

Parliamentary Debate 8 August 2019 – Abortion Legislation Bill

Issue	Law – current	Law – proposed	Comments
Criteria for abortion	<p>Criteria for abortion up to 20 weeks:</p> <p>The person procuring or supplying means of procuring abortion must believe:</p> <ul style="list-style-type: none"> • continuing the pregnancy would result in serious danger to the life or physical or mental health of the woman; or • substantial risk of serious foetal abnormalities; or • the pregnancy resulted from incest; or • the woman has a significant impairment. <p>Criteria for abortion after 20 weeks:</p> <ul style="list-style-type: none"> • necessary to save the life of the woman or prevent serious permanent injury to her physical or mental health. <p>Crimes Act 1961, s 187A.</p>	<p>Criteria for abortion up to 20 weeks:</p> <ul style="list-style-type: none"> • None. Abortion on demand for any woman (defined as a person of any age able to get pregnant). <p>Contraception Sterilisation and Abortion Act 1977, proposed s.10. (“CSA Act”).</p> <p>Criteria for abortion after 20 weeks:</p> <ul style="list-style-type: none"> • a qualified Health Practitioner must reasonably believe that the abortion is appropriate in the circumstances, having regard to the woman’s physical health, mental health and well-being. <p>CSA Act, proposed s.11.</p>	<p>In all cases, there is no statutory test and there are no safeguards to prevent abortions on the grounds of sex-selection, disability or coercion of the woman.</p> <p>The Bill does not outline what information the Health Practitioner will be required to provide the woman as to her other options, available supports should she wish to continue her pregnancy, or even a detailed understanding of what an abortion involves.</p> <p>Counselling is available but not mandatory.</p> <p>There is no stand-down period to ensure that a woman has had the opportunity to carefully consider her options prior to proceeding with an abortion; this is particularly necessary given that the Bill has done away with a requirement to have two Certifying Consultants consider each case.</p> <p>For abortions after 20 weeks, the terms “physical health,” “mental health” and “wellbeing” are not defined by the Bill. On a natural reading these terms are broad and unrestrictive. Given the policy intent to make abortion more accessible, it is difficult to see many instances in which an abortion would reasonably be refused. (Consider how the more stringent wording of our current law has been interpreted to effectively allow abortion on demand).</p>

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Late term abortions	Available only to save the life of the woman or prevent serious permanent injury to her physical or mental health. (Crimes Act 1961, s 187A.)	<p>The Bill would allow abortion up until a foetus has been fully born (fully left its mother's body).</p> <p>Section 159 Crimes Act 1961 has not been amended and this defines a child as only becoming a human being when it has completely left its mother's body. Part 2, section 11 of the Bill specifically states that section 182 of the Crimes Act (relating to the intentional killing of an unborn child) does not relate to any person who provides abortion services before or during the birth of any child.</p> <p>The Bill does not provide any restriction or regulation on the method of abortion that may be employed by an abortionist.</p>	<p>Although a full-term abortion is highly unlikely for many reasons (lack of demand, lack of abortionists willing to perform it and so on), the Bill has been drafted in such a way that an abortion can <i>legally</i> be obtained up until the point that a child has been fully born, with approval of one Health Practitioner. Responses often given by pro-choice advocates to any argument in respect to late term abortions is that in New Zealand fewer than 1% of abortions have occurred after 20 weeks and therefore this is statistically insignificant and should not be a focus of discussion. We would respond that:</p> <ol style="list-style-type: none"> 1. If there is a possibility of even one late-term, viable baby being aborted for the wrong reasons, that is one death too many. It is the responsibility of our law-makers to ensure that the most vulnerable in our society are protected. 2. The numbers of late term abortions are likely to increase given the liberalisation of the test under the Bill. 3. Public opinion is unlikely to support a liberal approach to late-term abortion.
Abortion for child (under 16)	<p>A child (of whatever age) is able to consent to an abortion as if they were an adult, without parental input or notification.</p> <p>S38 Care of Children Act 2004</p>	<p>The Bill defines a woman as “a person of any age who is capable of becoming pregnant.”</p> <p>The Bill has not amended section 38 COC Act, meaning that a child (of whatever age) is able to consent to an abortion as if they were an adult, without parental input or notification.</p>	<p>The decision to not require parental consent to a child's abortion was made when there were safeguards in place. The Bill has removed all safeguards prior to 20 weeks, including for a pregnant child who could access an abortion on demand.</p> <p>The decision of the drafters of the Bill to not repeal s38 COC Act is out of line with its stated intent to bring abortion into line with health law. In all other health procedures, a Health Practitioner is required to assess whether a patient has the competence to provide informed consent to a procedure. The younger the child, the more likely that decisions about their health will need to be made by their guardian. Yet, in the case of abortion, a child is able to consent to their own abortion regardless of whether they have the necessary competence.</p> <p>Advocates for this Bill have said that we should trust a "woman" to make a decision about her own body. This includes a pregnant child who will be left to make a life-changing decision without any meaningful support or oversight.</p>

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Criminal offences relating to abortion	<p>Offences under the Crimes Act 1961:</p> <ul style="list-style-type: none"> • Unlawfully procuring an abortion (s183). There are no records of anyone being convicted of this. • Unlawfully supplying the means of providing an abortion (such as drugs or implements) (s.186). <p>Offences under the Contraception, Sterilisation and Abortion Act 1977:</p> <ul style="list-style-type: none"> • Performing an abortion elsewhere than in a licensed institution (s.35). • Performing an abortion otherwise than in pursuance of certificate issued by two certifying consultants (s.35). • Female procuring her own unlawful abortion (s.44). Note: the maximum fine is \$200, and there are no records of any successful prosecutions under this section. 	<p>The following criminal offences apply under the Bill:</p> <ul style="list-style-type: none"> • Abortion performed or attempted by person other than a Health Practitioner (maximum penalty of 5 years imprisonment). • Abortion procured or attempted by person other than a Health Practitioner (maximum penalty of 5 years imprisonment). 	<p>The current law does not criminalise women for getting an abortion. No woman has been convicted of procuring an unlawful abortion under the current law. Women are specifically excluded from criminal liability by section 183(2) Crimes Act 1961.</p> <p>There is a concern that by taking abortions out of the Crimes Act, and making it simply a health matter, the Bill fails to provide any recognition whatsoever to the sanctity of the life of the unborn child. It is agreed that women should not be criminalised for getting an abortion (as they are not currently, although section 44 of the CSA should be repealed), but that it should remain a crime for someone to unlawfully procure an abortion or to unlawfully provide someone with the means to get an abortion.</p> <p>Note that under the Bill's proposed new section 183 Crimes Act:</p> <ul style="list-style-type: none"> • if an unqualified Health Practitioner (such as a podiatrist or a dietitian) were to perform or attempt to perform an abortion, they would not be subject to criminal liability in the same way that somebody who is not a Health Practitioner would be – but with a much lower maximum term of imprisonment than is currently the case. • In contradiction to the Explanatory Note, there is no offence for someone other than a Health Practitioner to supply the means for procuring an abortion (such as medication).
Offence of killing an unborn child	It is a criminal offence to kill an unborn child (s.182 Crimes Act 1961), maximum penalty of 14 years imprisonment.	The offence is retained, but the Bill amends the section to clarify that this does not relate to abortions, whether performed before or during the birth of the child.	The Ministry of Justice has no record of this section ever having been applied to abortions. It has only been used to prosecute people for assaulting a pregnant woman.

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Abortion provider	<p>Certifying consultant (medical practitioner) who has been appointed by the Abortion Supervisory Committee and is practicing in a licensed institution.</p> <p>A woman requires the sign off of two certifying consultants (one being a suitably qualified obstetrician or gynaecologist) before being in a position to have an abortion.</p>	<p>A woman can self-refer for an abortion.</p> <p>An abortion can be carried out by a “Qualified Health Practitioner”:</p> <ul style="list-style-type: none"> • No requirement to be a doctor • the Health Practitioners Competence Assurance Act 2003 (“HPCA Act”) does not provide clarity as to who would be deemed to be a Qualified Health Practitioner – it depends upon the ‘scope of practice’ determined by each individual health profession’s Governing Authority. Arguably a midwife/nurse practitioner could be empowered to provide abortion services. <p>There is no requirement that premises be licensed. By way of example, should a nurse be deemed to be a Qualified Health Practitioner there is no legal reason that he/she could not perform abortions at a school.</p>	<p>There is no requirement in the Bill that the Qualified Health Practitioner who provides abortion services, at any point in a woman’s pregnancy, is a doctor. In fact, the Bill specifically uses the term “Health Practitioner” rather than “Medical Practitioner” thereby broadening the category of person empowered to certify and carry out abortions beyond just doctors.</p> <p>The Bill defines a Qualified Health Practitioner as a Health Practitioner acting in accordance with the HPCA Act. This definition is unnecessarily obtuse and provides little clarity. The Authority previously tasked with overseeing abortions (the Abortion Supervisory Committee) is disestablished by the Bill. As a result, it will be at the discretion of the Ministry of Health and its various Authorities to determine the level of expertise required to provide abortion services. The various Authorities provided for under the HPCA Act will themselves determine whether their scope of practice incorporates abortion, such that it is arguable that midwives, nurses or any other Health Practitioner could be empowered to provide abortions, and to certify abortions after 20 weeks.</p> <p>Although it is unlikely that the Podiatrists or Psychologists Board would seek to extend its scope of practice to include provision of abortion services, the important point is, by failing to tightly define who is a Qualified Health Practitioner, the Bill devolves the decision from the hands of a democratic Parliament into the hands of un-elected bodies pursuant to the HPCA Act.</p>

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Conscientious objections	<p>No doctor, nurse or any other person is obliged to perform or assist with an abortion.</p> <p>It is unlawful for an employer to discriminate against an employee or job applicant on the grounds of a conscientious objection to abortion. (CSA Act, s.46).</p> <p>A person with a conscientious objection must inform a patient of his/her objection and inform them that they can obtain an abortion from another Health Practitioner (no obligation to refer or provide any further details) (HPCA Act s. 174).</p>	<p>A person with a conscientious objection to providing or assisting with an abortion must tell the patient of their objection at the earliest opportunity and must tell them how to access the official list of abortion service providers maintained by the Ministry of Health.</p> <p>An employer must accommodate the conscientious objection of a job applicant or employee <u>unless</u> it would “unreasonably disrupt the employer’s activities”, in which case the employer cannot hire someone, can fire them or offer them less favourable terms of employment, conditions of work and so on.</p>	<p>The requirement for a Health Practitioner to provide a woman with a list of abortion service providers arguably undermines that Health Practitioner’s ability to exercise true freedom of conscience.</p> <p>Further, the effect of the ability for an employer to refuse to hire someone, or to terminate their employment, on the grounds of their conscientious objection is a significant impingement on that person’s rights.</p>
Safe areas	N/A	<p>The Bill provides that safe areas (of max 150m) could be created around premises where abortion services are provided, on a case-by-case basis. The safe areas would provide a ban on any of the following:</p> <ul style="list-style-type: none"> • Any communication with or recording of people accessing or providing abortion services that would cause emotional distress to any reasonable person; • Any intimidation, interference or obstruction of a person accessing or providing abortion services. 	<p>This is a significant and concerning restriction on freedom of speech. The Bill uses broad wording such that provision of any information that would cause emotional distress to any reasonable person would be prohibited. Given the fraught emotional complexity involved in an abortion, it is hard to imagine that provision of any information (such as silently holding up a sign offering help) could not reasonably be inferred to be emotionally distressing.</p> <p>Given that the Bill does away with the requirement that abortion services are only provided from licensed premises, the potential impact of these safe areas is broad. Schools, family planning clinics, hospitals, GP clinics, and so on may be included.</p>