



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Abortion Legislation Bill

20/09/2019

Submission on the Abortion Legislation Bill

Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Abortion Legislation Bill (the Bill).
2. The Law Society recognises that the Bill is a significant piece of social legislation with a moral dimension. Contrasting opinions are held by members of the legal profession, just as they are by members of the public and politicians. For that reason:
 - a. this submission is confined to addressing matters of legal principle and legislative drafting; and
 - b. the purpose of the submission is to ensure the practical workability of the legislation, improve the coherence of the Bill given the broad policy it seeks to accomplish, and achieve consistency with constitutional principles and the New Zealand Bill of Rights Act 1990.
3. The Law Society's submission focuses on the following aspects of the Bill:
 - a. technical drafting matters;
 - b. definitions;
 - c. the availability of counselling;
 - d. the safe area regime;
 - e. the conscientious objection provisions; and
 - f. the duties of the Director-General of Health (privacy considerations).
4. The Law Society does not seek to be heard in relation to the submission but is happy to present orally if that would assist the select committee.

Technical drafting matters

5. Part 1 of the Bill amends the Contraception, Sterilisation, and Abortion Act 1977 (the principal Act). The first amendment is to repeal the Long Title of the principal Act. The Long Title explains the general purpose of the principal Act. Without the long title, no other provision describes the general purpose of the principal Act. It would be helpful to include a purpose provision, as indicated in the explanatory note to the Bill (the decriminalisation of abortion and alignment with the regulation of other health services).

Recommendation

- Repeal the Long Title and insert a new section 2A to the principal Act providing for the purpose of the principal Act. (Proposed sections 2A and 2B (inserted by clause 6 of the Bill) should be renumbered 2B and 2C respectively.)
6. Clauses 7 and 12 of the Bill "replace" a number of sections of the principal Act and Crimes Act 1961 respectively with a different number of sections. For example, clause 12 seeks to replace sections 182A to 187A of the Crimes Act 1961 (five sections) with a single new section 183. For clarity, it is suggested that clauses 7 and 12 should "*repeal and replace*" the relevant sections with the proposed new sections.

Recommendation

- Insert “Repeal and” before “replace” in clauses 7 and 12.

Definitions

New interpretation section (clause 5): “qualified health practitioner”

7. Clause 5 of the Bill replaces section 2 of the principal Act (Interpretation) with a new set of defined terms.
8. The Law Society has concerns about the proposed definition of “qualified health practitioner”. As presently drafted, the definition is:

qualified health practitioner, in relation to the provision of abortion services, means a health practitioner who is acting in accordance with the Health Practitioners Competence Assurance Act 2003.

9. The definition is not clear:
 - a. The relative clause (“in relation to the provision of abortion services”) appears to suggest that the term **qualified health practitioner** has two meanings: one related to abortion services, and one not related to abortion services. However, the phrase “qualified health practitioner” does not otherwise appear in the principal Act or the Health Practitioners Competence Assurance Act 2003 (HPCAA), so either the relative clause is unnecessary or its placement within the main clause obscures its meaning.
 - b. There is also an issue with the phrase “who is acting in accordance with”. The effect is that a health practitioner who inadvertently does not comply with a provision in the HPCAA is not a qualified health practitioner for the purposes of providing abortion services. If this is intentional, it should be more directly stated.
10. As such, a preferable definition is:

qualified health practitioner means a health practitioner who is registered under the Health Practitioners Competence Assurance Act 2003 and whose scope of practice includes provision of abortion services.

Recommendation

- Consider the purpose of the definition in the context of the Bill and amend the definition of qualified health practitioner.

Amendment to the Health and Disability Commissioner Act 1994: “health services”

11. Clause 16 of the Bill replaces paragraphs (b)(ii) to (iv) of the definition of “health services” in the Health and Disability Commissioner Act 1994 with a new definition:

(ii) *reproductive health services, including—*

(A) *contraception services and advice:*

(B) *fertility services:*

(C) *sterilisation services:*

(D) *abortion services*

12. The Law Society considers that the term "abortion services" in sub-paragraph (D) should be extended to include "abortion services *and advice*", so as to be consistent with the phrase

used in relation to contraception at (A). This is particularly given the proposed definition of "abortion services" in clause 5 of the Bill, which restricts "abortion services" to "services provided to facilitate an abortion".

Recommendation

- Amend proposed new subparagraph (D) to read "abortion services and advice".

Counselling

13. In clause 7 of the Bill, new section 13(1) of the principal Act will provide that a health practitioner must advise a woman of the availability of counselling services in three situations. New subsection (2) provides that a qualified health practitioner may not require attendance at counselling as a condition of providing abortion services. Since new subsection (1) applies to health practitioners, so too should subsection (2).

Recommendation

- Delete "qualified" from new section 13(2).

Safe areas

14. In clause 7 of the Bill, new sections 15 – 17 of the principal Act will create a regime empowering the Minister of Health to designate "safe areas" around abortion facilities. Within safe areas certain activities would be prohibited, with criminal sanctions for those who act in breach of the prohibitions.
15. The creation of the safe area regime and the prohibitions associated with it are a policy matter for Parliament to address. The Law Society does note, however, the following matters on which the committee may wish to reflect:
 - a. The safe area regime criminalises behaviour which is lawful if it occurs outside the designated area. Usually where regimes like this are set up,¹ the regime will provide for a means by which the public can determine where behaviour is lawful and where it is not lawful. The Law Society recommends that the select committee consider whether some form of notification should be a requirement of the safe area scheme.
 - b. As currently drafted, new section 15 prohibits certain activities "in" the safe area. On a proper reading of the section, therefore, the only activities that are prohibited are activities which occur inside the confines of the safe area space. It is doubtful whether this would capture behaviour that would be just as undesirable, such as, for example, somebody outside the zone using a long lens camera to record activities taking place inside a safe area. That is because the actions of the photographer do not occur in a safe area. The committee may wish to consider whether this is a difficulty that should be addressed in the drafting.
16. New section 17 sets out criteria to be considered by the Minister in making regulations prescribing a safe area. The criteria are listed cumulatively. The committee may wish to consider whether the cumulative requirement sets the bar too high, particularly where new section 17(2)(b) would ensure that no safe area could be established in circumstances where it could not be demonstrably justified.

¹ For example, the designation of alcohol-free zones under section 147C of the Local Government Act 2002.

Recommendation

- Consider whether the policy issues discussed have been adequately addressed or whether changes should be made in light of these issues.

Conscientious objectors

Who may state a conscientious objection?

17. It is unclear whether the Bill intends to grant the right of conscientious objection only to health practitioners, or to any person associated with the provision of the regulated services.
18. As drafted, new section 19 would permit any “person” to state a conscientious objection to the provision of contraception, sterilisation or abortion services, or to the provision of information about termination. Drawn in this way, new section 19 continues the scope of present section 46 of the Contraception, Sterilisation, and Abortion Act 1977, which allows a “medical practitioner, nurse, or other person” to object on the grounds of conscience. It may apply to (for example) a receptionist at a doctor’s surgery or hospital, even if the health practitioners themselves have no such objection.
19. However, new section 19 would impose a significant burden on those frontline staff to provide the information mentioned in new section 19(2). That would be novel: the current obligation to provide information about alternative providers only applies to a “health practitioner”.²
20. It may be that the underlying intention of the Bill is to allow conscientious objections only by a “practitioner”, as implied by the explanatory note.³ If that is the case, then “person (A)” in new section 19(1) should be amended to make that clear, perhaps to “health practitioner or nurse (A)”. However, that would have the effect of removing the current right of frontline staff to object to providing assistance with respect to those services.

Recommendation

- This aspect of the Bill requires careful consideration given the rights and obligations that flow from it.

Content of conscientious objection

21. New section 19(2) would require a person with a conscientious objection to tell a patient that they have a conscientious objection. That would go further than present law: currently, a practitioner is only required to tell a patient that they “can obtain the service from another health practitioner or from a family planning clinic”.⁴ The practitioner is not currently required to give a reason for the objection.
22. Two issues arise. First, as drafted, new section 19(2) requires person A to tell person B that they object on the grounds of conscience. It may be thought that this is unnecessarily confrontational. Person B may be particularly vulnerable, and the nature of the interaction may discourage them from seeking the service elsewhere. Second, person A ought to have the choice of how they go about advising person B how to access the list of service providers. A

² Health Practitioners Competence Assurance Act 2003, s 174.

³ Explanatory note to the Bill, p3.

⁴ Health Practitioners Competence Assurance Act 2003, s 174(2).

person may simply wish to say “I do not provide that service”, but as drafted this would not be sufficient.

Recommendation

- In new section 19(2), replace “A must tell B of their conscientious objection at the earliest opportunity” with “A must, at the earliest opportunity, tell B that A does not provide that service”.

“At the earliest opportunity”

23. New section 19(2) provides that a conscientious objection must be notified to a patient “at the earliest opportunity”. That obligation arises only once person A has been requested by person B to provide the regulated services.
24. If the intent is to provide for notification of conscientious objections at the earliest opportunity, the committee may wish to consider whether health practitioners ought to proactively state any conscientious objection in a publicly accessible way rather than waiting for an in-person consultation. That could be achieved by stating an objection on a practitioner’s website or on a register maintained by the Director-General of Health, similar to the register to be maintained under new section 18(c). The reason for the unavailability of services need not be given: the website or register could simply state that abortion services are not available at that location.

No need to provide information where person seeks to continue a pregnancy

25. New section 19 would provide that a person must be given information about how to access the list of abortion service providers (section 19(2)(b)) even if that person is seeking information about how to continue their pregnancy (section 19(1)(d)). This is unnecessary.

Recommendation

- In new section 19(1)(d), delete the words “continuing or”.

Applicability to locums

26. New section 20 intends to protect employees and applicants for employment from adverse treatment by reason of their conscientious objection. In this respect, it is similar to section 22 of the Human Rights Act 1993.
27. There is no definition of “employee” in the Bill and, as drafted, new section 20 would appear to apply only to those in a traditional employer/employee relationship. It might not extend to locums (who are typically contractors or employed by a contracting agency) or volunteer practitioners (for example, people who provide services through charitable organisations on an unpaid basis). The Bill should be amended to include people in those situations: the definition of “employer” in the Human Rights Act provides a useful starting point.

Recommendation

- Amend the definition of “employer” to read:
employer includes—
 - (a) the employer of an independent contractor; and
 - (b) the person for whom work is done by contract workers under a contract between that person and the person who supplies those contract workers; and

- (c) the person for whom work is done by an unpaid worker; and
- (d) any person acting or purporting to act on behalf of an employer.

Reasonable accommodation

28. New section 20(1) mirrors section 22 of the Human Rights Act, which provides that employees or applicants for employment must not be disadvantaged by reason of a prohibited ground of discrimination (such as age, sex or disability).
29. New section 20(2) provides an important qualification, namely that of “reasonable accommodation”: an employer must accommodate a conscientious objection only to the point of unreasonable disruption to their activities or business. Similar concepts are seen in sections 28(3) and 29 of the Human Rights Act, which provide for accommodation of a person’s religious practices or disability.
30. Two issues arise:
 - a. The threshold for establishing an “unreasonable disruption” in the Bill appears to be much lower than under the Human Rights Act, because an employer will avoid liability merely if they “consider” the objection will unreasonably disrupt their activities. That appears to be a subjective test. The test under sections 28 and 29 of the Human Rights Act is an objective test, requiring the employer to prove on the balance of probabilities that it cannot reasonably accommodate a person’s religious practice or disability. The explanatory note suggests the Bill is intended to reflect the latter.⁵
 - b. In the Human Rights Act, sections 28 and 29 are themselves subject to an important qualification that is absent from this Bill: employers may not rely on those exceptions if their business could be adjusted so that another employee could carry out the particular duties in question (section 35).
31. As drafted, the Bill does not provide protection for people with a conscientious objection as strong as that which is available under the Human Rights Act. The Bill would allow an employer to treat a person with a conscientious objection unfavourably, without needing to prove that the person’s objection would in fact disrupt their business, and without any requirement to consider whether other staff could carry out that part of the affected person’s duties. The Law Society cannot see any reasonable justification for this.

Recommendations

- Amend new section 20(2) to read:

However, if an applicant’s or employee’s objection would unreasonably disrupt the employer’s activities, the employer may take any of the actions described in subsection (1).
- Insert new section 20(2A):

Notwithstanding subsection (2), no employer may take any of the actions described in subsection (1) if the employer’s activities may be adjusted (not being an adjustment involving unreasonable disruption to those activities) so that some

⁵ Explanatory note, p 3: “Those who have a conscientious objection must be accommodate by an employer as long as it would not unreasonably disrupt the employer’s ability to provide abortion services.”

other employee could carry out the duties affected by the applicant's or employee's objection.

Application forms

32. The Human Rights Act contains an important prohibition on discrimination in pre-employment scenarios:

23 Particulars of applicants for employment

It shall be unlawful for any person to use or circulate any form of application for employment or to make any inquiry of or about any applicant for employment which indicates, or could reasonably be understood as indicating, an intention to commit a breach of section 22.

33. This protection is desirable because it can be difficult to prove an actual breach of section 22 of the Human Rights Act (discrimination in employment or pre-employment). Section 23 assists to prevent discriminatory conduct from the outset by ensuring application forms or pre-employment inquiries do not unnecessarily disadvantage some applicants. It does not prevent, for example, an employer asking applicants to disclose a disability that needs to be accommodated in the workplace: the purpose of the inquiry then becomes one of accommodation, rather than barring entry to the workplace altogether.
34. There is no equivalent protection in the Bill, which means that some applicants with a conscientious objection may be more readily screened out at the pre-employment stage. The advice from the Crown Law Office to the Attorney-General assumes this is a deliberate omission and is consistent with the Bill's intent to facilitate access to abortions for women seeking them.⁶
35. The omission of an equivalent protection seems incongruous and is not adequately explained. It would mean that people with a conscientious objection based on a prohibited ground of discrimination under the Human Rights Act (such as religious or political belief) will likely enjoy the protection of section 23 of that Act, but an objection based on another ground will not. This invites uncertainty and a disparity of treatment between people with conscientious objections.

Recommendation

- Include, as a new subsection in section 20:
(1A) It shall be unlawful for any person to use or circulate any form of application for employment or to make any inquiry of or about any applicant for employment which indicates, or could reasonably be understood as indicating, an intention to commit a breach of subsection (1).

Duties of the Director-General of Health (privacy considerations)

36. Clause 7 introduces new section 18, which sets out the duties of the Director-General of Health.

⁶ Advice from Crown Law Office to Attorney-General regarding the Abortion Legislation Bill, 1 August 2019.

37. New section 18(a) requires the Director-General to “collect, collate, analyse and publish information about abortion ... and counselling services ...”. The Law Society recommends that any published information should be aggregated in a way that does not identify individuals.
38. New section 18(c) requires the Director-General to “make and maintain a list of abortion service providers”. While the term “abortion provider” is defined at new section 2 by reference to the individual practitioner, there is no definition of “abortion service provider”, so it is unclear whether this term is intended to refer to the individual practitioner or the business through which they provide abortion services.
39. Since listing the name of the abortion provider would give rise to privacy considerations, and potentially safety risks, we consider that it is preferable to list the name of the business practice rather than the individual’s own name, particularly since new section 19(2)(b) suggests that the list will be publicly available.
40. In the event that it is considered necessary to list each abortion service provider’s individual name, then consideration should be given to establishing a mechanism whereby that abortion service provider can apply to have their name removed from the list for safety or other privacy related reasons.
41. The Law Society also recommends that new section 18 is amended to explicitly state that the list will be publicly available, rather than relying on the implication in new section 19(2)(b).

Recommendations

- Amend new section 18(a) to provide for the aggregation (anonymisation) of published information;
- Consider amendments to new section 18(c) to address the privacy and safety issues discussed at paragraph 41 – 42 above, in relation to abortion service providers; and
- Amend new section 18 to make clear that the list of abortion service providers will be made publicly available.



Tiana Epati
President

20 September 2019