Grant Illingworth QC

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Richard McLeod
McLeod & Associates
By Email

Dear Richard,

Family First Opinion: Safe Areas

You have instructed me to provide an opinion concerning the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill. In essence, the issue is whether the restrictions proposed in the Bill would constitute an unreasonable interference with human rights if enacted into law. The Bill commences with a general policy statement which says:

> All New Zealanders deserve to have the right to access health services with their safety, privacy, and dignity protected. Many people have spoken about their experiences accessing abortion services where they have not been afforded that protection.
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> Protests at and around abortion clinics are common place in New Zealand. These protests amount to targeted harassment of those people who choose to access essential health services. No other group is subjected to protest simply for going to their doctor, nor should these people be.
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> The Bill provides a regulation-making power to set up safe areas around specific abortion facilities, on a case-by-case basis. The purpose of this regulation-making power is to protect the safety and well-being, and respect the privacy and dignity, of women accessing abortion facilities and practitioners providing and assisting with abortion services.
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> The Bill defines the type of behaviour that is prohibited as—
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> - intimidating, interfering with, or obstructing a protected person either with the intention of frustrating the purpose for which the protected person is in the safe area, or in a manner that an ordinary reasonable person would know would cause emotional distress to a protected person:
> - communicating with, or visually recording, a person in a manner that an ordinary reasonable person would know would cause emotional distress to a protected person.
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> It also provides that the safe area can be no more than 150 metres from any part of the protected facility.
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> The decision to make regulations creating a safe area would be made on the recommendation of the Minister of Health, in consultation with the Minister of Justice. The specific size and exact location of the safe area would be determined on a case-by- case basis, as appropriate for the individual facility's circumstances. The details would be set out in the regulations made for specific premises.
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> Safe access zone laws are becoming common place around the world. This Bill will not put New Zealand at the forefront of the reproductive rights movement, it will not make us world leaders. It will allow us to follow the lead of certain states and provinces in Australia, Canada, and the United States, in ensuring that people are able to access essential health services with their safety, privacy and dignity protected.

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The policy statement thus describes a perceived social problem, the purpose of the Bill in relation to that social problem, and the means by which the purpose is intended to be achieved. The perceived social problem is said to be the targeted harassment, by protesters, of women who choose to access abortion services in New Zealand. It is effectively contended that this problem is common and constitutes a breach of the rights of those affected to access health services "with their safety, privacy, and dignity protected." Whether it is common in New Zealand for women to be the subject of "targeted harassment" when seeking abortion services is difficult to judge and I will not attempt to make that assessment. For present purposes, it is sufficient to assume that this allegation may well be correct. The stated purpose of the Bill, in relation to the perceived social problem, is "to protect the safety and well-being, and respect the privacy and dignity, of women accessing abortion facilities and practitioners providing and assisting with abortion services." In general terms, the means by which the purpose is intended to be achieved is to confer on an official decision-maker (the Governor-General) a power to make regulations that would enable safe areas to be set up around specific abortion facilities, on a case-by-case basis.

For the purposes of this opinion, it is appropriate to accept, without equivocation, that everyone seeking access to health services should be entitled to do so with their safety, privacy and dignity protected. These are basic legal protections, and it is difficult to imagine any New Zealand judge disagreeing with that aspect of the policy statement, at least in principle. Very often, though, general principles are not precise enough to enable a court to determine how to balance the opposing interests involved when fundamental rights come into conflict with one another.

As the policy statement expressly acknowledges, the perceived social problem only arises when some people exercise their right to protest. To express objection is a general right in our society which the courts have a duty to protect. A key question is, therefore: where should the line be drawn (if at all) when the right of a person to be protected when accessing or providing health services comes into conflict with the right of others to express objection or dissent in the form of public protests?

Before attempting to address that question, it is necessary to turn to the detailed provisions proposed in the Bill. As the title of the Bill indicates, if enacted it would amend the Contraception, Sterilisation, and Abortion Act 1977 by inserting three new provisions. These new provisions would become sections 13A, 13B and 13C of the 1977 Act. The third of these provisions would authorise the Governor-General to make regulations prescribing as a "safe area" any specified premises at which abortion services are provided, plus an area around those premises which has a boundary extending not more than 150 metres from any part of the premises. This could extend into public spaces such as parks, footpaths and roads.

Any such regulations could only be made on the recommendation of the Minister of Health after consulting with the Minister of Justice. But the Minister of Health must first be satisfied that prescribing a safe area is necessary to protect the safety and well-being, and respect the privacy and dignity, of several specified classes of person, including:

- people accessing abortion services, or seeking advice or information about abortion services; and
- people providing, or assisting with providing, abortion services, or providing advice or information about abortion services.

A second and vitally important requirement is that the Minister of Health must be satisfied that prescribing a safe area can be "demonstrably justified in a free and democratic society as a reasonable limitation on people's rights and freedoms." This provision is obviously intended to give effect to section 5 of the New Zealand Bill of Rights Act 1990, discussed further below. Also, the regulations must be reviewed periodically in accordance with the process specified in the proposed section 13C.

Under the proposed section 13A, if a safe area were established:

- It would be a criminal offence to engage in any "prohibited behaviour" in that safe area.
- The proposed maximum punishment, on conviction, would be a fine of up to $1,000.

Also, under the proposed section 13B, if a police constable were to believe, on reasonable grounds, that a person was engaging in prohibited behaviour in the safe area, the constable could require the person to stop engaging in that behaviour. If the person failed to obey the police requirement, the constable could then arrest the person and take the person into custody without a warrant.

The term "prohibited behaviour" is therefore extremely important in the scheme of the proposed statute. It is defined to mean:

(a) intimidating, interfering with, or obstructing a protected person -

  (i) with the intention of frustrating the purpose for which the protected person is in the safe area; or,

  (ii) in a manner that an ordinary reasonable person would know would cause emotional distress to a protected person:

(b) communicating with, or visually recording, a person in a manner that an ordinary reasonable person would know would cause emotional distress to a protected person

This definition appears to create two distinct offence categories, one in paragraph (a) and one in paragraph (b). I will refer to these categories as "the paragraph (a) offence" and "the paragraph (b) offence." As explained below, each of these categories has its own unusual deficiencies.

The term "protected person" is used four times in this definition. It, too, is a vitally important component in the legislation. It is defined as follows:

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

(a) accessing abortion services; or,

(b) providing, or assisting with providing, abortion services; or,

(c) seeking advice or information about abortion services; or,

(d) providing, or assisting with providing, advice or information about abortion services.

In my view, the provisions outlined above are deeply problematic. The first problem arises from the need for the Minister of Health to be satisfied that specifying a safe area for any particular abortion service can be demonstrably justified in a free and democratic society as a reasonable limitation on people's rights and freedoms. As noted above, this requirement arises from section 5 of the Bill of Rights which provides:

5 Justified limitations

Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Minister of Health is here confronted with a puzzling conundrum: on what basis should it be concluded, in any given situation, that imposing a safe area around an abortion service location, and thereby limiting fundamental rights in that area, is demonstrably justified in a free and democratic society? It seems clear that not all abortion services are expected to meet that criterion, so what could distinguish those that do from those that do not?

Arguably, the answer might be that a history of serious problems arising from protests at a particular abortion service might persuade the Minister to conclude that the imposition of a safe area is justified in that location. Whether this would meet the test of being demonstrably justified in a free and democratic society as a reasonable limitation on the rights of others is debateable. But, if there had never been any trouble at all in relation to a particular abortion service, should it be concluded, by the same logic, that a restriction on fundamental rights in the adjacent area could not be demonstrably justified?

This issue could arise in a prosecution under the proposed section 13A. A defendant in such proceedings might attempt to challenge the validity of the regulation in question by arguing that the Minister had no proper basis for concluding that the imposition of a safe area was "demonstrably justified." It could then be argued that the regulation-making power had been exercised unlawfully and was invalid. This, in turn, might provide a viable defence to the charge.

For reasons that can be explained in more detail if necessary, this would raise thorny issues of the kind that troubled the House of Lords in the *Boddington* case.[1] Briefly put, the issue is whether an official decision can be subjected to a collateral challenge in criminal proceedings, or whether a person who wishes to defend the criminal charge by challenging an official decision must apply separately for judicial review. Over the years, eminent judges have reached conclusions that differ from the *Boddington* approach, including our own Sir Robin Cooke (as he then was).[2] The correct approach to the collateral challenge question was at least partly resolved by our Supreme Court in one of the *Siemer* cases;[3] but it is unclear whether collateral challenge is excluded in all situations of the *Boddington* kind in New Zealand.

The collateral challenge conundrum pales into insignificance, however, once the definitions of "prohibited behaviour" and "protected person" come into full focus. As noted above, a protected person is someone who is in a "safe area" for a particular purpose. In many circumstances, the purpose for which a person is in an area adjacent to an abortion service will be a private issue known only to that person. Protecting that person's privacy is part of the purpose of the legislation. It is not at all clear how a suspected offender could be supposed to know the private and confidential purpose for which the potential victim happened to be in the area in question.

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[1] *Boddington v British Transport Police* [1998] UKHL 13.
[2] See: *Reid v Rowley* [1977] NZLR 472.
[3] *Siemer v Solicitor-General* [2013] 3 NZLR 441.

This difficulty flows through into the definition of "prohibited behaviour." As has been seen, the paragraph (a) offence definition includes "intimidating, interfering with, or obstructing a protected person" in particular circumstances. Normally, a prosecutor must prove that an offender had a guilty mind at the time of the allegedly criminal conduct. Part of the guilty mind requirement is the need to prove that the offender knew any essential facts that would made the conduct illegal. Under the paragraph (a) offence definition:

- A potential victim could be in a safe area for a purpose that would make her a protected person, but that purpose would not normally be known to the protester.
- Unless the potential victim disclosed her private information, the protester would often have no way of knowing whether she was a protected person (other than by guesswork).
- Without that information, the protester would not know a fact that is an essential component in respect of the guilty mind element of the offence.
- The protester would then have a viable defence to a charge of intimidating or interfering with or obstructing a protected person.

This could make it extremely difficult to establish guilt under the paragraph (a) offence definition. In some cases, the prosecution might be able to establish guilty knowledge through circumstantial evidence; but this would not be easy in most cases. The protective purpose of the amending legislation would often be frustrated where guilty knowledge could not be established for a charge of intimidating, interfering with, or obstructing a protected person.

Nor is this the end of the potential difficulties for the prosecution under the paragraph (a) offence definition. To prove that the protester had intimidated, interfered with, or obstructed a protected person would not be enough, of itself, to secure a conviction. The proposed section 13A has some additional requirements for a charge of that kind. The prosecution would also have to prove:

- that the protester acted with the intention of frustrating the purpose for which the protected person was in the safe area; or
- that the protester acted in a manner that an ordinary reasonable person would know would cause emotional distress to a protected person.

The difficulty with the first of these alternatives is obvious: if the protester did not know the precise purpose of the alleged victim, it would be impossible to prove that the protester acted with the intention of frustrating that purpose. The difficulty with the second alternative is more complicated:

- The definition of "protected person" includes those who are in a safe area for a variety of purposes, namely: accessing abortion services; providing, or assisting with providing, abortion services; seeking advice or information about abortion services or providing, or assisting with providing, advice or information about abortion services.
- Under the second alternative, a prosecutor would have to establish that the protester had acted in a manner that would cause emotional distress to a protected person. This is to be judged by what "an ordinary reasonable person" would know.
- In applying this test, it would be necessary for a judge to decide which version of the protected person definition should apply (e.g. a person providing abortion

services, or a person accessing abortion services) or whether the test should be applied to all of the categories listed in the definition.

- The judge would then have to decide the difficult question of what "an ordinary reasonable person" would know concerning the infliction of emotional distress.

Suffice it to say, this is a very messy situation from a legal perspective.

The paragraph (b) offence definition would make it an offence to communicate with, or visually record, "a person in a manner that an ordinary reasonable person would know would cause emotional distress to a protected person." The intention of this provision was probably to prevent two kinds of objectionable conduct from occurring within a safe area: communicating with a protected person or visually recording a protected person in a way that, viewed objectively, would cause emotional distress to the victim of the wrongful behaviour. The problem is that the words used fail, by a wide margin, to express that intention coherently or accurately.

The first problem in relation to the paragraph (b) offence is that the wrongful conduct is defined as communicating with or visually recording "a person." Perhaps this part of the definition should have referred to a protected person, which would have meant that the communication or recording would need to take place in or by a safe area. As the proposed definition currently reads, though, there is no requirement for the communication or recording to be in respect of a protected person, nor is there any requirement for the communication or recording to take place in or by a safe area.

Also, under the paragraph (b) offence definition, the only requirement that links up with the stated purpose of the legislation is that the communication or visual recording must be carried out "in a manner that an ordinary reasonable person would know would cause emotional distress to a protected person." But this does require a protected person to have been affected by the behaviour, and it does not require anything at all to have taken place within a safe area. In short, the paragraph (b) offence definition appears irrational and unjustifiable from a legal point of view.

As earlier noted, the rights and freedoms affirmed in the Bill of Rights may be subject only to such reasonable limits, prescribed by law, as can be demonstrably justified in a free and democratic society. "Prescribed by law" implies reasonable clarity and certainty, both of which are lacking in the proposed provisions.

The rights and freedoms affirmed in the Bill of Rights that could be affected by the proposed legislation are as follows:

- Section 13 provides that everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.
- Section 14 provides that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.
- Section 15 provides that every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.
- Section 17 provides that everyone has the right to freedom of association.

- Section 18 provides that everyone lawfully in New Zealand has the right to freedom of movement.

The proposed legislation could result in most if not all of those fundamental rights being restricted within every zone designated as a safe area under any relevant regulations. In combination, such restrictions could affect significant parts of our inner cities. As earlier noted, the fundamental question is this: where should the line be drawn (if at all) when the right of a person to be protected when accessing or providing health services comes into conflict with the right of others to express objection or dissent in the form of public protests?

The answer must surely be that the line should be drawn so as to create a demonstrably justifiable balance between the rights and freedoms of the health services group and the rights and freedoms of those who wish to exercise the rights and freedoms identified above under the Bill of Rights. As section 5, provides, any balancing must be prescribed by law. This must mean a law that is drafted to an appropriate standard of clarity and certainty. If rights and freedoms are to be attenuated, this should be done through legislation that is properly drafted. As the above analysis reveals, an appropriate standard has not been met in the drafting of the provisions that would come into force if the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill is enacted into law.

In making that statement, it is not my intention to denigrate the rights and freedoms of people seeking, or seeking to provide, health services. On the contrary, and as is acknowledged earlier in this opinion, it is appropriate to accept, without equivocation, that everyone seeking access to health services should be entitled to do so with their safety, privacy and dignity protected. But a laudatory purpose does not justify a poorly drafted law that significantly diminishes basic human rights. In my respectful opinion, the provisions proposed in the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill are deeply flawed and should not be accepted by Parliament.

This leaves a final but important question: what restrictions would apply if the Bill were to be enacted into law in its current form? This is a difficult question to answer because, as I have attempted to explain, the correct interpretation of the proposed legislation is debateable in several respects. The following points nevertheless seem tolerably clear:

- Standing quietly in or near a safe area merely to observe what is happening, without attempting to communicate with abortion service clients or service providers, or to record their movements, and without attempting to dissuade, badger or intimidate them, should remain a lawful activity even if the Bill were to be enacted into law.

- It seems reasonably obvious that, in relation to abortion services, many potential protesters are motivated by religious concerns. It also seems clear that some people in that category may wish to visit known abortion service locations in order to pray for the welfare of those who are likely to be affected by the services on offer, namely pregnant women and their unborn children.

- This, of itself, is not and would not become, an unlawful activity under the proposed legislation, so long as there was no overt conduct of an offensive kind. But there are some forms of praying that could be viewed as offensive and might be deemed to fall within the scope of "prohibited behaviour" as defined.

- Thus, for example, a loudly expressed prayer for an abortion services client to feel convicted of sin and to repent of immoral behaviour could well fall within the

category of intimidation, obstruction or interference as explained above. Such behaviour might also satisfy a judge that the person praying had acted in a manner which would cause emotional distress to a protected person, viewed objectively.

- This, in turn, illustrates the point that the dividing line between lawful and unlawful behaviour could be difficult to judge in various situations that could arise under the proposed legislation. In short, enacting the proposed provisions would be likely to create some grey areas which would have to be navigated by police. In all the circumstances, this is unlikely to be a fresh task that they would happily welcome.

Finally, in the policy statement quoted above, people who are opposed to abortion and who stand near abortion service facilities are described as "protesters." Their conduct is described as "targeted harassment of those people who choose to access essential health services." I understand, however, that some concerned individuals simply hold up signs saying things like "Pregnancy Support" accompanied by contact details. Rather than expressing opposition, dissent, or disagreement, they try to convey a willingness to help prospective mothers who are going through personal difficulties arising from their pregnancies. Conduct of that kind is not unlawful under the law as it stands at present and, even if the Bill were to be enacted into law, it is difficult to see how such conduct could be prosecuted as an offence under the proposed provisions outlined above, so long as it was not accompanied by badgering, harassment, obstruction or intimidation.

Yours faithfully,

G M Illingworth QC