MAXIM INSTITUTE

SUBMISSION TO THE HEALTH SELECT COMMITTEE: CONTRACEPTION, STERILISATION AND ABORTION (SAFE AREAS) AMENDMENT BILL

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1. INTRODUCTION

We are opposed to the Contraception, Sterilisation and Abortion (Safe Areas) Amendment Bill.

In September 2019, we presented written and oral submissions to the Abortion Legislation Select Committee.[1] Based on our research and legal analysis, our submission included comments on the introduction of safe areas. Having considered the Contraception, Sterilisation and Abortion (Safe Areas) Amendment Bill we re-submit to you the relevant and amended section of our previous submission.

This Bill seeks to "protect the safety and well-being, and respect the privacy and dignity, of women accessing abortion facilities and practitioners providing and assisting with abortion services." A consequence of the Bill, however, is that it limits New Zealanders' right to freedom of expression. Although our laws do recognise that there is sometimes a need to limit our freedom of expression, we consider that this is an unjustifiable limitation because it does not meet the criteria for doing so: it does not serve a sufficiently important purpose; and it is not a rational, reasonable or proportionate response. The Committee therefore should not recommend this Bill to the House.

While we oppose the Bill, we also propose a series of recommendations to improve it, should it pass. These focus on our concerns with the definition of prohibited behaviour, and the criteria for prescribing a safe area. First, however, we will address the reasons why we believe this Bill fails to sufficiently respect New Zealanders' right to freedom of expression.

2. THE BILL'S PROVISION FOR SAFE AREAS IS AN UNJUSTIFIED LIMITATION ON RIGHTS AND FREEDOMS

We consider the introduction of **safe areas would be an unjustified limitation of fundamental rights and freedoms, most notably the right to freedom of expression.**[2] The importance of freedom of expression has been well-recognised by our Courts:[3]

> *Freedom of expression is a right which is basic to our democratic system. As the Supreme Court of Canada has said: "The core values which free expression promotes include self-fulfilment, participation in social and political decision making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect freely on one's circumstances and condition."*

Moreover, our Courts have also recognised the need for protecting the practice and processes of freedom of expression to sustain our democratic culture:[4]

> *In assessing the particular weight to be given to freedom of speech in a protest context, respecting the freedom to choose the means of protesting which are seen to be most effective is important. Respect for protest as a means of pressing for change in official policy or conduct is very much part of New Zealand's culture and societal values. [...] As Andrew Geddis has put it: "[T]he overall health of our body politic may be judged by how far our legal ordering provides [the individual dissenter] with the space to make her opinions known to the public."*

Despite the importance of the right to freedom of expression, this right is not absolute, and as stated in the Bill of Rights Act is subject to "such reasonable limits … as can be demonstrably justified in a free and democratic society."[5] Our Courts have held that making this assessment involves determining whether the proposed limit: [6]

a. "serve[s] a purpose sufficiently important to justify" limiting a right, and if so,

b. whether the limit is "rationally connected with its purpose," "impair[s] the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose," and is "in due proportion to the importance of the objective."

We will now look at each criterion in turn.

2.a. The introduction of safe areas fails to serve a sufficiently important purpose.

The Explanatory note of the Bill asserts that "protests at and around abortion clinics are common place in New Zealand." We find, however, that **the Bill's proposed limits to freedom of expression do not serve a sufficiently important purpose because there is insufficient evidence that safe areas are needed.**[7]

In 2018 the New Zealand Law Commission's investigation into "Alternative Approaches to Abortion Law" considered the introduction of safe access zones. It sought input from health professional bodies (including DHBs and the Supervisory Committee), abortion service providers, and Health Practitioners.[8] It considered the types of demonstrations that people have experienced in accessing an abortion such as vigils, holding signs, or approaching women to give information, and concluded that:[9]

> *The Commission has not seen any clear evidence that the existing laws around intimidating and anti-social behaviour are inadequate, as would be required to justify the introduction of safe access zones [...] the Commission does not suggest the introduction of safe access zones.*

"Legislation should only include criminal offences if they are necessary to achieve a significant policy objective that cannot be achieved effectively through other measures."[10] The Summary Offences Act 1981 already

prohibits disorderly or offensive behaviour against public order, intimidation (which includes stopping, confronting, or accosting someone in a public place), and obstructing a public way.[11] As a result, the safety and well-being of women and abortion providers are already protected from inappropriate protest actions. The implementation of safe areas is thus an unnecessary restriction on the rights of New Zealanders to freedom of expression.

In its assessment of the Abortion Legislation Bill's consistency with the Bill of Rights Act, Crown Law said that "there is good reason to believe that anti-abortion demonstration activity could become more widespread and intrusive." We consider that the reasons provided by Crown Law were inadequate, as follows:[12]

1. Crown Law asserted that because the Abortion Legislation Bill allows abortions to be provided at locations other than hospitals, this could result in more demonstrations because premises of abortion providers will lack the security and physical features of a hospital. First, not all abortions in New Zealand are provided from hospitals.[13] Second, as noted by the Law Commission, with abortion services available from more locations, it will likely be more difficult for demonstrators to target the premises of abortion providers.[14]
2. Crown Law relied on the online claim of one person that she had been a "sidewalk counsellor" as evidence that "some activity in New Zealand is more intrusive than silent protest." This is insufficient backing for their claims that this a common place problem.
3. Crown Law referenced the Canadian experience where after decriminalisation of abortion, the climate around some abortion clinics became unpleasant and frightening. It does not necessarily follow that decriminalisation has had, or will have, the same effect in New Zealand. Crown Law then referenced the "Regulatory Impact Analysis [which] also notes research concluding that such protest action causes anxiety and distress among people seeking and delivering abortion services, and that protest would deter health professionals from delivering abortion services." Crown Law, however, omitted citing the following sentence of the Regulatory Impact Statement: "there is limited evidence of the degree of harm protestors may have on Medical Practitioners or women accessing abortion services."[15]

Following reforms to New Zealand's abortion laws in early 2020 we have not seen evidence of an increase in protests or harmful activity outside premises that provide abortion services. While COVID-19 restrictions possibly reduced opportunities for protests, **we are of the view that laws, and particularly laws that restrict fundamental rights and freedoms should not be made on the basis of speculation.**[16] Should anti-abortion protest become widespread and intrusive to such an extent that our current legal framework is unable to provide adequate protection, a legislative response should then be considered.

The British Parliament also considered this issue and concluded that implementing safe areas would not be an appropriate response. After an extensive review, the Home Office found that only a small percentage of their clinics had experienced anti-abortion protesting and their current legislation provided sufficient protection from harm. In his written Ministerial Statement Sajid Javid, Secretary of State for the Home Department said:[17]

> *In this country, it is a long-standing tradition that people are free to gather together and to demonstrate their views. This is something to be rightly proud of. However, it is vital that how views are demonstrated is carried out within the law, and never more so than on such an issue that can have such a personal impact on individuals. This Government is absolutely clear that no one should feel harassed or intimidated simply for exercising their legal right to pregnancy advice and abortion services, and I am adamant that where a crime is committed, the police have the powers to act so that people feel protected.*

The law exists to protect us from harm, however, introducing additional legislation to respond to crimes already addressed in our laws is superfluous and fails to meet the criteria of limiting a fundamental freedom. New Zealand should follow the example of Britain and determine whether the legislation would serve a sufficiently important purpose before proposing safe areas legislation.

2.b. The creation of safe areas is not a rational, reasonable, or proportionate response.

We consider the Bill's provisions in respect to **safe areas do not meet the second criterion of the justification test: that the limit be a rational, reasonable, and proportionate response to the objective.**

In clause 13C(2) the Bill states that the Minister of Health "may recommend the making of regulations [to prescribe a safe area] if the Minister is satisfied that prescribing a safe area is necessary to protect the safety and well-being, and respect the privacy and dignity, of persons accessing … [or] providing … abortion services."[18] This test for designating a safe area is incredibly broad and as a result many abortion providers could fit the criteria to make a safe area "necessary." Although the Minister is required to consider whether the need for a safe area is "demonstrably justified in a free and democratic society," we do not consider this to be a sufficient safeguard. Such a significant power to restrain freedoms should not be delegated, but rather, should remain in the hands of an elected Parliament. The risk is also increased due to the amendments introduced with the Abortion Legislation Bill and the removal of the requirement that abortion services only be provided at licenced premises, a wide range of public spaces could be captured by this prohibition, including family planning clinics, hospitals, GP clinics, schools, and so on.

Once a safe area has been created, clause 13A(3) of the Bill provides that any behaviour that "an ordinary reasonable person would know would cause emotional distress to a protected person" would be prohibited within the safe area.[19] The provision does not require that actual emotional distress is caused. Given the wide range of reasons for seeking abortion services, and the fraught emotional complexity often involved, it would be very difficult to formulate and apply a general legal test for what would cause emotional distress to a protected person who is seeking, or providing, abortion services.[20] **We are concerned that the threshold would accordingly be set very low, in practice creating a total restriction on freedom of expression within the safe area.**

In providing that prohibited behaviour includes "communicating with […] a person in a manner that […] would cause emotional distress to a protected person" the Bill's definition in clause 13A(3)(b) is so broad as to appear "to cover any speech or behaviour with a communicative element."[21] We agree with the Attorney-General's assessment that the "creation of the proposed offence is likely to have a chilling effect on all forms of communication within a safe area," and 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."[22]

Crown Law and the Attorney-General again speculate that the Courts are "likely" to maintain a distinction between criminalised harm and "mere annoyance or irritation."[23] **If this is the desired policy intent, the distinction between the two behaviours should be expressly legislated.** As noted by Crown Law, "the proposed offence goes to the heart of the classic justification for freedom of expression, the 'marketplace of ideas;' that is, the public airing of controversial views, which may be distasteful to some, in a way that gives pause or discomfort to the audience and causes them to evaluate whether that view is correct."[24] A sweeping prohibition cannot reasonably be seen to be a justified limitation on this freedom.

3. FURTHER ISSUES

In addition to failing the Bill of Rights Act test for a justifiable limitation on the right to freedom of expression, the Bill contains further flaws.

First, while clause 13C of the Bill allows for safe areas to be prescribed on a case-by-case basis, **the Bill does not outline how a safe area will be physically identified.**[25] This creates uncertainty for people who wish to exercise their right to freedom of expression as to whether, and if so, precisely where, a safe area applies. For the law to be justly enforced it is essential that the New Zealand public have access to the information regarding the fullness of what that law entails and where it does and does not take effect.

Second, while the Bill purports to only criminalise prohibited behaviour toward a group of protected people, in practice its restrictions to freedom of expression will apply to all people in the safe area. Clause 13A(3) states that a protected person is in a safe area for a particular purpose.[26] In many cases, however, the purpose for which a person is in a safe area will be known only to them—particularly with the wide range of public spaces that could be captured. **The Bill does not make clear how a suspected offender could know the private and confidential purpose for which the potential victim is in the safe area and therefore if that person is protected.** We are concerned that this allows for uncertainty about whether a crime has been committed and could result in broad interpretation and application of the law.

4. RECOMMENDATIONS

The introduction of safe areas limits the fundamental right to freedom of expression for every New Zealander. While this right is subject to reasonable limitations, the proposed legislation fails on two primary counts. First, it does not serve a sufficiently important purpose because current legislation is suitable for responding to disorderly or offensive behaviour, intimidation or obstructing a public way.[27] Rather than relying on speculation we should follow the British example and, prior to legislative change, conduct "an in-depth assessment to understand the scale and nature of the protests and to establish if more needs to be done to protect those requiring an abortion."[28] Second, the proposed legislation also fails to deliver a rational, reasonable, or proportionate response because it is broad in its test for designating safe areas, sets a low threshold in its definition of prohibited behaviour which in practice is likely to result in a complete restriction of freedom of expression, and fails to distinguish between behaviour that is criminal or simply an annoyance, inappropriately leaving this important consideration to the courts. **The Committee, therefore, should not recommend this Bill to the House.**

If the Bill is to be passed into law, however, we recommend that our specific and significant concerns should be addressed as follows:

a. **Make the test for designating a safe area more specific, such that a safe area must be deemed necessary to achieve certain specified outcomes rather than relying on very broad concepts such as "dignity" and "well-being," which are open to interpretation. This will also assist the Director-General in conducting the efficacy of the safe area during their mandatory reviews outlined in clause 13C(3);**

b. **Provide a clearer definition of what causing emotional distress as recognised by "an ordinary reasonable person" entails;**

c. **Remove clause 13A(3)(b)–that prohibited behaviour includes "communicating with" protected persons–or alternatively, strengthen this clause to include *"with the intention of frustrating the purpose for which the protected person is in the safe area"*;**

d. **Clarify the distinction between mere annoyance or irritation and criminalised harm, so that this is explicit for the courts; and**

e. **Require information regarding where safe areas exist to be publicly available and regularly updated to remove uncertainty.**

While these recommendations are intended to improve the drafting of the Bill, they do not resolve our overarching concerns with limiting New Zealanders' freedom of expression. This freedom is fundamental to the functioning of our democracy and should only be limited when in cases that are "demonstrably justifiable." The Contraception, Sterilisation and Abortion (Safe Areas) Amendment Bill fails to meet the required criteria, and therefore we submit that it should not become law.

5. ENDNOTES

1 Maxim Institute, *Submission to the Abortion Legislation Select Committee: The Abortion Legislation Bill,* (2019), available at: www.maxim.org.nz/article/abortion-legislation-submission/, accessed 13 April 2021.

2 Bill of Rights Act 1990, s.14: "Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form."

3 *Brooker v Police* [2007] NZSC 30 at [114].

4 *Brooker v Police* [2007] NZSC 30 at [116].

5 New Zealand Bill of Rights Act 1990, s.5.

6 *R v Oakes* [1986] 1 SCR 103; adopted in New Zealand by *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 (SC).

7 Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020, Explanatory Note.

8 New Zealand Law Commission, *Alternative Approaches to Abortion Law, Ministerial Briefing Paper,* (2018) at 12.12.

9 New Zealand Law Commission, *Alternative Approaches to Abortion Law, Ministerial Briefing Paper,* (2018) at 12.14.

10 Legislation Design and Advisory Committee Legislation Guidelines (March 2018) at 116.

11 Summary Offences Act 1981, ss. 3, 4, 21 & 22.

12 Crown Law letter to the Attorney-General reporting on the Abortion Legislation Bill's consistency with the Bill of Rights Act, 1 August 2019, at 38.1.

13 New Zealand Law Commission, *Alternative Approaches to Abortion Law, Ministerial Briefing Paper,* (2018) at 2.38.

14 New Zealand Law Commission, *Alternative Approaches to Abortion Law, Ministerial Briefing Paper,* (2018) at 12.13.

15 Regulatory Impact Statement, "Abortion Law Reform," at 3.6.

16 The Bill provides for Safe Areas to be created but "there is no New Zealand data available on the impact on women accessing abortion services of the behaviour around these services of anti-abortion groups or individuals. The information relied upon in the analysis was that gathered by the Law Commission." See Regulatory Impact Statement, "Abortion Law Reform," at 5.

17 UK Parliament, "Outcome of the Abortion Clinic Protest Review: Written statement HLWS927,", www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2018-09-13/HLWS927/, accessed 13 April 2021.

18 The assessment of need involves very broad grounds including the safety, wellbeing, privacy, and dignity of the person. See Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2019, cl.13C(2).

19 Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2019, cl.13A(3).

20 Given the vastly different experiences of women accessing an abortion, it is difficult to determine the interpretation that will be given to the concept of an "ordinary reasonable person."

21 *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill,* (2021) at [16].

22 *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill,* (2021) at [17] and [22].

23 Crown Law letter to the Attorney-General reporting on the Bill's consistency with the Bill of Rights Act, 1 August 2019, at 41; and *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill,* (2021) at [16].

24 Crown Law letter to the Attorney-General reporting on the Bill's consistency with the Bill of Rights Act, 1 August 2019, at 32.

25 Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2019, cl.13C.

26 Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2019, cl.13A(3).

27 Summary Offences Act 1981, ss. 3, 4, 21 & 22.

28 UK Parliament, "Outcome of the Abortion Clinic Protest Review: Written statement HLWS927,", www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2018-09-13/HLWS927/, accessed 13 April 2021.