However, EJP submits that the inclusion of "communicating" is not in fact an unjustified limit on freedom of expression, because the word is qualified in the Bill. Not all "communicating" is prohibited under the Bill. There is an objective limit on the scope of which communication is prohibited – that which a reasonable person would know would cause emotional distress to a person accessing this healthcare.[26] This is not dissimilar to the Harassment Act 1997, whereby it is prohibited for a person to engage in activity which would causes another to fear for their safety.[27] The communication set out in the current Bill is preventing people from accessing healthcare, which is in turn risking their safety. Prohibiting such communication would prevent the harassment of protected people accessing this healthcare.

3.7 As mentioned at 2.5, in Australian provisions with similar wording, the High Court of Australia has taken a different stance to our Attorney-General. There, the freedom of expression argument was rejected in favour of safe access zones.[28] The Solicitor General noted the harm caused by an environment of conflict, fear, and intimidation outside abortion clinics where women were made to 'run the gauntlet' to abortion clinics. The Court ruled that while freedom of expression was important, it did not require others to receive the messages of protestors.

[26] Safe Areas Bill, above n 1, cl 13A(3)(b).

[27] Harassment Act 1997, s 4.

[28] Clubb v Edwards; Preston v Avery, above n 19.

3.8 The High Court of Australia agreed that concerns about political speech being silenced by hurt feelings may be valid in the context of commercial rivals or voluntary participants of a political debate. However, such freedom of expression concerns:[29]

> "...have no attraction in the context in which persons attending to a private health issue, while in a vulnerable state by reason of that issue, are subjected to behaviour apt to cause them to eschew the medical advice and assistance that they would otherwise be disposed to seek and obtain."

3.9 This Bill does not restrict freedom of expression completely. It can still be exercised within the safe area, so long as it does not target or cause emotional distress to a protected person. Further, protestors are still free to exercise their rights to freedom of expression elsewhere in public and in appropriate forums for democratic debate. They are still free to direct their views towards Parliament and the wider public, just not at targeted, vulnerable individuals.

Recommendations

- Retain the word "communicating" in Clause 13A(3)(b) as it is a justified and proportionate limit on freedom of expression.
- In the alternative that the word "communicating" is not a justified limit, the word should be replaced, rather than removed, in order to still achieve the Bill's purpose. This could be modelled off the more specific, Canadian provisions.

[29] at [59].

Responding to Other Common Concerns

4.1 Civil or Criminal?

4.1.1 Some detractors of this Bill have argued that its content is better covered by the civil law. We submit this is not the case. It is true that the tort of intentional infliction of emotional distress (IIED) does overlap with this Bill to a degree. However, we believe it is important to acknowledge why this criminal offence is needed beyond a civil wrong.

4.1.2 Firstly, civil wrongs are instigated by the plaintiff as an individual. When already confronted by a protestor in an offensive manner, the last thing a victim should be expected to do is engage further proceedings with the aggressor. As has been acknowledged by those in favour and against this Bill, it deals with an emotionally raw subject matter. It is logical therefore that rather than leave this to an area of law which encourages more confrontation, this would be regulated by the criminal law.

4.1.3 Secondly, the civil law has a different standard of proof than the criminal law. This Bill undoubtedly engages and limits protestors' right to freedom of expression (though in a justified manner). To let a wrong be proven on the balance of probabilities seems far too harsh a limit when compared with the beyond reasonable doubt standard.

4.1.4 Finally, the tort of IIED and this Bill protect very different legal interests. Bradley v Wingnut Films[30] makes clear that IIED is concerned with protecting a person from mental distress leading to actual loss or harm. This Bill is concerned with

[30] Bradley v Wingnut Films [1993] 1 NZLR 415 (HC).

protecting a person's mental and physical health, but also with ensuring a person can exercise their right to medical health unaccosted. The further interest it protects is that of privacy. The link between the right to an abortion and the right to privacy has been acknowledged in many different jurisdictions, most notably in Roe v Wade[31] in the United States. Here, consider a woman going to a standard GP or hospital for abortion services. It would be impossible to tell the purpose of their visit to anyone outside. Those going to clinics specifically designed to provide or assist in the provision of abortion services have no such anonymity. This Bill, in part, protects the privacy of those women to not have the specifics of their health known and judged by protestors. This is an interest IIED cannot address and deserving of unique protection.

4.1.5 The March 2018 Law Commission report states that "Legislation should only include criminal offences if they are necessary to achieve a significant policy objective that cannot be achieved effectively through other measures".[32] This is certainly the case here and hence we recommend the Bill not be changed in this regard.

4.2 Exceptions for Family

4.2.1 Mr Chris Penk MP, in parliamentary debate, raised a concern that this Bill does not include an exemption for fathers of the foetus.[33] This is a valid point; the law should not make what would undoubtedly be a difficult conversation even more

[31] Roe v Wade 410 US 113 (1973) at 129.

[32] Law Commission Alternative Approaches to Abortion Law (NZLC MB4, 2018) at 111.

[33] (10 March 2021) 750 NZPD (Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill – First Reading, Chris Penk).

trying. However, we respectfully submit that the Bill as drafted already addresses this concern.

4.2.2 Clauses 13A(3)(a)(ii) and 13A(3) of the Bill preface that only unintended behaviour which the "reasonable person would know would cause emotional distress to a protected person" is criminalised. The law of New Zealand has already acknowledged in other areas that a familial relationship between two people can affect the reasonable person test. The 1919 case, Balfour v Balfour,[34] establishing this rule is well accepted in New Zealand law. Even intuitively, it is logical that the reasonable person would consider certain discussions to be acceptable between spouses or intimate partners that would not be acceptable from a stranger. As such, we do not believe this an adequate reason for voting against this Bill.

Recommendations

- That the prohibited behaviour remains a criminal offence as it aims to achieve different objectives to a civil wrong.
- That no special provision is made for the father, because the current drafting is sufficient to protect against such situations.

Creation of Safe Areas

5.1 Under the proposed power in clause 5, the Minister of Health can recommend creating a safe area only if they are satisfied it is necessary for the safety of protected people, and is a reasonable limitation of rights. This process prevents

[34] Balfour v Balfour [1919] 2 KB 571 (CA).

the overzealous creation of safe areas. However, the process should also ensure that safe areas are available when genuinely needed.

5.2 This Bill opts to create safe areas on a case-by-case basis, in contrast with the automatic basis many other jurisdictions use.[35] While an automatic process has merits, creation on a case-by-case basis can still be effective provided that the process is not overly restrictive. An application process enshrined in law would guarantee abortion providers' right to be heard on the issue. Further, a list of relevant considerations would provide clarity on the nature of the decision making process.

5.3 Application Process

5.3.1 In the Regulatory Impact Assessment[36] and the Select Committee Report on the Abortion Legislation Bill,[37] reference was made to an application process. The power in the Bill does not currently reflect this. The Regulatory Impact Assessment also noted that a process would be put in place by the Ministry of Health when required.[38] Specific provision within the Bill for applications by abortion providers would guarantee a right for providers to be heard and ensure Ministers cannot simply ignore reasonable requests.

5.3.2 This process could take the form of a legal requirement for the Minister, upon receiving a written request for a safe area from a provider, to consider and respond with reasons for their decision within a reasonable time period. This

[35] Termination of Pregnancy Act 2018 (Qld), s 14; Public Health and Wellbeing Amendment (Safe Access Zones). Act 2015 (Vic), s 5; Reproductive Health (Access to Terminations) Act 2013 (Tas), s 9.

[36] Ministry of Justice Regulatory Impact Assessment – Abortion Law Reform (5 August 2019) at 29.

[37] Abortion Legislation Bill 2019 (164-2) (select committee report) at 20.

[38] Above n 36, at 35.

provides an opportunity for providers to be heard and for Ministers to be held publicly accountable for their decisions. It would leave the decision to the Minister, while ensuring proper process is followed.

5.4 Relevant Considerations

5.4.1 A list of relevant considerations would guide Ministers when considering establishment and size of safe areas. Such a list would provide direction on what Ministers should consider when evaluating a request, beyond the current test to prevent undue restrictions. To preserve the discretionary nature of the power, the list would be non-exhaustive and weighting of considerations would be up to the Minister.

5.4.2 Some possible relevant considerations could be the views of abortion providers and the local community for instance. This list could also address the issue of minimum sizes, with a possible consideration being the effectiveness of the proposed size. This could address the issue of a Minister morally opposed to safe areas creating a safe area of an insignificant size.

Recommendations:

- Introduce a provision requiring the Minister, upon receiving a written request for a safe area from a provider, to consider and respond with reasons for their decision within a reasonable time period.
- Introduce a provision with a list of relevant consideration for the establishment and determination of the size of a safe area.