

3 April 2024

Hon Judith Collins KC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Pae Ora (Healthy Futures) (3 Day Postnatal Stay) Amendment Bill

Purpose

1. We have considered whether the Pae Ora (Healthy Futures) (3 Day Postnatal Stay) Amendment Bill (the Bill), a member's Bill in the name of Catherine Wedd MP, is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14, freedom of expression, and s 19, freedom from discrimination. Our analysis is set out below.

The Bill

3. The Bill amends the Pae Ora (Healthy Futures) Act 2022 (the principal Act). It increases the amount of publicly funded inpatient postnatal care¹ for mothers and newborns from 48 to 72 hours following birth and creates a requirement for lead maternity providers to inform women of this entitlement.

Consistency of the Bill with the Bill of Rights Act

Section 14 - Freedom of expression

4. Section 14 of the Bill of Rights Act affirms the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind and in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.²
5. Clause 5 of the Bill inserts s 93C into the principal Act, which requires that a lead maternity provider inform women of the entitlement to a minimum period of 72 hours of inpatient postnatal care. This requirement of providing information prima facie engages s 14 of the Bill of Rights Act.
6. A provision which limits a protected right or freedom may be consistent with the Bill of Rights Act if the limitation is reasonable and justifiable in a free and democratic society under s 5 of that Act. The s 5 inquiry may be approached as follows:

¹ Inpatient postnatal care is defined as meaning inpatient care provided to a woman and baby immediately after labour and birth for the purposes of post-birth recovery.

² See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

- a. Does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
- b. If so, then:
 - i. Is the limit rationally connected with the objective?
 - ii. Does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. Is the limit in due proportion to the importance of the objective?³

7. We consider that any limit on the freedom of expression contained within the Bill is justified under s 5 of the Bill of Rights Act because:

- a. people receiving healthcare in New Zealand have the legal right to appropriate information to enable them to make an informed decision.⁴ The objective of the new s 93C is to ensure the right to appropriate information is met. This is a sufficiently important objective to justify some limitation on s 14;
- b. the requirement on lead maternity providers to inform a woman that she is entitled to a minimum period of 72 hours of inpatient postnatal care is rationally connected to the objective of ensuring patients receive appropriate information to make an informed decision about their care after labour and the birth of their child; and
- c. the requirement limits s 14 no more than reasonably necessary and is in due proportion to the importance of the Bill's objective. Section 93C requires that the lead maternity provider give the information within the context of their occupation. This is consistent with their obligations as a medical professional. It can be reasonably expected that a medical professional advises a patient about their care entitlements so that the patient can make an informed decision. Further, we consider the information to be factual in nature and contains limited expressive value.

Section 19 - Freedom from discrimination on the basis of sex

- 8. Section 19(1) of the Bill of Rights Act affirms the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993, one of which is "sex". The term "sex" includes pregnancy and childbirth.
- 9. The Bill refers only to "women". To the extent that "sex" includes gender identity we have considered whether the Bill engages s 19. We have concluded that it does not. By taking an interpretation that is consistent with the Bill of Rights Act we consider "woman" should be read broadly to include those individuals who are able to give birth, but who may not identify or be identified as women (for example those who are intersex or transgender).

³ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

⁴ Right 6, Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996.

Conclusion

10. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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