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Attorney-General

Abortion Legislation Bill – consistency with New Zealand Bill of Rights Act 1990
Our Ref: ATT395/294

1. This briefing advises you of Crown Law’s view as to the consistency of the draft Abortion Legislation Bill with rights affirmed by the New Zealand Bill of Rights Act 1990. The Bill was considered by the Cabinet Legislation Committee on 23 July 2019. This advice addresses all matters in the Bill with the exception of those provisions that limit access to abortion after 20 weeks’ gestation. In respect of the matters addressed, we conclude the Bill is consistent with the Bill of Rights Act.

Summary of advice

2. This advice concludes that:
 - 2.1 Decriminalising abortion by repealing the limitations on abortion contained in the Crimes Act 1961 does not engage the right not to be deprived of life under s 8 of the Bill of Rights Act.
 - 2.2 Decriminalising abortion also does not engage the right to freedom from discrimination on the basis of sex or disability under s 19 of the Bill of Rights Act.
 - 2.3 New sections 15 and 17 of the CSA Act, which would create a power to declare “safe areas” around the premises of abortion providers, limit the right to freedom of expression in s 14 of the Bill of Rights Act. That limitation is justified under s 5.
 - 2.4 New section 16 of the CSA Act, which would allow Police to arrest and detain people who appear to be engaging in “prohibited behaviour” within a “safe zone” without warrant, does not engage the right to freedom from arbitrary detention in s 22 of the Bill of Rights Act.
 - 2.5 New section 19 of the CSA Act, which requires a health practitioner with a conscientious objection to refer a person seeking an abortion to another provider of the service sought, is inconsistent with the rights to freedom and manifestation of religion, thought and conscience in ss 13 and 15 of the Bill of Rights Act. These limitations are justified under s 5.

- 2.6 New section 20 of the CSA Act, which authorises refusing to accommodate staff with a conscientious objection, and permits differential treatment in the process of employing staff for an abortion service provider, is inconsistent with the right to freedom from discrimination on the basis of religious belief and ethical belief, under s 19 of the Bill of Rights Act. These limitations are justified under s 5.

BILL OF RIGHTS ACT ISSUES

Decriminalisation – s 8 right not to be deprived of life

3. We have considered whether decriminalisation of abortion would constitute an infringement on the right not to be deprived of life. We conclude that the right is not at issue in the Abortion Legislation Bill.
4. For such an infringement to arise, a foetus must be capable of enjoying the right not to be deprived of life as a matter of law. To answer this question, we have examined the CSA and Bill of Rights Acts, the “born alive” rule, and associated jurisprudence.
5. No foetal right to life arises from the common law or s 8 of the Bill of Rights Act. While the point has not been conclusively determined in New Zealand, decisions of the High Court, Court of Appeal and the Supreme Court in *Right to Life New Zealand Inc v Abortion Supervisory Committee* are instructive.

Personhood and the born alive rule

6. The “born alive” rule is well established in New Zealand and comparable jurisdictions.¹ The rule provides that, at common law, a foetus has no status to bring a claim and thus has no enforceable rights before birth – it is not a legal person.² At first instance of the *Right to Life* proceeding, Miller J concluded that New Zealand law generally adheres to the born alive rule.³ This was endorsed by the Court of Appeal and the Supreme Court – the latter in a decision with respect to leave.⁴ A foetus thus has no enforceable rights at common law until it is born alive.
7. Although a foetus is not itself a legal person capable of enforcing its rights, a foetus may be capable of assuming interests and protections based in legislation. Thus whether deviation from the born alive rule is permitted depends on the statutory context.⁵

No deviation from the born alive rule with respect to the right not to be deprived of life

8. We consider there is no relevant New Zealand legislation that allows deviation from the born alive rule to the extent that a foetus enjoys a right not to be deprived of life.

¹ See for example *Paton v Trustees of BPAS* [1979] QB 276 at 989; *Re F (in utero)* [1988] 2 All ER 193 (CA); and *Winnipeg Child & Family Services (Northwest Area) v G (DF)* (1997) 152 DLR (4th) 193.

² See for example *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA).

³ *Right to Life New Zealand Inc v Abortion Supervisory Committee* [2008] 2 NZLR 825 (HC) [*Right to Life* (HC)] at [81], citing *Harrild v Director of Proceedings*, above n 2.

⁴ *Abortion Supervisory Committee v Right to Life New Zealand Inc* [2011] NZCA 246, [2012] 1 NZLR 176 [*Right to Life* (CA)]; and *Right to Life New Zealand Inc v Abortion Supervisory Committee* [2011] NZSC 97 [*Right to Life* (SC)] at [1].

⁵ See for example *Re an Unborn Child* [2003] 1 NZLR 115 in the context of laws relating to guardianship.

The CSA Act, for example, does not achieve this. The long title to the CSA Act states the relevant purpose is:

...to provide for the circumstances and procedures under which abortions may be authorised after having full regard to the rights of the unborn child.

9. As the Law Commission notes, this may appear to suggest a foetus has rights.⁶ However, Court of Appeal authority states the substance of the CSA Act does not confer enforceable rights on a foetus; rather it prescribes specific precautionary requirements to balance the “deep philosophical and moral and social attitudes” in a way Parliament thought necessary at the time.⁷ The Court of Appeal in the *Right to Life* proceeding endorsed this point, stating:⁸

[54] We are satisfied that there is no basis either from the Long Title to the CSA Act or the abortion law to derive generally an express right to life in the unborn child. ...

[55] For similar reasons we are satisfied that there is no warrant for interpreting the CSA Act consistently with a “State Interest” right to life for the unborn child. The legislation, as understood from its text and according to its purpose, does not lead us to the interpretation contended for by RTL. Furthermore, we can find no basis in the CSA Act for an express right to life. ...

10. Equally, the Bill of Rights does not provide a statutory context in which to deviate from the born alive rule. Miller J in *Right to Life* considered whether the phrase “no one” in s 8 of the Bill of Rights included all humans, legal and natural, such that it also included a foetus. His Honour concluded s 8 did not extend to a foetus, nor could s 6 operate to extend the meaning of a person to include a foetus. His Honour did so on the basis that: first, very few rights in the Bill of Rights could be exercised by or on behalf of a foetus; secondly, it was telling that no definition of “person” extending to a foetus was included in the Act; and finally, it was:⁹

... most unlikely that ... the legislature would have failed to address the position of the unborn child explicitly [in the Bill of Rights Act], had it intended to extend to it the right to life.

11. The Court of Appeal, while declining to decide the point, observed that Miller J’s conclusions had “much to commend them”.¹⁰ The Supreme Court declined leave on the relevant issues, and thus has not heard substantive argument on them. However, the leave decision on those issues turned on the very question of whether the fundamental right to life extended to a foetus. In that context, the Supreme Court stated that “it is plain that the legislation was based on the premise of the ‘born alive’ rule”.¹¹

12. In our view, given the fundamental nature of the born alive rule, recognition of rights bestowed on a foetus contra the rule ought to be expressly stated or necessarily inferred in legislation. That imperative is more pronounced the greater the

⁶ Law Commission *Alternative approaches to abortion law: Ministerial briefing paper* (NZLC MB4, 2018) at [3.30].

⁷ *Wall v Livingston* [1982] 1 NZLR 734 (CA) at 737.

⁸ *Right to Life* (CA), above n 4.

⁹ *Right to Life* (HC), above n 3, at [101]–[102].

¹⁰ *Right to Life* (CA), above n 4, at [64].

¹¹ *Right to Life* (SC), above n 4, at [1].

significance of the right, due to the greater deviance from the born alive rule it is likely to entail. The right not to be deprived of life is the most fundamental in the Bill of Rights Act. As Miller J points out, it is most unlikely that the legislature would have failed to address this significant matter if it did indeed intend to extend that right to a foetus.

13. Many similar jurisdictions do not bestow rights protections on a foetus. For example, Canadian and United States jurisprudence holds that a foetus does not enjoy the protection of equivalent right to life guarantees as they are not covered by the terms “everyone” or “person” respectively.¹² Our position is also consistent with the United Nations Human Rights Committee’s recent *General comment No 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*. In that *General comment* the Committee does not refer to any right to life for a foetus, focusing instead on protecting women and girls from unsafe abortions.¹³
14. The above authorities and our analysis point to the conclusion that a foetus does not enjoy the right not to be deprived of life under s 8 of the Bill of Rights Act. Accordingly, the Abortion Legislation Bill appears to be consistent with the right to not to be deprived of life affirmed in s 8 of the Bill of Rights Act.

Decriminalisation – s 19 disability discrimination

15. One of the grounds of discrimination prohibited by s 19 of the Bill of Rights Act and s 21 of the Human Rights Act is disability. We have considered whether the decriminalisation of abortion would constitute discrimination on the basis of disability, in that it might either:
 - 15.1 directly lead to the birth of fewer children with disabilities; or
 - 15.2 indirectly have the effect of treating a person or group of persons differently.¹⁴
16. Because a foetus is not a legal person in whom Bill of Rights Act rights may vest, the right to be free from discrimination on the basis of disability cannot arise in the context of the abortion of a particular foetus. The Abortion Legislation Bill is therefore compliant with the Bill of Rights Act in respect of direct discrimination.
17. New Zealand’s Independent Monitoring Mechanism on the Convention on the Rights of Persons with Disabilities has observed that an approach that has the effect of preventing the births of a protected minority group could be discriminatory.¹⁵ The Law Commission noted this may increase stigma in society, result in fewer people with lived experience of disability to advocate for protections, and feed the

¹² *Tremblay v Daigle* [1989] 2 SCR 530 (SCC), concerning s 7 of the Canadian Charter; and *Roe v Wade* 410 US 113 (1973) at 158 per Blackmun J, concerning the Fourteenth Amendment to the United States Constitution.

¹³ Human Rights Committee *General comment No 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life* CCPR/C/GC/36 (30 October 2018) at 5.

¹⁴ Section 65 of the Human Rights Act 1993: see *NRFLA v Human Rights Commission* [1998] 2 NZLR 218 (HC) at 236.

¹⁵ New Zealand Independent Monitoring Mechanism under the Convention of the Rights of Persons with Disabilities *Submission from New Zealand’s Independent Monitoring Mechanism to Inform the Development of the List of Issues Prior to Reporting for New Zealand’s 2nd Periodic Review under the Convention on the Rights of Persons with Disabilities* (2017) at 10.

notion of disability as a “negative experience rather than a facet of human diversity”.¹⁶

18. We note that the Abortion Legislation Bill does not include express reference to foetal disability. In removing the statutory tests contained in s 187A of the Crimes Act, the Abortion Legislation Bill removes foetal abnormality as a ground for an abortion. For an abortion at not more than 20 weeks gestation, new section 10 contains no statutory criteria to be met, let alone criteria related to disability. For an abortion at more than 20 weeks, new section 11 contains statutory criteria that focus not on the status of the foetus, but on the status of the woman seeking an abortion. Further, there are no identified elements of the Bill that create limits or tests that would indirectly result in discrimination on the basis of disability. This suggests the Abortion Legislation Bill is less likely than the present legislative regime to lead to indirect discrimination on the basis of disability.
19. There is a remaining concern that the Abortion Legislation Bill may lead to late term abortions for non-severe disabilities, particularly in light of increasingly refined screening methods and techniques. At this stage that concern is speculative only. It has not been shown that the provisions of the Abortion Legislation Bill will result in the birth of fewer children with disabilities and thereby cause indirect discrimination against those with disability.
20. Accordingly, the Abortion Legislation Bill appears to be consistent with the right to be free from discrimination on the basis of disability affirmed in s 19 of the Bill of Rights Act.

Decriminalisation – s 19 sex discrimination

21. As noted above, one of the grounds of discrimination prohibited by s 19 of the Bill of Rights Act and s 21 of the Human Rights Act is sex. We have considered whether the decriminalisation of abortion would constitute sex discrimination, in that it might either:
 - 21.1 directly lead to the birth of fewer children of a particular sex; or
 - 21.2 indirectly have the effect of treating a person or group of persons differently.¹⁷
22. Echoing our analysis above, because a foetus is not a legal person in whom Bill of Rights Act rights may vest, the right to be free from discrimination on the basis of sex cannot arise in the context of the abortion of a particular foetus. The Abortion Legislation Bill is therefore compliant with the Bill of Rights Act in respect of direct discrimination.
23. There is a remaining concern that sex-selective abortions will nonetheless have the effect of treating one sex differently from the other. The Law Commission noted it saw no evidence of sex-selective abortions under the present legislation. It did,

¹⁶ Law Commission, above n 6, at [12.23].

¹⁷ Section 65 of the Human Rights Act 1993: see *NRHA v Human Rights Commission* [1998] 2 NZLR 218 (HC) at 236.

however, note some evidence of sex-selective abortion in specific communities within other jurisdictions with similar legislation to the Abortion Legislation Bill.¹⁸

24. The Abortion Legislation Bill does not include reference to the sex of the foetus as a ground for obtaining an abortion in either new section 10 or 11. Nor are there any identified elements of the Bill that create limits or tests that would indirectly result in discrimination on the basis of sex. It has not been shown that provisions in the Bill will result in the birth of fewer children of a particular sex with the effect of treating a person or group of persons differently.
25. Accordingly, the Abortion Legislation Bill appears to be consistent with the right to be free from discrimination on the basis of disability affirmed in s 19 of the Bill of Rights Act.

“Safe area” regime – s 14 freedom of expression

26. The Bill proposes to create a power to permit regulations delineating “safe areas” around abortion providers’ premises. If such regulations are made, the “prohibited conduct” defined in new section 15 will be criminalised within that area. That conduct includes:
- 26.1 intimidating, interfering with or obstructing a person with the intention to stop the person seeking or delivering abortion services; and
- 26.2 communicating with, or visually recording, a person:
- 26.2.1 with the intent of causing emotional distress to a person seeking or delivering abortion services; and
- 26.2.2 in a way that is objectively distressing to a reasonable person in those circumstances.
27. Under new section 17, regulations would only be made if the Minister of Health is satisfied such regulations are appropriate and proportionate to prevent harm to persons accessing those premises, and are a demonstrably justifiable limitation on rights and freedoms in a democratic society. In effect the Minister of Health is required to conduct the justification balancing exercise required under s 5 of the Bill of Rights Act when considering whether a safe area is warranted.
28. It is largely the regulation-making decision which stands to be challenged under the Bill of Rights Act, rather than empowering provisions which do not directly impact upon rights and freedoms. As we explain below, however, the offence of communication intended to cause emotional distress is a significant impairment of s 14 of the Bill of Rights Act, and so we have carefully considered whether such a limitation is capable of being demonstrably justified in this context. We conclude it is.
29. There will still be a potential supplementary Bill of Rights Act issue, namely whether the regulation declaring a “safe area” is lawful. But once it is accepted that the principle of criminalising certain communications within a safe area is justifiable, the

¹⁸ Law Commission, above n 6, at [12.18]–[12.19].

legality of the exercise of that regulatory power in a particular way will be a context-dependent exercise which we cannot evaluate in the abstract.

Intimidation, interference and obstruction

30. Some of the conduct that would be criminalised in a safe area – intimidation, interference and obstruction – is familiar to the existing criminal law. Similar offences in the Summary Offences Act 1981 prohibit disorderly or offensive behaviour against public order (ss 3–4), intimidation (s 21, which includes stopping, confronting or accosting someone in a public place), and obstructing a public way (s 22). To the extent that summary offences relate to disruption of public order, they have been narrowly interpreted by the Supreme Court in order to reflect the right to freedom of expression in public places.¹⁹ The proposed offence of engaging in prohibited behaviour within a safe area has a slightly different focus; while it would involve a similar actus reus to those summary offences, it has a new context-specific mens rea, less focused on disruption of public order and more on disruption of access to a public service.
31. The differing mens rea means it is doubtful that the rights to freedom of expression (s 14) or association (s 16) are directly engaged by such a prohibition, but those rights may be incidentally engaged in the course of an offender’s conduct. A “direct action” protest, which aims to disrupt access to or delivery of a health service permitted by law, generally results in an unreasonable burden on the people it targets. We therefore consider limitations on such conduct to be readily justifiable. We note similar considerations apply in respect of the power to declare a “specified non-interference zone” under s 101B of the Crown Minerals Act 1991, to prevent on-site protests that would disrupt off-shore mineral exploration.²⁰ 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.

Communication intended to cause emotional distress

32. The second part of the definition of “prohibited behaviour”, which bans any “communication” or visual recording intended to cause “emotional distress” to people accessing an abortion provider’s premises within a safe area, is not a form of conduct previously proscribed by law. This prohibition would directly engage s 14. 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. In other words, causing emotional distress can be a central purpose of free expression.
33. Accordingly, a safe area regulation may criminalise some silent protests (those not amounting to obstructive or intimidating behaviour) which cause the sort of harm expected to result from free expression (emotional distress). Such a prohibition requires robust justification.

¹⁹ *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91; and *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1.

²⁰ We note no Bill of Rights Act vetting advice was prepared in respect of that power, as it was added to the Crown Minerals Amendment Act 2013 by Supplementary Order Paper No 205 of 2013.

34. Limits on rights fall to be considered under s 5 in accordance with the *Oakes* test.²¹ That is:²²
1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
 2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:
 - (a) be ‘rationally connected’ to the objective and not be arbitrary, unfair or based on irrational considerations;
 - (b) impair the right or freedom in question as ‘little as possible’; and
 - (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.
35. A rational and proportionate limitation meeting this test will be “demonstrably justified in free and democratic society” under s 5.

Sufficiently important objective?

36. New section 17(2)(a) makes clear the objectives of the safe access regime are:
- ...to protect the safety and wellbeing, and respect the privacy and dignity of, persons—
- (i) accessing abortion services:
 - (ii) providing, or assisting with providing, abortion services:
 - (iii) seeking advice or information about abortion services:
 - (iv) providing, or assisting with providing, advice or information about abortion services;
37. This wording closely reflects the purposes of the similar regime existing in Victoria,²³ which was recently upheld as a justified limitation on the right to political communication by the High Court of Australia.²⁴ We conclude the objective of ensuring safe, private and dignified access to abortion providers’ premises on an equal basis with other health services is a sufficiently important aspect of the decriminalisation of abortion to justify a limitation on freedom of expression.
38. The Law Commission has observed no apparent need for a safe area regime in New Zealand. The Bill includes such a regime, contrary to that view. It is apparent that the Bill addresses a real issue:
- 38.1 The Law Commission noted there was no clear evidence the existing laws around intimidating and anti-social behaviour were inadequate to manage safe and dignified access to abortion providers’ premises.²⁵ However there

²¹ *R v Oakes* [1986] 1 SCR 103; adopted in New Zealand by *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 (SC).

²² *R v Chaulk* [1990] 3 SCR 1303 at 1335–1336; cited in *Hansen*, *ibid* at [64].

²³ Public Health and Wellbeing Act 2008 (Vic), s 185A(a).

²⁴ *Clubb v Edwards; Preston v Avery* [2019] HCA 11.

²⁵ Law Commission, above n 6, at [12.14].

is good reason to believe that anti-abortion demonstration activity could become more widespread and intrusive following the passage of the Bill. Within the current statutory regime of criminalised abortion, providers almost all operate from hospitals,²⁶ which tend to be large facilities on major roads. Repealing the “certifying consultants” system under the CSA Act and relying instead on health practitioners’ scope of practice to determine who may provide abortion services is likely to lead to a proliferation of locations at which such services are provided, including some primary health providers, lacking the physical and security features of a hospital.²⁷

38.2 Furthermore, it is apparent that some activity occurring in New Zealand is more intrusive than silent protest. The practice known as “sidewalk counselling”, utilised by anti-abortion activists, involves approaching people entering premises to seek abortion services in order to persuade them of the alternatives to abortion.²⁸ Anti-abortion activists claim to engage in such activity in New Zealand.²⁹

38.3 The potentiating effect of decriminalisation on anti-abortion activism can be substantial, which in turn impacts the provision of abortion services and the ability safely to seek such services. The British Columbia Supreme Court found that in Canada, following the Supreme Court’s judgment in *Morgentaler*,³⁰ the climate around abortion clinics became unpleasant and frightening in some areas so to discourage clinicians from working there, and women seeking a medical service involving personal trauma and anxiety were becoming particularly upset or angry due to the conduct in front of abortion clinics.³¹ The Regulatory Impact Analysis 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.³²

39. In that context we are satisfied the objective of permitting the regulation of safe areas is sufficiently important.

²⁶ At [2.38].

²⁷ It is relevant to consider the extent of anti-abortion activism in other jurisdictions where abortion has been decriminalised, such as the United States of America, Canada and Victoria. For example the Canadian Supreme Court judgment quashing restrictions on abortions expanded the provision of such services in Vancouver and resulted in significant anti-abortion activism outside the new facilities, as described in *R v Lewis* (1996) 139 DLR (4th) 480 (BCSC) at [19].

²⁸ See *R v Spratt* (2008) 235 CCC (3d) 521 (BCCA) at [58].

²⁹ A spokesperson for Voice for Life New Zealand says she is “a former sidewalk counsellor, part of a small team outside Hastings Hospital abortion clinic, that helped 32 women choose to continue their pregnancies”: Voice for Life New Zealand “Media” (<https://voiceforlife.org.nz/who-we-are/media/>, accessed 17 July 2019).

The Life Resources Charitable Trust says that free-standing abortion clinics in Auckland and Wellington were targeted by sidewalk counsellors in the 1970s and 1980s: Life Resources Charitable Trust “Coercion and Abortion” (<http://www.life.org.nz/abortion/abortionkeyissues/coercion-and-abortion/Default.htm>, accessed 17 July 2019).

³⁰ *R v Morgentaler* [1993] 3 SCR 463, wherein the Supreme Court of Canada declared that criminal penalties related to abortion were unconstitutional.

³¹ *R v Spratt* (2008) 235 CCC (3d) 521 (BCCA), at [70].

³² Regulatory Impact Analysis at section 3.6 (p 29).

Proportionality?

40. There is a rational connection between the objective and the limitation. Preventing distressing communication with people seeking or providing abortion services will tend to preserve their privacy, dignity, safety and wellbeing. The essential issues in assessing proportionality are therefore whether the impairment on the right to freedom of expression is “minimally impairing”, and whether in all the circumstances the impairment of the right is outweighed by the aims of the legislation.
41. Addressing these issues requires a close examination of the Bill’s effect on common forms of protest at abortion providers’ premises. We anticipate courts will recognise a distinction between harmful and merely annoying activism within a safe area:
- 41.1 Parliament has in one other respect criminalised speech resulting in emotional distress under the Harmful Digital Communications Act 2015. That Act criminalises posting a digital communication with the intention of causing “harm” to a victim,³³ where “harm” is defined as “serious emotional distress”.³⁴ In its ministerial briefing paper on regulating digital communications, the Law Commission had grappled with the difficulty of regulating the harms arising from communications. The Commission concluded that “the law has a role to play” when the level of emotional distress was “significant”, but not when a communication “simply causes annoyance or irritation”.³⁵
- 41.2 Unlike the resulting offence provision in the Harmful Digital Communications Act, which requires “serious” emotional distress and proof of actual harm to the victim, the criminal offence created by new section 15 would merely require “emotional distress” as measured by the reasonable person accessing an abortion provider to seek or provide abortion services.³⁶
- 41.3 The Bill does not prohibit protest within a safe area per se, but rather limits protests that rise to the level of causing “emotional distress”. Despite the distinction between the wording of new section 15 and the Harmful Digital Communications Act measure of “harm”, we conclude that a Bill of Rights Act-consistent interpretation is still likely to maintain a distinction between criminalised harm and mere “annoyance or irritation”. Relatively unobtrusive silent protests, within safe areas but a respectful distance from the entrances to the premises in question, may escape criminalisation on the basis that the communication is unpleasant but not harmful. The more assertive practice of “sidewalk counselling”, described above at paragraph 38.2, is more likely to fall within the scope of prohibited communication.
42. Such a distinction supports a conclusion that the proposal is minimally impairing of the right and proportionate to the aim.

³³ Harmful Digital Communications Act 2015, s 22(1).

³⁴ Section 4.

³⁵ Law Commission, above n 6, at [1.27].

³⁶ We note however the vastly divergent penalties for the respective offences: imprisonment for two years and a fine of up to \$20,000, in respect of s 22 of Harmful Digital Communications Act 2015; as against a maximum fine of just \$1,000 for the proposed offence under new section 15.

43. The proposed “safe area” regime is not of universal application, but rather is tailored to a particular need:
- 43.1 Unlike the Victorian regime, which applies to all premises in that state, the Bill requires safe areas to be declared by regulation. That will ensure that limitations on s 14 only arise where there is a specific need arising in relation to particular premises.
- 43.2 Under new section 17(1)(b) the regulation may be tailored to the nature of the particular site by defining the “area” to which it applies (so long as that area is within 150 metres of the premises).
44. Although the prohibited behaviour within such areas is the same in every case, as noted above a Bill of Rights Act-consistent reading will require courts to maintain a distinction between criminalised harm and mere annoyance.

Case law regarding safe access zones

45. Australian and Canadian case law has found safe access zone regimes to be justified limitations on constitutional rights. However as we explain shortly, although the recent High Court of Australia judgment *Clubb v Preston* is a final appellate judgment and relates to a similar legislative regime, it is not sufficiently reflective of New Zealand’s legal tradition to be confidently relied upon. We prefer the reasoning of the British Columbia Court of Appeal in *R v Sprutt*, described below.
46. As noted above at paragraph 37, in *Clubb* the High Court of Australia recently considered the constitutionality of a Victorian statute providing for a similar “safe access zone” regime. Part 9A of the Public Health and Wellbeing Act 2008 provides for 150 metre access zones to apply around *every* abortion provider’s premises, and for the criminalisation of a similar range of conduct within those zones which is “reasonably likely to cause distress or anxiety”.³⁷ Mrs Clubb breached the law by standing five metres from the entrance to such premises and handing out anti-abortion pamphlets to the people entering.³⁸ She was found guilty of:
- ... communicating about abortions with persons accessing premises at which abortions are provided while within a safe access zone, in a way that is reasonably likely to cause anxiety or distress ...
47. Although the Australian constitution has no general right to freedom of expression, the High Court of Australia has recognised an implied right of freedom of “political communication”, described as:³⁹
- ... a freedom that arises by necessary implication from the system of responsible and representative government set up by the Constitution, not a general freedom of communication of the kind protected by the First Amendment to the United States Constitution.
48. The extent of this implied freedom is “limited to what is necessary for the effective operation of that system”.⁴⁰ Accordingly, while *Clubb* provides some support to the

³⁷ Public Health and Wellbeing Act 2008 (Vic), s 185B(1)(b).

³⁸ *Clubb v Edwards* [2019] HCA 11 at [11].

³⁹ *APLA Ltd v Legal Services Commissioner of New South Wales* [2005] HCA 444 at [27] per Gleeson CJ and Heydon J.

view that the proposed safe area regime would be a proportional limitation on freedom of expression, the broader scope of the right affirmed in New Zealand means that *Clubb* is of limited application.

49. Mrs Clubb was not found to be engaged in “political” speech when she engaged with people entering the facility. The Court characterised an abortion decision as “an apolitical, personal decision informed by medical considerations, personal circumstances and personal religious and ethical beliefs, qualitatively different from a political decision as to whether abortion law should be amended”.⁴¹ But free expression is broader in scope and includes communication about religious and ethical issues in an effort to persuade the listener.
50. In addition, the *Clubb* majority found that the communication restrictions at issue were content-neutral, in that they applied equally to activities in support of both pro- and anti-abortion standpoints.⁴² Content neutrality is central to the right to political communication because “a law that burdens one side of a political debate, and thereby necessarily prefers the other” will impair that right,⁴³ and accordingly it will be difficult to justify shutting one side out of a political debate. But the Court’s findings have an air of unreality – the Victorian law was quite plainly targeted at curtailing anti-abortion activism,⁴⁴ as is the proposed Abortion Legislation Bill.
51. *R v Spratt* is more directly relevant to the New Zealand context. In that case, the British Columbia Court of Appeal upheld s 2 of the Access to Abortion Services Act 1996 (BC), which prohibited “sidewalk interference” and “protest” within a designated “access zone”. The Court applied the *Oakes* test and concluded that limitations on the Charter right to freedom of expression were demonstrably justified in a free and democratic society.
52. The Court determined that an *absolute* prohibition on protest within an access zone was a justifiable limitation on the Charter right, because:
- 52.1 it would be too difficult to try to distinguish between different degrees of interference with women approaching a clinic;⁴⁵
- 52.2 people expressing a viewpoint are not entitled to a captive audience, but people attempting to access a clinic are not free to avoid the message;⁴⁶
- 52.3 the right to freedom of expression was not absolutely abrogated, and any form of protest could still occur outside of the access zone;⁴⁷ and
- 52.4 the deleterious effects on freedom of expression was not so severe as to outweigh the importance of achieving the legislative objective.⁴⁸

⁴⁰ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561.

⁴¹ *Clubb v Edwards*, above n 38, at [252] (see also [31]).

⁴² At [56], [123] and [375], reflecting similar conclusions reached by the United States Supreme Court: *Schenck v Pro-Choice Network of Western New York* 519 US 357 (1997).

⁴³ *Clubb v Edwards*, above n 38, at [55].

⁴⁴ As the Court concluded in *R v Lewis* (1996) 139 DLR (4th) 480 (BCSC), at [91]; see also *Clubb v Edwards*, above n 38, at [182].

⁴⁵ *R v Spratt* (2008) 235 CCC (3d) 521 (BCCA), at [80].

⁴⁶ At [84].

⁴⁷ At [85].

53. With the exception of the first point (which does not arise under the proposed scheme due to the mens rea requirement of any unlawful communication, meaning that the proposed prohibition is not absolute) the same factors are applicable to the proposed scheme contained in the Bill, and support a conclusion that a particular exercise of the regulatory power will be capable of justification.

Limitation is demonstrably justified

54. We conclude the empowering provision to make regulations, declaring safe areas in which communication causing emotional distress is criminalised, is inconsistent with s 14 of the Bill of Rights Act, but that inconsistency is a demonstrably justified limitation under s 5 because:

- 54.1 the power to declare a safe area and thereby criminalise certain communication within that area pursues a sufficiently important purpose;
- 54.2 the criminalisation of certain communication is rationally connected to that purpose; and
- 54.3 the limitation is minimally impairing of s 14 and any regulation is capable of amounting to an appropriate balance of the rights and interests at issue, because:
- 54.3.1 there is a requirement to be satisfied of the need for a safe area in respect of a particular facility;
- 54.3.2 there is an ability to tailor the extent of that area within a 150 metre boundary;
- 54.3.3 most likely the court will make an interpretive distinction between harmful and merely annoying communication; and
- 54.3.4 the same considerations listed in paragraphs 52.2-52.4 above are applicable in this case.

Warrantless arrest

55. One aspect of the proposed “safe area” regime is new section 16 of the CSA Act. That section would permit a constable to arrest and take into custody without warrant persons who are reasonably believed to be engaging in prohibited behaviour within a safe area and fail to stop engaging in the prohibited behaviour.
56. Arrest without warrant must be specifically provided for by law. There is a general power to arrest people for offences punishable by imprisonment.⁴⁹ For any lesser offences, it is necessary to empower constables to arrest without warrant.
57. Because the power to arrest without warrant is express and authorised by law, new section 16 does not limit the freedom from arbitrary detention provided by s 22 of the Bill of Rights Act. Any arrest may be “arbitrary” on the facts, or become arbitrary due to a failure to comply with the obligation under s 23(2) of the Bill of

⁴⁸ At [91].

⁴⁹ Crimes Act 1961, s 315.

Rights Act to promptly charge or release a person arrested for an offence. But a simple power to arrest without warrant does not offend against any section of the Bill of Rights Act.

Conscientious objection

58. Clause 7 would insert new sections 19–20 into the CSA Act, which:
- 58.1 continue the ability to exercise a conscientious objection to providing contraception, sterilisation and abortion services, but creates a new referral duty on people exercising such an objection;
 - 58.2 require an employer to accommodate a conscientious objection, unless it would cause unreasonable disruption to the employer’s activities; and
 - 58.3 creates a process for applicants or employees to complain about differential treatment on the basis of a conscientious objection.

New referral duty – ss 13 and 15 freedom and manifestation of religion, conscience, and belief

59. New section 19 differs from the current conscientious objection provision in the CSA Act. It requires a health practitioner to notify their conscientious objection to a pregnant woman at the earliest possible opportunity, and creates a duty to refer the woman to another practitioner who can provide the service required.
60. New section 19 would not require a person to provide or perform any contraception, sterilisation or abortion service despite their conscience. However, it would require a person to refer a woman seeking that service to a provider of that service. For someone with a belief that certain such services are inconsistent with the sanctity of life, this may engage their freedom of thought, conscience and religion under s 13 of the Bill of Rights Act, or their manifestation of those beliefs under s 15. Requiring a person with a conscientious objection to providing a particular service to refer a woman to a provider of the service, may result in the health practitioner feeling complicit with the provision of that service despite their objection.
61. The Minister of Justice has indicated the purpose of this amendment is:⁵⁰
- ... to mitigate the risks to the pregnant woman of the potential delays, costs, and stress of having to find another health practitioner. The right of the practitioner to object to providing the service, and the right of the woman to access the services in a timely way, must be appropriately balanced.
62. The Attorney-General has previously considered a similar clause for consistency with s 13 of the Bill of Rights Act. Clause 7 of the End of Life Choices Bill would permit a medical practitioner to conscientiously object to providing assisted dying services and refer someone to another medical practitioner. The Attorney-General concluded this was a prima facie breach of s 13 because it required the medical practitioner to do something the practitioner conscientiously objected to (making a referral).⁵¹ The

⁵⁰ Hon Andrew Little “Taking a Health Approach to the Regulation of Abortion” (Cabinet paper, 21 May 2019) at [62].

⁵¹ Hon Christopher Finlayson “Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the End of Life Choice Bill” (4 August 2017) at [63].

Attorney-General concluded the limit on s 13 was justified under s 5 as it was necessary to meet the objective of the Bill and was the most minimal impairment of the right possible.⁵²

63. We conclude the limitation of ss 13 and 15 of the Bill of Rights Act created by new section 19 is similarly justified. The Abortion Legislation Bill is intended to facilitate access to abortions for women seeking them. For the same reasoning as the Attorney-General adopted in relation to the End of Life Choices Bill, the referral of pregnant women to willing health practitioners is necessary to meet that objective:

63.1 Facilitating access to abortion services is a legitimate goal to achieve by legislating. Furthermore, delay in the administration of an abortion can be dangerous for pregnant women, as it can lead to more severe side effects and higher rates of complications, as well as significantly more pain for women seeking medical abortions.⁵³ The objective of the referral duty is therefore sufficiently important.

63.2 The referral duty is also proportionate to the goal of facilitating access to abortions, in that it achieves its objective while minimally impairing the conscientious objector's rights. It does not require active participation in the provision of services, but will mitigate the delays to accessing services that will be caused by the conscientious objector's refusal.

64. Accordingly, new section 19 appears to be consistent with the right to freedom and manifestation of religion and conscience affirmed in ss 13 and 15 of the Bill of Rights Act.

Employment discrimination – s 19 freedom from unlawful discrimination on the basis of religious or ethical belief or political opinion

65. New section 20 permits health providers to differentiate between prospective and current employees on the basis of their inability to reasonably accommodate a conscientious objection. It replicates current provisions applying to employment in the Human Rights Act:

65.1 Section 22 of the Human Rights Act makes it unlawful for employers to refuse to employ, dismiss, or to treat employees differently on the basis of a prohibited ground of discrimination. This prohibition would be replicated in respect of conscientious objection by new section 20(1).

65.2 Section 28(3) creates a duty to accommodate religious or ethical beliefs unless they would unreasonably disrupt the employer's activities. This accommodation duty would be replicated in respect of conscientious objection by new section 20(2).

65.3 The dispute resolution mechanism provided by the Human Rights Act would also be replicated by new section 20(3), which would permit an aggrieved person with a conscientious objection to bring an employment discrimination claim as if it were a breach of s 22.

⁵² Hon Christopher Finlayson "Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the End of Life Choice Bill" (4 August 2017) at [64].

⁵³ Law Commission, above n 6, at [2.89].

66. However, new section 20 goes further than the Human Rights Act protections on employees, appearing to provide less protection to prospective employees with a conscientious objection than the more general protections on religious and ethical beliefs:
- 66.1 Under the Human Rights Act there is explicit protection from being asked questions in the employment application process that would tend to indicate an intention to discriminate:

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.

- 66.2 To the contrary, new section 20 contains no such protection, and new sections 20(1)(a) and 20(2) imply such questions will form a legitimate part of the employment process, as employers may refuse to employ someone if their conscientious objection cannot be accommodated.

New section 20 infringes s 19 of the Bill of Rights Act

67. Religious and ethical beliefs are already required to be reasonably accommodated by employers under s 28(3) of the Human Rights Act. But to the extent that new section 20 permits pre-employment discrimination on the basis of a religious or ethical belief meeting the definition of “conscientious objection”, it authorises differential treatment on the basis of religious or ethical belief in breach of s 19 of the Bill of Rights Act.
68. Political opinion is also a protected ground under s 19 of the Bill of Rights Act, but the “reasonable accommodation” duty in s 28(3) does not apply in respect of such beliefs expressed or manifested in the course of employment. If a person is subject to differential treatment on the basis of a political opinion meeting the definition of “conscientious objection”, then new section 20 also authorises differential treatment on the basis of political opinion in breach of s 19 of the Bill of Rights Act.

Limitations on s 19 are justified under s 5

69. For similar reasons to those given above in relation to the proposed referral duty created by new section 19, the limitations on the right against discrimination on the basis of religious, ethical or political belief are justified ones.
70. The Abortion Legislation Bill is intended to facilitate access to abortions for women seeking them. For the same reasoning as the Attorney-General adopted in relation to the End of Life Choices Bill, the ability to treat applicants and employees differently on the basis of a conscientious objection is necessary to meet that objective:
- 70.1 As noted above at paragraph 63.1, facilitating access to abortion services is a legitimate goal to achieve through legislation. The apparent aim of new section 20 is to ensure conscientious objection does not render an abortion provider ineffective through lack of available staff to perform certain procedures.

- 70.2 New section 20 is also proportionate to the goal of facilitating access to abortions, in that it achieves its objective while minimally impairing the conscientious objector's rights. New section 20(2) protects people with a conscientious objection by requiring an employer to consider whether and how they could reasonably accommodate the objection. It is only if a conscientious objection cannot be reasonably accommodated that employment status can be affected. The reasonable accommodation test will ensure that the extent of any differential treatment on the basis of religious, ethical or political belief is proportionate to the goal of effective service delivery.
71. In accordance with Crown Law's policies, this advice has been peer reviewed by Paul Rishworth QC. This advice was substantially contributed to by Monique van Alphen Fyfe, Assistant Crown Counsel.

Matt McKillop
Crown Counsel