

Submission on 2019 Abortion Legislation Bill

1. The New Zealand Council for Civil Liberties supports the Abortion Legislation Bill with recommendations for minor amendments.

About the New Zealand Council for Civil Liberties

2. The New Zealand Council for Civil Liberties (Council) is a watchdog for rights and freedoms in New Zealand. The Council is a voluntary not-for-profit organization that works through education and advocacy to promote a rights-based society and prevent the erosion of civil liberties.
3. We wish to appear before the Committee to make an oral submission.

General Comments

4. The Council welcomes the introduction of the Abortion Legislation Bill (the Bill) to decriminalize abortion and provide pregnant people with the right to make their own choices about their reproductive health. The Council believes on principle that people should have autonomy over their own bodies. The Council also believes that abortion should be the pregnant person's uncoerced choice. The Council has reviewed the Abortion Legislation Bill and finds it provides an acceptable balance between necessary controls and civil liberties.

Legal Position

5. Currently New Zealand law treats abortion as a criminal act covered by two laws - the Crimes Act 1961 and the Contraception, Sterilization and Abortion Act 1977. To obtain a legal abortion pregnant people have to convince two medical consultants that a termination is necessary on one or more the following grounds:
 - a. because the pregnancy poses a serious danger to the person's life or to their mental or physical wellbeing; or
 - b. that there is a substantial risk that the child, if born, would be so physically or mentally abnormal as to be seriously handicapped; or
 - c. that the pregnancy is the result of incest; or
 - d. that the pregnant person is severely impaired and unable to give meaningful consent to sexual intimacies resulting in pregnancy.

6. The Council believes these grounds for access to safe lawful termination of an unwanted or unsafe pregnancy is unsatisfactory for both pregnant people and medical practitioners. Pregnant people typically face more stress and uncertainty when being assessed for abortion than for similar medical procedures. The World Health Organisation reports¹ that abortion rates are similar in countries where the procedure is legal and in countries where it is not. The study found that abortions were "*safe in countries where it was legal, but dangerous in countries where it was outlawed and performed clandestinely*".
7. The current system requires that two certifying consultants authorize each termination. In some parts of New Zealand there is limited or no access to medical consultants. Pregnant people in rural areas have more difficulty, inconvenience and cost of travel to obtain approval for an abortion as well as travel for the procedure itself. Those difficulties may result in some people who would otherwise choose to have an abortion being unable to access one. This may contribute to unwellness or death of a pregnant person which could be avoided if abortion was a more practical option. According to the Perinatal and Maternal Mortality Review Committee (PMMRC)², in New Zealand on average, 10 women die every year from pregnancy-related causes. Since 2006, 28 pregnant people have died from suicide and a further 13 died from an amniotic fluid embolism around the time of childbirth.
8. Submissions³ to the Law Commission review in 2018 on *Alternative Approaches to Abortion in respect of Access to Abortion Services*, expressed concern about barriers to access and the detrimental impact they have on people seeking an abortion. Submitters commented that barriers to access have a disproportionate impact on Māori. Submitters also highlighted how barriers impact on women in rural and isolated areas; young women; women with limited financial resources; and women who are not supported by their families and whānau.”
9. The Council believes pregnant people should not be denied access to health services because they live in more remote or rural areas, or because they lack financial resources for travel. This Bill will bring much needed certainty to pregnant people and medical practitioners and make it easier and safer for people choosing to have a termination of pregnancy. The Council **recommends** additional funding be provided from a health budget for travel costs where local services are inadequate.

¹ <https://web.archive.org/web/20140324063058/http://www.medicalnewstoday.com/releases/85456.php>

² <https://www.hqsc.govt.nz/our-programmes/mrc/pmmrc/information-about-deaths-of-babies-and-mothers/>

³ <https://submissions.lawcom.govt.nz/category/abortion-law-reform/>

Consent and Free Choice

10. Article 17 of the UN Convention on the Rights of Persons with Disabilities (CRPD), to which New Zealand is a signatory, states:

“Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.”

11. Article 25 of the CRPD states signatories shall:

“Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;”⁴

12. And shall:

“Provide these health services as close as possible to people’s own communities, including in rural areas”⁵

13. Article 25 (d) of the CRPD states signatories shall:

“Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;”⁶

14. Article 25 of the UN Declaration of Human Rights, to which New Zealand is a signatory, states that:

“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”⁷

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<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-25-health.html>

⁵ *ibid*

⁶ *ibid*

⁷ <https://www.un.org/en/universal-declaration-human-rights/index.html>

15. Target 3.7 of the UN Sustainable Development Goals, to which New Zealand is a signatory, states:

“3.7 By 2030, ensure universal access to sexual and reproductive health-care services, including for family planning, information and education, and the integration of reproductive health into national strategies and programmes.”

16. The Council notes with disappointment that the New Zealand Bill of Rights Act 1990 does not include a right to health care. The Council recommends that the Bill of Rights Act 1990 should be updated to include that right in order to align it with our treaty commitments.

17. The Council believes that New Zealanders have a right to access necessary health services including termination of an unwanted or risky pregnancy stemming from Article 25 of the UN Declaration of Human Rights. And further, that New Zealand committed to enable that right when we signed up to the UN Sustainable Development Goals.

18. The Council believes that New Zealand is committed to providing pregnant people with the uncoerced choice on abortion by article 25 of the CRPD.

19. The Council considers it is important that other views are respected and that people who do not wish to have an abortion should be under no compulsion to have one.

20. The Council believes that health practitioners should not be compelled to perform an abortion but should refer any person seeking an abortion to other appropriate services without delay.

21. The Bill requires that practitioners who object on grounds of conscience must disclose their objection to a pregnant person at the earliest opportunity. The Council believes that this provision is not strong enough to enable people who may become pregnant to have adequate choice for health services. The Council **recommends** that medical practices where abortion may be refused by some or all staff should have a notice of its Abortion Policy in public display in its reception area and on its website if it has one. The Policy should be available on request.

22. The Bill introduces the requirement that a practitioner who objects on the grounds of conscience must provide a pregnant person with the contact details of a provider of the service requested. In the Council's view providing contact details of practitioners

may not be sufficient in some parts of New Zealand, especially where there are few medical options locally. The Council **recommends** that a central health authority also provide advisory services and contact information for any pregnant person without local support.

Regulations on Safe Areas

23. The Council supports the right to protest. The Council was founded in response to the 1951 waterfront lockout of workers during an industrial dispute. While our concerns have broadened, supporting the free right to protest has remained a focus.

24. Article 21 of the International Covenant on Civil and Political Rights, to which New Zealand is a signatory, states:

“The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.”⁸

25. The Council has considered the regulations to allow **safe areas** to be established around specific abortion facilities as a protection against harassment by demonstrators. The Council anticipates that should the Bill pass, there may be smaller facilities set up where pregnant people and medical practitioners would be more vulnerable to hostile demonstrations.

26. We have concluded that on the balance the right of pregnant people and medical practitioners to be free from harassment outweighs the right of individuals to protest in the vicinity of a facility providing health services. The Council notes that article 21 of the *International Covenant on Civil and Political Rights* supports public health as a reason for minor restrictions on protest. The Council supports the right to protest outside of the **safe areas**.

27. The Council supports the provision under clause 17 to promulgate Regulations for defining safe areas. The Council further believes such Regulations should be required not discretionary. Declaring a specified area to be a safe area for the purposes of the new Act and Regulation should be a quick process, not one requiring additional legislation to be passed.

⁸ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

28. The Council **recommends** the replacement of **may** with **shall** in clause 17
Regulations: safe areas to read

- (1) The Governor-General **shall**, by Order in Council made on the recommendation of the Minister of Health after consultation with the Minister of Justice, make regulations for the purposes of section 15 prescribing as a safe area—
 - (a) any specified premises at which abortion services are provided; and
 - (b) an area around those premises that is an area having a boundary of not more than 150 metres from any part of the premises.
- (2) The Minister **shall** make regulations under subsection (1) **where** the Minister is satisfied that prescribing a safe area—
 - (a) is necessary to protect the safety and well-being, 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; and
 - (b) can be demonstrably justified in a free and democratic society as a reasonable limitation on people’s rights and freedoms.

Disability Issues and Right to Information

29. The Council does not believe that pregnancy is a disability. Moreover, the Council believes that New Zealand has a commitment in line with CRPD Articles 17 and 25 to honour the bodily autonomy and uncoerced choices of all individuals over their reproductive functions. This principle applies to disabled and nondisabled people alike.

30. The Council welcomes the removal of processes that reduced the rights of disabled people to be able to make their own decisions about becoming parents or not. Reproductive rights should include the right to become pregnant if that is the intention of the person. New *section 11* provides that a qualified health practitioner must have regard to a pregnant person’s physical health, mental health, and well-being when considering whether an abortion is appropriate.

31. The Council understands some organisations and individuals representing disabled people and health practitioners expressed concerns to the Law Commission⁹ about easing the criteria for abortions sought on the basis on fetal impairment. Although the current law allows abortions on the grounds of fetal impairment, the threshold is that there is a substantial risk the child would be born “seriously handicapped”.¹⁰
32. Two main issues were raised regarding removal of the current statutory grounds for abortion in section 187A of the Crimes Act 1961. First, several submitters were concerned that a relaxation of the law could mean an increase in abortions performed because the fetus would otherwise be born with disabilities. For example, high rates of abortions following prenatal diagnosis of Down syndrome have attracted comment both in New Zealand¹¹ and overseas.¹² The Council understands that in some of the countries New Zealand often compares itself to the rate is over 90 per cent.¹³
33. New Zealand’s Independent Monitoring Mechanism on the CPRD observed that an approach that selectively prevented the births of an otherwise protected minority group could be seen as discriminatory.¹⁴ A decrease in numbers of people with Down Syndrome and other developmental differences can increase stigma they face in society. It could also mean there would be fewer people with lived experience to

⁹ <https://submissions.lawcom.govt.nz/category/abortion-law-reform/>

¹⁰ Crimes Act 1961, s 187A(1)(aa)

¹¹ See for example Ruby Nyika “Mothers of children with Down Syndrome encouraged to terminate” (20 April 2017) Stuff <www.stuff.co.nz>; Tessa Prebble “Are we sleepwalking into a world without Down Syndrome?” (11 October 2006) The Spinoff <www.thespinoff.co.nz>.

¹² Alison Gee “A world without Down’s syndrome?” (29 September 2016) BBC News <www.bbc.com>; Dave Maclean “Iceland Close to Becoming First Country where no Down’s Syndrome Children are born” (16 August 2017) The Independent <www.independent.co.uk>.

¹³ For example, a 2010 report from England and Wales found that after the prenatal diagnosis of Down syndrome 92 per cent of affected pregnancies were aborted: Joan K Morris and Anna Springett The National Down Syndrome Cytogenetic Register for England and Wales: 2009 Annual Report (Queen Mary University of London, December 2010) at 4. See also Robert Cole and Gareth Jones “Testing times: do new prenatal tests signal the end of Down syndrome?” (2013) 126(1370) N Z Med J 96; Parliamentary Inquiry into Abortion on the Grounds of Disability (Parliament of the United Kingdom, 2013). It has been reported that close to 100 per cent of Icelandic women and 98 per cent of Danish women who receive positive prenatal diagnoses of Down syndrome choose to abort: Julian Quinones and Arijeta Lajka “What kind of society do you want to live in?: Inside the country where Down syndrome is disappearing” (15 August 2017) CBS News <www.cbsnews.com>; Dave Maclean “Iceland Close to Becoming First Country where no Down’s Syndrome Children are born” (16 August 2017) The Independent <www.independent.co.uk>.

¹⁴ 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)

advocate for appropriate protections and services for disabled people. It could also add to the belief that disability is a negative experience rather than a natural aspect of human diversity.

34. A member of the Council has heard from some members of the disability community anecdotal reports of medical practitioners encouraging abortion in cases of a pregnant person receiving a diagnosis of Down Syndrome.¹⁵ The communications did not in most cases include more positive information on current realities of life for a child or adult with Down Syndrome and what support they could access as parents. The provision of such information could potentially dispel the stigma and fear that sometimes accompanies the diagnosis of Down Syndrome and other developmental conditions. There are suggestions that a diagnosis of Down Syndrome for an otherwise healthy fetus need not be a trigger for an abortion if the pregnant person would otherwise have continued with the pregnancy.
35. The Council has considered these issues and has sympathy for concerns raised that abortions could be performed based on a lack of balanced information pregnant people receive on the impact of having a disabled child. The Council does not however want to second guess the situation any pregnant person may face in making their decisions.
36. Under Right 6 of the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996¹⁶, consumers of health services have the right to be fully informed, including receiving:
- 1(b) an explanation of the options available, including an assessment of the expected risks, side effects, benefits, and costs of each option;
 - and
 - (2) Before making a choice or giving consent, every consumer has the right to the information that a reasonable consumer, in that consumer's circumstances, needs to make an informed choice or give informed consent.
37. The Council **recommends** that a central health authority coordinate with relevant disability advocacy organisations, production and distribution of information about raising a child with a disability such as Down Syndrome. Such information should be

¹⁵ Private communications in Facebook group of Disabled People

¹⁶ <http://www.legislation.govt.nz/regulation/public/1996/0078/latest/whole.html>

provided to health practitioners and counsellors attending pregnant people and be available for pregnant people.

38. The Council **recommends** that information about common disabilities such as Down Syndrome, and support available to parents be offered to pregnant people. There should not be any requirement for a pregnant person to take such information.

Definition of “Woman”

39. The Council believes that any pregnant person may consider or seek an abortion regardless of their age or gender identity. The range of people who may become pregnant include cisgender girls and women, some intersex and nonbinary people, and some transgender men and boys.
40. The Council believes that the use of the word “woman” in clause 5 is inaccurate and unnecessary. The Council recommends that **person** or **pregnant person** is used in the Act rather than defining a pregnant person as a woman.

Conclusion

41. The New Zealand Council of Civil Liberties believes that abortion is a health issue for a pregnant person not a crime and that the law should change to reflect this.

Recommendations

42. The New Zealand Council of Civil Liberties recommends that the Abortion Legislation Bill be passed with the following amendments and directions for implementation, namely that:
- (a) the Ministry of Health ensure additional funding is provided for pregnant people to cover travel costs where local services are inadequate;
 - (b) Clause 7 which introduces a new *Section 19 Conscientious objection*, should be amended to require that medical practices where abortion may be refused by some or all staff should have a notice of its Abortion Policy in public display in its reception area and on its website if it has one and be available on request by new or current clients;

- (c) Clause 7 which introduces a new *Section 19 Conscientious objection*, should be amended to require that a central health authority provide advice and contact information for any pregnant person requesting this directly;
- (d) Regulations for safe areas should be required not discretionary and that **may** be replaced with **shall** in *clause 17 Regulations: safe areas*;
- (e) the Ministry of Health coordinate with relevant disability advocacy organisations, production and distribution of information about raising a child with a disability such as Down Syndrome and other common conditions; and
- (f) *person* or *pregnant person* is used in the Act rather than defining a pregnant person as a *woman* as proposed in Clause 5 in amendments to *Section 2 Interpretation*.