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# Contraception, Sterilisation and Abortion (Safe Areas) Amendment Bill

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*28/04/2021*

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

### 1. Introduction

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to make a submission on the Contraception, Sterilisation and Abortion (Safe Areas) Amendment Bill (**Bill**), a member's bill in the name of Louisa Wall.
- 1.2 The Bill amends the Contraception, Sterilisation and Abortion Act 1977 (**Act**) to provide a regulation-making power to set up safe areas around specific abortion facilities on a case-by-case basis. The Bill does not create the safe area.
- 1.3 The Law Society seeks to be heard.

### 2. Executive Summary

- 2.1 The policy underpinning the Bill is that there be a regulation-making power to set up safe areas. This submission is confined to matters of legal principle and drafting issues that arise in the proposed definition of "prohibited behaviour" (in safe areas), as set out in proposed section 13A(3).
- 2.2 The Law Society agrees with the Attorney-General's conclusion that proposed section 13A(3)(b) is inconsistent with the right to freedom of expression in the New Zealand Bill of Rights 1990 (**Bill of Rights**) insofar as it criminalises "communicating" in a manner that is objectively emotionally distressing.<sup>1</sup> The Attorney-General has suggested a possible change to achieve consistency with the Bill of Rights by deleting paragraph (b) of section 13A(3) and re-designing paragraph (a). The Law Society broadly agrees with this conclusion.
- 2.3 The Law Society's submission expands on the Attorney-General's conclusion by highlighting further difficulties with paragraph (a) of the proposed definition. It recommends the definition of "prohibited behaviour" is re-considered in its entirety. Like the Attorney-General, the Law Society sees substantial merit in clearly setting out the types of behaviours that are intended to be prohibited in safe zones. That is the approach taken by some Canadian provinces and Australian states (discussed further below). This would have the advantage of clearly signalling the type of behaviour that the Bill seeks to prohibit, rather than relying (as the Bill currently does) on the very broad concepts of "intimidating, interfering with, or obstructing" protected persons, and "communicating with" them, in a manner that causes "emotional distress". More specific prohibitions might, for example, include such things as protests, signs or banners, and "counselling" (being attempts to advise or persuade a person to refrain from making use of abortion services), and so on.

### 3. Background

- 3.1 The Abortion Legislation Bill, as first introduced, provided a similar regulation-making power to set up safe areas around specific abortion facilities, on a case-by-case basis.<sup>2</sup> However, following consideration of several Supplementary Order Papers at the Committee of the Whole House, including SOP 504, the substantive clauses making up the proposal were

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<sup>1</sup> 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.

<sup>2</sup> The Law Society made a submission on the Bill as first introduced: New Zealand Law Society submission on the Abortion Legislation Bill, 20 September 2019, available here: <https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/0010-139672-Abortion-Legislation-Bill-20-9-19.pdf>.

removed (even though the definition of “safe areas” was retained). The current Bill seeks to rectify that situation, which was the result of error in the voting procedures.

- 3.2 The safe area proposal in the Bill replicates, with some amendments, the scheme in the Abortion Legislation Bill as reported back to the House by the Abortion Legislation Committee.<sup>3</sup>
- 3.3 The (rather different) safe area proposal carried at the first reading of the Abortion Legislation Bill had been vetted and found to be consistent with the Bill of Rights, in that the limits on freedom of expression created by declaration of a safe area were capable of justification.<sup>4</sup> The version of the safe area proposal reported to the House by the Abortion Legislation Committee was not, however, subject to scrutiny under section 7 of the Bill of Rights.
- 3.4 Likewise, the Law Society (and other submitters) did not have the opportunity to comment on the amended safe areas proposal as reported back by the Abortion Legislation Committee.

#### **4. Definition of Prohibited Behaviour in the current Bill**

- 4.1 Proposed section 13A(3) is set out for convenience:

(3) In this section,—

**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.

**protected person** means a person who is in a safe area for the purpose of—

- (a) accessing abortion services; or
- (b) providing, or assisting with providing, abortion services; or
- (c) seeking advice or information about abortion services; or
- (d) providing, or assisting with providing, advice or information about abortion services.

- 4.2 A person who engages in prohibited behaviour commits an offence and is liable on conviction to a fine not exceeding \$1,000.

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<sup>3</sup> Abortion Legislation Committee, Report on the Abortion Legislation Bill, 14 February 2020.

<sup>4</sup> 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>).

- 4.3 The critical difference between the original ‘safe areas’ proposal in the Abortion Legislation Bill and the proposal set out in this Bill is the re-drafted definition of “prohibited behaviour” in proposed new section 13A(3).
- 4.4 As set out in the Attorney-General’s section 7 report, the Bill substantively changes the definition of “prohibited behaviour” in two key ways:<sup>5</sup>
- (a) The prohibited behaviour of intimidating, interfering with or obstructing, 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 cause emotional distress to a protected person (as judged by an “ordinary reasonable person”).
  - (b) The prohibited behaviour of “communicating with, or visually recording” a protected person would no longer require any intention to cause emotional distress (as in the original Bill). Instead, the offence would be complete if the behaviour is objectively distressing to a protected person accessing or providing abortion services.

***Intimidation, interference with, or obstruction – proposed section 13A(3)(a)***

- 4.5 Under proposed new section 13A(3)(a), behaviour amounting to intimidation, interference or obstruction will constitute an offence if it is *either* “with the intention of preventing access or provision of abortion services” (section 13A(3)(a)(i)) **or** done in a manner that an “ordinary reasonable person would know would cause emotional distress to a protected person” (section 13A(3)(a)(ii)).
- 4.6 The Law Society assumes the “**or**” is intended, on the basis that conduct rising to the level of “intimidating, interfering with, or obstruction” and intended to frustrate the purpose for which a protected person is in the safe area (subparagraph (i)), is to be prohibited conduct *regardless* of whether it would amount to emotional distress defined in subparagraph (ii).
- 4.7 If the behaviour would cause emotional distress, by dint of the test in subparagraph (ii), then that paragraph would apply as well, but is redundant. The key question will have been whether there was intimidation, interference or obstruction with the required intention of frustrating protected persons’ access to services.
- 4.8 Although it is not clear from the explanatory materials, the aim of new subparagraph (ii) *may* have been to clarify what counts as behaviour that is “intimidating, interfering with, or obstructing” – to provide that these terms are extended to include conduct that achieves its effect through the infliction of emotional distress on a person. Without paragraph (a)(ii), it may have been thought the courts would most likely adopt a higher threshold for “intimidation, interference with, or obstruction”. Mere causing of emotional distress would probably not be enough.
- 4.9 If that was the aim, however, paragraph (a)(ii) is clumsily expressed.
- 4.10 First, it is clumsy because paragraph (a)(ii) is presented as an *alternative* offence to intimidation, interference with, or obstruction “with the intention of frustrating the purpose for which the protected person is in the safe area”. It suggests that the intention in subparagraph (i) is not needed when subparagraph (ii) operates. But the intention in subparagraph (i) must always be an element of the offence. If intimidation of protected

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<sup>5</sup> Above n 1, at [9].

persons is done for reasons not related to frustrating the purpose of entering safe areas, it is a different type of offence altogether.

- 4.11 Secondly, paragraph (a) would need to be redesigned to make it clear that what is really being sought is an extension to the *definition* of “intimidating, interfering with, or obstructing”. In other words that, as well as *actual* ‘intimidating, interfering with and obstruction’ being unlawful, so too is “communicating” with protected persons in a manner that causes the defined level of emotional distress.
- 4.12 Paragraph (a)(ii) is therefore either *unnecessary* (because intimidation, interference with, or obstruction ought to be prohibited without regard to emotional distress, as the original Bill provided) or *incoherent* (because subparagraph (ii) is made an alternative to subparagraph (i), but (i) ought always to be an element of the offence of intimidation, interfering with, or obstructing). In addition, subparagraph (ii) does not achieve the aim of extending the definition of “intimidating, interfering with, or obstructing” by lowering the threshold at which they apply, since those words would bear their ordinary meaning and are not obviously extended by subparagraph (ii).
- 4.13 On that basis, the Law Society considers that paragraph (a)(i) is sufficient on its own. The offence would become the intentional intimidation, interference with or obstruction of persons in safe zones seeking access to (or providing) abortions. (We agree there must also be an intention to frustrate the purpose for which a protected person is in the safe area.) Whether the manner in which this was done caused emotional distress need not arise.
- 4.14 If this were the case, the definition of prohibited behaviour would broadly replicate the wording in the original Bill (see clause 15(3)(a)). That simply required intimidation, interference with, or obstruction of a protected person with the intention that, or being reckless as to whether, a person is prevented from accessing abortion services. There was no mention of “emotional distress” in this element of the definition (although there was in the prohibition of “communications” in clause 15(3)(b) which is substantially the same as the now proposed section 13A(3)(b)).
- 4.15 Crown Law’s advice on clause 15(3)(a) of the original Bill, with which the Law Society agrees, helpfully concluded:<sup>6</sup>
- “We are satisfied that a power to declare a safe area prohibiting such conduct, where that conduct is specifically intended to prevent abortion services from being lawfully sought or delivered, is a proper limitation on the freedoms of expression and assembly in ss 14 and 16 of the Bill of Rights Act.”
- 4.16 If the aim is to prohibit *more* behaviour than that which intimidates, interferes with, or obstructs, by extending the prohibition to conduct causing emotional distress, then another way needs to be found to accomplish this. As it stands, proposed section 13A(3)(b) (which we discuss in more detail below), covers “communicating with” protected persons (rather than intimidating, interference with, or obstruction) in a manner that objectively causes emotional distress. So the extension of the prohibition beyond intimidating for example was, it seems, to be accomplished by paragraph (b). We discuss difficulties with paragraph (b) below.

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<sup>6</sup> Above n 3, at [31].

### **Communication – proposed section 13A(3)(b)**

- 4.17 Proposed section 13A(3)(b) prohibits behaviour that is “communicating with, or visually recording, a person in a manner that an ordinary reasonable person would know would cause emotional distress to the protected person”. Subparagraph (b) appears designed to apply to the use of words falling *short* of actual intimidation, interference or obstruction (for it is otherwise redundant).
- 4.18 The Attorney-General has concluded that this part of the definition of prohibited behaviour is overly broad and not a justifiable limitation on the right to freedom of expression in section 14 of the Bill of Rights. This is because it criminalises “emotionally distressing” communication in settings that go beyond the accepted rationale of the provision (which is to protect the safety, wellbeing, privacy and dignity of protected persons).<sup>7</sup> It is likely to lead to a broader range of communication being criminalised than is necessary. The Law Society agrees with this conclusion.
- 4.19 The Attorney-General goes on to suggest that paragraph (b) be deleted, and that instead there should be an extended definition of “intimidation” in paragraph (a) that attempts to describe the types of behaviours engaged in by abortion protestors and which are to be prohibited. That is, protests, signs and footpath counselling and the like. We note this suggestion goes some way toward rectifying the problems the Law Society identified in relation to paragraph (a) outlined above.
- 4.20 The Law Society considers the Attorney-General’s proposal has considerable merit and can be taken one step further. Specifically describing the prohibited conduct could remove the need to introduce the concept of “emotional distress” into the Bill altogether. Rather, certain actions and behaviours such as “signs and placards” and “footpath counselling” would be specifically proscribed. Labelling these things as “intimidation”, as the Attorney-General suggests, might go too far, but intimidation in paragraph (a) could be reserved as a back stop for otherwise unregulated behaviour that rises to that level.
- 4.21 In short, if there exists an objective threshold of emotional distress that a reasonable person would ascribe to a protected person who is confronted by abortion protests (and this is the premise of the Bill), the Law Society suggests it is better to translate that objective standard into a set of more precise prohibitions that Parliament agrees have that impact.
- 4.22 This is the approach taken in the British Columbia legislation,<sup>8</sup> which was at issue in *R v Spratt* (2008) 235 CCC (3d) 521. In the relevant legislation there is no reference to emotional distress as such but there is reference to a list of things that must not be done in an “access zone”. These include “sidewalk interference” defined (in part) to mean “advising or persuading, or attempting to advise or persuade, a person from making use of abortion services”.<sup>9</sup>
- 4.23 The Australian states of New South Wales and Victoria also have safe access legislation that is closer to the model in proposed section 13A(3) (because it deploys the term “distress” as well as “anxiety”).<sup>10</sup> But it is more straightforward and does not contain the same drafting

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<sup>7</sup> Above n 1, at [16]-[18].

<sup>8</sup> Access to Abortion Services Act, RSCB 1996, c 1. The British Columbia legislation, as set out in the *Spratt* case mentioned above, is appended as an example along with similar enactments from Alberta and Ontario.

<sup>9</sup> *Ibid.*

<sup>10</sup> See Public Health Act 2010, Part 6A (New South Wales) and Public Health and Wellbeing Amendment

difficulties as this Bill. They make it clear that the causing of distress must be “reasonably likely” before an offence is committed through communications, but do not seek to ‘bundle’ distress into the concept of “intimidating, interfering with, or obstructing” as proposed section 13A(3)(ii) does in the New Zealand Bill. For example, the relevant Victorian provision reads:<sup>11</sup>

"prohibited behaviour" means—

- (a) in relation to a person accessing, attempting to access, or leaving premises at which abortions are provided, besetting, harassing, intimidating, interfering with, threatening, hindering, obstructing or impeding that person by any means; or
- (b) subject to subsection (2), communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety; or
- (c) interfering with or impeding a footpath, road or vehicle, without reasonable excuse, in relation to premises at which abortions are provided; or
- (d) intentionally recording by any means, without reasonable excuse, another person accessing, attempting to access, or leaving premises at which abortions are provided, without that other person's consent; or
- (e) any other prescribed behaviour

#### **Recommendation**

- 4.24 For these reasons, the Law Society considers that the approach to defining prohibited behaviour in proposed new section 13A(3) needs to be reconsidered and revised along the lines suggested above.
- 4.25 Ideally, any changes to the proposed definition would be made available for public submissions but in any event ought to be subject to a new Bill of Rights vetting process by the Attorney-General.



Frazer Barton  
**NZLS Vice President**

28 April 2021

#### **Appendix 1:** Relevant excerpts from British Columbia, Alberta and Ontario legislation.

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<sup>11</sup> (Safe Access Zones) Act 2015, Part 9A (Victoria).  
Public Health and Wellbeing Amendment (Safe Access Zones) Act 2015, part 9A, section 185B.

## Appendix 1

### A. British Columbia – Access to Abortion Services Act, RSCB 1996 – sections 1 and 2

#### *Definitions*

1. In this Act

... "sidewalk interference" means:

- (a) advising or persuading, or attempting to advise or persuade, a person to refrain from making use of abortion services, or
- (b) informing or attempting to inform a person concerning issues related to abortion services

by any means, including, without limitation, graphic, verbal or written means.

#### *Activities restricted in an access zone*

(1) While in an access zone, a person must not do any of the following:

- (a) engage in sidewalk interference;
- (b) protest;
- (c) beset;
- (d) physically interfere with or attempt to interfere with a service provider, a doctor who provides abortion services or a patient;
- (e) intimidate or attempt to intimidate a service provider, a doctor who provides abortion services or a patient.

(2) Despite this section a provincial constable or municipal constable, as defined in section 1 of the Police Act, may, in an access zone, carry out their duties as a provincial constable or municipal constable.

(3) In a prosecution under subsection (1) (a), it is a defence if the defendant establishes that they were acting as

- (a) a service provider,
- (b) a doctor who provides abortion services, or
- (c) a patient.

### B. Alberta - Protecting Choice for Women Accessing Health Care Act – sections 1 and 2

#### *Definitions*

1. In this Act

... "interference" means an act of

- (i) advising or persuading, or attempting to advise or persuade, another person to refrain from accessing abortion services,
- (ii) advising or persuading, or attempting to advise or persuade, a physician who provides abortion services or a service provider to refrain from providing, or facilitating the provision of, abortion services, or



- (iii) informing or attempting to inform another person concerning issues related to abortion services, by any means, including graphic, verbal or written means or the use or display of models or representations;

**Activities restricted in access zone:**

- (1) Subject to subsections (2) and (3), a person shall not do any of the following while in an access zone:
  - (a) engage in interference;
  - (b) engage in protest;
  - (c) continuously or repeatedly observe
    - (i) a patient, a physician who provides abortion services or a service provider,
    - (ii) a residence of a physician who provides abortion services or of a service provider, or
    - (iii) a building in which abortion services are provided or facilitated;
  - (d) request that
    - (i) a patient refrain from accessing abortion services, or
    - (ii) a physician or a service provider refrain from providing, facilitating the provision of, abortion services,as the case may be;
  - (e) physically impede or attempt to impede the passage of a patient, a physician who provides abortion services or a service provider;
  - (f) intimidate or attempt to intimidate a patient, a physician who provides abortion services or a service provider.

**C. Ontario – Safe Access to Abortion Services Act 2017 – section 3**

**Prohibitions in access zones for clinics or facilities**

- (1) While in an access zone established under section 6 for a clinic or facility, no person shall,
  - (a) advise or persuade, or attempt to advise or persuade, a person to refrain from accessing abortion services;
  - (b) inform or attempt to inform a person concerning issues related to abortion services, by any means, including oral, written or graphic means;
  - (c) perform or attempt to perform an act of disapproval concerning issues related to abortion services, by any means, including oral, written or graphic means;
  - (d) persistently request that,
    - (i) a person refrain from accessing abortion services, or
    - (ii) a protected service provider refrain from providing, or assisting in the provision of, abortion services;
  - (e) for the purpose of dissuading a person from accessing abortion services,
    - (i) continuously or repeatedly observe the clinic or facility or persons entering or leaving the clinic or facility,

- (ii) physically interfere with or attempt to physically interfere with the person,
  - (iii) intimidate or attempt to intimidate the person, or
  - (iv) photograph, film, videotape, sketch or in any other way graphically record the person;
- (f) for the purpose of dissuading a protected service provider from providing, or assisting in the provision of, abortion services,
- (i) continuously or repeatedly observe the clinic or facility or persons entering or leaving the clinic or facility,
  - (ii) physically interfere with or attempt to physically interfere with the provider,
  - (iii) intimidate or attempt to intimidate the provider, or
  - (iv) photograph, film, videotape, sketch or in any other way graphically record the provider; or
- (g) do anything prescribed for the purpose of this clause.