

## **Abortion Legislation Bill – Consistency with the New Zealand Bill of Rights Act 1990**

### **Summary**

1. Due to the high degree of public scrutiny of the criteria for permitting access to abortion services, it is appropriate for me to set out my opinion on that aspect of this Bill. I have therefore considered proposed new sections 10 and 11 of the Contraception, Sterilisation and Abortion Act for consistency with the New Zealand Bill of Rights Act 1990.
2. I have concluded the gestational limit in new section 11 limits the right to freedom from discrimination in s 19 of the Bill of Rights Act. However, that limitation is justified under s 5. New section 11 is therefore consistent with the Bill of Rights Act.

### **The gestational limit**

3. Clause 7 of the Bill would insert new sections 10 and 11 into the CSA Act. New section 10 permits abortion services to be provided without any limitation or need for additional legal justification until the end of the 20th week of gestation.
4. New section 11 would create a gestational limit on unrestricted access to abortion services. It provides that after the 20th week of gestation, an abortion may only be provided if a qualified health practitioner concludes it is appropriate in the circumstances, with regard to the woman's physical health, mental health, and well-being.

### **New section 11 limits the right to freedom from discrimination**

5. To infringe the right to freedom from discrimination in s 19 of the Bill of Rights Act, a distinction must be drawn on the basis of a protected characteristic and constitute a material disadvantage to the affected members of that group. I have concluded new section 11 gestational limit impairs the s 19 right. That is because it constitutes disadvantageous differential treatment on the basis of a protected characteristic, in this case pregnancy.

### *Differential treatment*

6. One of the grounds of discrimination prohibited by s 21 of the Human Rights Act is "sex, which includes pregnancy and childbirth".<sup>1</sup> A distinction drawn by reference to the length of a pregnancy therefore has the potential to infringe s 19 of the Bill of Rights Act, if it constitutes a material disadvantage and is not justified under s 5.

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<sup>1</sup> Human Rights Act 1993, s 21(1)(a).

7. This is an example of so-called “intra-ground” discrimination, where the appropriate comparator to illustrate the differential treatment caused by a particular act or omission is another person who exhibits the *same* protected ground, but to a different degree or in a different form. For example, a policy permitting employers to fire women who are more than 20 weeks pregnant would allow differential treatment of a woman who is 21 weeks pregnant compared to a woman who is 19 weeks pregnant.
8. It would not be correct to suggest that, because both women are pregnant, they have the same protected status and therefore cannot be discriminated against by reason of how they manifest that status. A simple example demonstrating this is age. As everyone has an “age”, any distinction wrought by a rule about age will not be on the ground of merely *having* an age. Rather, it will be based on having reached a *particular* age, compared to a younger or older comparator. It will be a distinction *within* the ground of age. The same can be said of different types of disability.<sup>2</sup>

### *Material disadvantage*

9. The second part of the test of whether a measure limits s 19 is whether the differential treatment of women more than 20 weeks pregnant constitutes a material disadvantage.<sup>3</sup>
10. I have concluded the addition of a fetter on access to abortion for women who are more than 20 weeks pregnant will materially disadvantage women on the basis of the length of their pregnancy. It both requires women to seek approval to have an abortion, and creates the potential for approval to be withheld and abortion services denied.
11. In 2017, approximately 0.5 per cent of abortions were carried out after the 20th week of pregnancy.<sup>4</sup> As such, under new section 11, a small group of women after the 20th week of pregnancy would have their ability to make decisions about abortion procedures removed from them, and potentially be restricted from access to abortion services.
12. The limit on access to abortions proposed by new section 11 coincides with the timing of the anatomy scan, which takes place by ultrasound between 18–20 weeks of pregnancy and is central to assessing the health and development of the foetus.<sup>5</sup> The foetus is not large enough before this point to have its body structure and development assessed.<sup>6</sup> Depending on the result of the anatomy scan, further testing may be required to check for congenital abnormalities.<sup>7</sup>

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<sup>2</sup> *B v Waitemata District Health Board* [2017] NZSC 88, [2017] 1 NZLR 823 at [101] and n 121.

<sup>3</sup> *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [109].

<sup>4</sup> Law Commission *Alternative approaches to abortion law: Ministerial briefing paper* (NZLC MB4, 2018) at para 4.74.

<sup>5</sup> Ministry of Health “Screening tests and scans: 14 to 30 weeks” retrieved from <https://www.health.govt.nz/your-health/pregnancy-and-kids/pregnancy/weeks-14-30/screening-tests-and-scans-week-14-30>.

<sup>6</sup> Royal Australian and New Zealand College of Radiologists “18–20 Week Screening Pregnancy Ultrasound” retrieved from <https://www.insideradiology.com.au/18-20-week-ultrasound/>.

<sup>7</sup> *Ibid.*

13. The Law Commission records the Abortion Supervisory Committee and health professionals as submitting that virtually all abortions recorded from 20 weeks onward relate to wanted pregnancies, and abortions only occur because a serious abnormality or threat to the woman's life or health is detected.<sup>8</sup> In 2015, 82 per cent of the 107 abortions reported from 20 weeks onward were associated with congenital abnormalities.<sup>9</sup>
14. New section 11 will require women to make rapid decisions about abortion if the anatomy scan suggests a congenital abnormality. A woman's ability to clarify the health of the foetus with further testing, or to make a considered decision as to whether to carry on a pregnancy of a foetus with a congenital abnormality, may be compromised by the feeling that she must make a decision as to abortion before the end of the 20th week.

**New section 11 is a justified limitation under s 5**

15. Limits on rights fall to be considered under s 5 in accordance with the *Oakes* test.<sup>10</sup> In order to be demonstrably justified in a free and democratic society, a limit on a right must:
- 15.1 Serve a sufficiently important purpose to limit a right; and
  - 15.2 Be proportionate to achieving that purpose, in that it must:
    - 15.2.1 Be rationally connected to that purpose;
    - 15.2.2 Impair the right in question as little as is possible to achieve that purpose; and
    - 15.2.3 Have an overall impact on the right that is proportional to the objective of the limit.

*Limitation for health care purposes not justified*

16. The text of new section 11 suggests its primary objective is to ensure that abortions are appropriate with regard to a woman's physical and mental health and wellbeing. This is a sufficiently important objective for which the right to freedom from discrimination may conceivably be limited.
17. Limiting a woman's ability to choose to have an abortion after 20 weeks' gestation is not rationally connected to the goal of ensuring abortions are safe, and is not a policy that minimally impairs the right to freedom from discrimination because that goal is already met by the general law regulating health services. For these reasons, new section 11 is not proportionate to the goal of ensuring abortion services are safe.
- 17.1 The existing general law regulating health services already addresses the issue of safe health services, through health practitioners' general duties

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<sup>8</sup> NZLC MB4, at para 2.16.

<sup>9</sup> NZLC MB4, at para 2.17.

<sup>10</sup> *R v Oakes* [1986] 1 SCR 103; adopted in New Zealand by *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 (SC).

of care, their duties under the Health and Disability Consumers' Code of Rights, and the legal obligation to only provide services that are within the practitioner's scope of practice. There does not appear to be a reason to regulate the same outcome in a duplicative manner in relation only to abortion services.

- 17.2 For the same reasons, the Law Commission suggested such a test was potentially redundant.<sup>11</sup>

*Limitation to reflect societal interest in preservation of human life is justified*

18. The Bill reflects a modified version of the Law Commission's proposed Model C, which would have restricted access to abortion after the 22nd week of gestation. The Law Commission noted the increased complexity of late-term abortions and community concern for preserving the life of a foetus as it develops.<sup>12</sup> The Commission ultimately proposed such a limit by reference to foetal viability, stating that after 22 weeks of gestation some foetuses may survive if born. The Commission noted the Queensland Law Reform Commission had proposed the same 22 week limit on the basis that it represented "the stage immediately before the 'threshold of viability' under current clinical practice".<sup>13</sup> Clinical practice indicated an active approach to resuscitation for infants born at 23 weeks, with resuscitation being attempted in more than half of cases in both New Zealand and the United Kingdom.<sup>14</sup> In 2018 the Queensland Law Reform Commission reported international clinical practice was that life-sustaining treatments are unlikely to be delivered to children born alive at less than 23 weeks of gestation.<sup>15</sup>
19. The 20 week test proposed in the Bill is similar to the Law Commission's suggested gestational limit of 22 weeks. The Minister of Justice explained the difference, in the Cabinet paper seeking agreement to draft the Bill, as maintenance of "the status quo of a 20 week gestational threshold".<sup>16</sup>
20. That status quo emerged from the 1975 report of the Royal Commission on Contraception, Sterilisation and Abortion. The report noted that foetal viability was (at that time) recognised as possible after 24 weeks of gestation, and referred to a proposed 20 week gestational limit being advanced at the time by a select committee of the United Kingdom House of Commons.<sup>17</sup> On that basis, the Royal Commission found:<sup>18</sup>

... it is conceivable that with the development of medical science foetuses born before twenty weeks may be capable of extra-uterine life. We find ourselves in agreement with the recommendations of the Select Committee in England and consider there should be an upper time limit on abortions, restricting them to twenty

<sup>11</sup> NZLC MB4, at para 4.56.

<sup>12</sup> NZLC MB4, at para 4.62.

<sup>13</sup> NZLC MB4, at para 4.69.

<sup>14</sup> NZLC MB4, at para 4.72.

<sup>15</sup> Queensland Law Reform Commission *Review of termination of pregnancy laws* (WP No 76, 2018) at para 3.187.

<sup>16</sup> Hon Andrew Little "Taking a Health Approach to the Regulation of Abortion" (Cabinet paper, 21 May 2019) at [44].

<sup>17</sup> Royal Commission on Contraception, Sterilisation and Abortion "Contraception Sterilisation and Abortion in New Zealand: Report of the Royal Commission of Inquiry" [1977] II AJHR E26 at 275–276.

<sup>18</sup> *Ibid*, at 276.

weeks' gestation, subject only to, the provision that abortions should still be allowed after that time only where there is a substantial risk [of disability or threat to the woman's life or health].

21. It appears then that the 20 week gestational limit currently contained in s 187A of the Crimes Act reflected medical knowledge of foetal viability in 1975, but with a "buffer" built into the test to account for the possible advancement of medical science.
22. This history of gestational limit proposals in New Zealand demonstrates that foetal viability has been long treated as the determinative factor in the regulation of abortion access. I find this approach concerning, because I do not believe that access to abortion ought to be progressively limited in future alongside advancements in medical technology. Foetal viability is an important consideration in defining the limits of abortion access, but it is not the determinative one.
23. In considering limits on abortion access, I conclude there are two equally important interests at play: personal bodily autonomy, on the one hand; and a broad societal interest in the preservation of human life, on the other. I do not consider that foetal viability alone is a determinative reason to limit pregnant women's human rights. But states must nonetheless find some way to balance the two broader interests I have described. The broad societal interest in preserving human life is therefore a sufficiently important objective to justify a limitation on human rights, and limiting access to abortion is a rational way of achieving that objective.
24. Reflecting both interests in law will result in relatively unimpeded access to abortion during the early part of pregnancy, and diminishing access to abortion in the later part of pregnancy. But there is no one right answer as to when that broader interest outweighs a woman's personal autonomy. Different states have reached different conclusions as to when limitations on access to abortion ought to be imposed. Australian states that have reformed abortion laws in recent years have imposed gestational limits on access to abortion commencing between 16 and 24 weeks.<sup>19</sup>
25. A 20 week gestational limit, beyond which abortion services require justification, falls in the middle of that range. It also reflects the long-standing approach to abortion access in New Zealand, currently contained in s 187A of the Crimes Act 1961.
26. The nature of a gestational limit is relevant to whether it is reasonable. An absolute limit on abortion after 20 weeks of gestation would not be a justifiable limit on s 19. Although almost all abortions take place in the early stages of pregnancy, there will inevitably be circumstances where an abortion is appropriate during late pregnancy, including threats to foetal and maternal health detected

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<sup>19</sup> The gestational limit in Tasmania is 16 weeks, and the gestational limit in Victoria is 24 weeks (NZLC MB4, at Appendix 6). Since the New Zealand Law Commission's report, Queensland has decriminalised abortion and introduced a 22 week gestational limit on access to abortion services (Termination of Pregnancy Act 2018), and a bill has been introduced to the New South Wales Legislative Assembly to do the same (Reproductive Health Care Reform Bill 2019).

during anatomy scanning. New section 11 does not precisely define the circumstances in which a late abortion is available. Instead it makes the woman's health the primary consideration, and allows any other consideration that may be relevant to be taken into account. This allows decisions about abortion after 20 weeks of gestation to be made in accordance with good medical practice.

27. Gestational limits are arbitrary by nature. Their impact is also arbitrary: every foetus does not become viable at the point a gestational limit on abortion begins to apply. As such it is difficult to undertake a "minimal impairment" analysis of gestational limits, and particularly difficult where such limits are not to be justified by reference to foetal viability alone. But that does not mean a gestational limit is not capable of justification. I consider a gestational limit permitting of abortions where appropriate in the circumstances, applying sometime around the mid-point of pregnancy, will be capable of justifiably limiting pregnant women's human rights.
28. The End of Life Choice Bill currently before the House involves analogous issues. That Bill would make a person eligible to request assisted dying if they suffer from a terminal illness likely to end their life within six months. If enacted, that test would represent Parliament's view of the appropriate balance of the right to bodily autonomy with society's interest in preserving human life. The six month period chosen will not necessarily correlate with the point at which an illness becomes intolerable to the person suffering, and so it is similarly arbitrary in nature. But it is justifiable. It is open to Parliament to make such distinctions on the basis that society's interest in preserving human life remains significant up until the time that a person's death is imminent.
29. I conclude the proposed 20 week gestational limit is a demonstrably justifiable limit on the right to freedom from discrimination in a free and democratic society. For that reason new section 11 is a justified limitation on s 19 of the Bill of Rights Act.

Hon David Parker  
Attorney-General

5 August 2019