AMNESTY INTERNATIONAL

Amnesty International Aotearoa New Zealand
Submission to the Abortion Legislation Committee on the *Abortion Legislation Bill*

19 September 2019

INTRODUCTION

1. Amnesty International is a global movement of more than 7 million people who campaign for a world where human rights are enjoyed by all. Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards. We are independent of any government, political ideology, economic interest or religion and are funded by the individual giving of our supporters.

2. This submission is made on behalf of Amnesty International Aotearoa New Zealand (AIANZ). In New Zealand we have approximately 38,000 supporters and work on a wide range of human rights issues of both national and international significance.

3. AIANZ does not take a position on when life begins. This is a moral and ethical issue for each pregnant individual to decide as a matter of their own conscience. In line with international human rights law, and New Zealand jurisprudence, we recognise that legal protection of human rights, including the right to life, commences at birth.[1]

4. AIANZ encourages the Select Committee to take a human rights based approach to analysing the current Bill. This includes fulfilling New Zealand's human rights obligations with regards to protecting and guaranteeing rights to the highest attainable standard of health, non-discrimination and equality, privacy, information, liberty, and security of the person and freedom from cruel, inhuman, or degrading treatment.

5. AIANZ has a preference for a regime based on "Model A", as one of the regimes proposed by the Law Commission, which includes decriminalisation of abortion and regulating abortion services under the existing legal framework on healthcare provision. We believe this model will best ensure that access to safe abortions is effectively available to pregnant people to make their own decisions, free from barriers, delays or restrictions that could violate their human rights, including their reproductive autonomy.

6. However, we recognise that the proposed Bill is an improvement on the current framework by seeking to decriminalise abortion, and better aligning the regulation of abortion services with other health services. **We therefore support the Bill in principle.**

[1] CCPR/C/GC/36, 30 October 2018.

GENERAL PRINCIPLES

7. AIANZ's approach to this Bill is informed by the following principles:

a. **Non-discrimination and equality**: No one's status as a rights holder and equal subject of the law may be suspended, diminished or mandatorily set aside because of pregnancy.

b. **Addressing intersectional discrimination:** Those who face human rights violations due to their pregnancy status and the criminalisation and other barriers to abortion includes groups that tend to be differentially or disproportionately affected, including children, people living with disabilities, lesbian, bisexual, transgender and intersex people, gender non-conforming individuals, those living in rural areas, those living in poverty or low-income, and racial and ethnic minorities.

    i. AIANZ notes that in the context of New Zealand, this particularly means addressing Te Tiriti o Waitangi obligations with regard to the current barriers to access that have been identified as having a disproportionate impact on Māori, and the fact that the Law Commission has stated that "reform measures are unlikely to address entirely the disproportionate impact of barriers on Māori women."[2]

c. Economic and social rights: The New Zealand Government must ensure pregnant people have information about and access to services and support, including health care and social security supports, so that they have a real choice as to whether to carry their pregnancy to term, and that they are not forced to seek recourse to abortion due to denial of their economic and social rights.

d. Comprehensive health care: The provision of abortion information and services is part of comprehensive health care and requires functioning health care systems. Human rights further require that people can access quality health information, facilities, goods and services on a non-discriminatory basis and that barriers to access are removed.

e. **Challenging the root causes of discrimination:** Criminalisation of abortion in any circumstances and denial of access to safe abortion services is a manifestation, cause and consequence of social systems that discriminate, deny personal and bodily autonomy and impose unequal burdens on the basis of individuals' reproductive capacities and their pregnancy status, among other related factors.

[2] Law Commission *Alternative approaches to abortion law* (NZLC MB4, 2019), at [7.11].

ABORTION LAW & INTERNATIONAL HUMAN RIGHTS

8. AIANZ notes that multiple human rights treaty bodies have recommended that New Zealand reform its abortion law to better comply with international human rights obligations.[3] This includes commonly urging states to address unsafe abortion, remove obstacles to safe abortion services, and to take appropriate measures, legislative or otherwise, to ensure that women and girls and pregnant people do not resort to unsafe abortion.[4]

9. In 2012, the Committee on the Convention on the Elimination of Discrimination Against Women published its concluding observations on its seventh review of New Zealand, including in relation to abortion law:[5]

> The Committee notes with concern, however, the convoluted abortion laws which require women to get certificates from two certified consultants before an abortion can be performed, thus making women dependent on the benevolent interpretation of a rule which nullifies their autonomy. The Committee is also concerned that abortion remains criminalized in the State party, which leads women to seek illegal abortions, which are often unsafe.
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> The Committee urges the State party: (a) To review the abortion law and practice with a view to simplifying it and to ensure women's autonomy to choose; (b) To prevent women from having to resort to unsafe abortions and remove punitive provisions imposed on women who undergo an abortion.

10. The Committee repeated their recommendations for reform in 2018.[6]

11. During New Zealand's Universal Periodic Review before the Human Rights Committee in Geneva in January 2019, several states recommended that New Zealand reform the law on abortion and take a human rights-based approach, including by implementing "Model A" from the Law Commission report.[7]

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[3] Including under the Convention on the Elimination of Discrimination Against Women (CEDAW), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic and Social Rights (ICESCR), and the United Nations Convention on the Rights of the Child (UNCROC).
[4] See for examples: CRC/C/15/Add.168; E/C.12/1/ADD.74; CRC/C/15/Add.154; E/C.12/1/ADD.64; E/C.12/1/Add.62; E/C.12/1/Add.78; CRC/C/15/Add.202; CCPR/CO/79/LKA; E/C.12/ALB/CO/1; CEDAW/C/LCA/CO/6; CRC/C/TTO/CO/2; CEDAW/C/BRA/CO/6; CEDAW/C/NAM/CO/3; E/C.12/UNK/CO/1; E/C.12/KEN/CO/1; CCPR/C/CMR/CO/4; E/C.12/DOM/CO/3
[5] CEDAW/C/NZL/CO/7, 2012 at [33]–[34].
[6] CEDAW/C/NZL/CO/8, 2018
[7] A/HRC/41/4, 122.95 [Iceland], 122.96 [Netherlands], 122.97 [Uruguay], 122.98 [Canada].

COMMENTS ON SPECIFIC PROVISIONS

Section 2: Interpretation

12. The Bill primarily refers to women throughout the Bill in reference to those accessing abortion services. "Woman" is then defined in new section 2 meaning "a person of any age who is capable of becoming pregnant."

13. The majority of personal experiences with abortion relate to women and girls who were born female and identify as female. However those who face discrimination due to their pregnancy status and the criminalisation and other barriers to abortion also includes transgender men, intersex people, and gender diverse people who have the reproductive capacity to become pregnant. These communities can be differentially affected, and already experience marginalisation in accessing health services in New Zealand.[8]

14. Whilst AIANZ notes that the interpretation provision technically clarifies that the Bill covers a "person of any age who is capable of becoming pregnant", only using "woman" throughout the legislation could create an unnecessary barrier to people who do not identify as women but have the capacity to become pregnant from accessing abortion services. Some health providers and the public are likely to read the law at face value. The language in the Bill also does not acknowledge the psychological harm associated with being mis-gendered.[9]

15. AIANZ therefore recommends that the Bill be clarified further and that it is made explicit that services should be available also to transgender people and people of other gender identities capable of becoming pregnant. This could also include amending the Bill to refer to "pregnant person" or "pregnant people" throughout, to prevent any unintended confusion, barriers or discriminatory impacts for all those who may require abortion services.

Section 11: Provision of abortion services to women more than 20 weeks pregnant

16. Part of fulfilling New Zealand's human rights obligations is ensuring that access to safe abortions is effectively available to pregnant people to make their own decisions, free from barriers, delays or restrictions that violate their human rights, including their reproductive autonomy.[10]

17. As noted above, AIANZ advocates for legislation based on "Model A", as one of the three options proposed by the Law Commission. This would mean that the decision whether to have

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[8] Rosslyn Noonan and Joy Liddicoat *Who I am: report of the inquiry into discrimination experiences by transgender people,* (Wellington, Human Rights Commission, 2007), available at **https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008_14-56-48_HRC_Transgender_FINAL**

[9] JM Grant, LA Mottet, J Tanis, J Harrison, JL Herman, M Keisling *Injustice at every turn: a report of the national transgender discrimination survey* (Washington, National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011).

[10] CCPR/C/GC/36, 30 October 2018, at [8].

an abortion would be made by the pregnant person concerned in consultation with their health practitioner.

18. The current section 11 effectively creates a statutory "gestational limit." While states are not prohibited in international human rights law from imposing reasonable restrictions on abortion services, such as gestational limits, such restrictions must not undermine pregnant people's human rights.

19. The Law Commission report noted that the Abortion Supervisory Committee and health professionals submitted that virtually all abortions recorded from 20 weeks onward relate to wanted pregnancies, and abortions only occur because a serious abnormality or threat to the person's life or health is detected.[11] It was also noted that abortions after 20 weeks constitute 0.5% of all abortions.[12] Public health and social sciences research have also demonstrated that gestational limits can be guided by an abstract linear sense of time which has very little to do with the individual timing and development of each person's pregnancy. [13]

20. This reality can effectively render gestational limits a barrier to accessing services. For example, given what is at stake when people are seeking an abortion and that pregnancy development is inherently unique and individual, treating someone whose pregnancy is one day past the gestational limit differently than someone whose pregnancy is one day prior to the limit, is arguably unfair and can have differential impacts. This could impact certain groups disproportionately, such as people living in remote or rural areas in New Zealand, on low incomes, or other marginalised groups.

21. This is particularly cogent given the Law Commission noted that barriers to access already have a disproportionate impact on Māori:[14]

> Health professional bodies, abortion service providers and other submitters raised significant concerns about the disproportionate impact that barriers to access have on Māori. They stated that in areas with high Māori populations there is limited access to reproductive and contraceptive health services and information generally; a shortage of general practitioners (GPs); and an even greater shortage of GPs who will refer to abortion services. Health practitioners in the Hastings/Hawke's Bay area, for example, reported that many Māori women they work with are not enrolled with a GP.

22. AIANZ submits that it is essential to create an environment where pregnant people have the information and support they need to make a decision on any potential termination of pregnancy and be able to access safe abortion services as early in pregnancy as possible. It should also recognise that a very small number of people may need abortions at later stages of pregnancy, and that the law should permit an individual consideration of their situation, in

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[11] Law Commission *Alternative approaches to abortion law* (NZLC MB4, 2019), at [2.16].

[12] At [2.11].

[13] See for example, S. M. Beynon-Jones, "Gestating times: Women's accounts of the temporalities of pregnancies that end in abortion in England", 39 *Sociol Health Illn*, 832–846, 2017, onlinelibrary.wiley.com/doi/10.1111/1467-9566.12522/full

[14] Law Commission *Alternative approaches to abortion law* (NZLC MB4, 2019), at [7.6].

a way that does not restrict their reproductive autonomy.

Sections' 12 and 13 - Counselling

23. Providing accurate, culturally appropriate and non-stigmatising information and counselling is essential to assist women, girls and all pregnant people to make informed and autonomous decisions about their pregnancies, foetal diagnoses and fertility, free of coercion.[15]

24. AIANZ does not oppose this provision given that it refers to voluntary counselling and explicitly prohibits making access to abortion services conditional to receiving counselling, which would otherwise constitute a barrier.

25. The WHO notes that provision of counselling to pregnant individuals who desire it should be confidential, non-directive and by trained personnel.[16] AIANZ supports the Ministry of Health being responsible for ensuring adequate availability and professional standards of abortion counselling services. We recommend that the new regime continues to ensure that all counsellors affiliated with abortion providers are required to hold a relevant qualification or have equivalent training, be a registered member of their profession, be engaged in abortion counselling on a regular basis and have regular clinical supervision and peer review.

26. In addition to the above, AIANZ recommends that the Ministry of Health ensures that there is partnership with Māori in developing the abortion service workforce and national standards, and ensuring adequate access to culturally appropriate information and services, especially in areas with high Māori populations.

27. AIANZ also endorses the Nairobi Principles on Abortion, Prenatal Testing and Disability of 2019:

> Principle 6: "We affirm that the only way of supporting all prospective parents to make informed decisions about continuing or terminating their pregnancies is through affirmative measures, such as combating ableism in prenatal testing and counselling processes, ensuring all parents are operating in an enabling environment and have the social and economic supports they need to raise any child, including a child with disabilities or who is otherwise socially excluded, and promoting the rights and inclusion of persons with disabilities in all spheres of public and private life."
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> Principle 12: "As prenatal science and technology advance, we recognize that providers should offer evidence-based information to pregnant people neutrally and without bias during the prenatal screening and diagnostic process. We will advocate for professional and ethical standards and medical education that ensures that providers are trained on the rights and lived realities of people with disabilities or are able to refer to relevant people who can provide this information."

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[15] See Joint Civil Society Statement, *The Nairobi Principles on Abortion, Prenatal Testing and Disability, 2019*, nairobiprinciples.creaworld.org/nairobi-principles-on-abortion-prenatal-testing-and-disability/
[16] World Health Organisation *Safe Abortion: Technical and Policy Guidance for Health Systems* (2nd ed., 2012) at 36.

"Mandatory waiting periods"

28. Even in states with broader access to legal abortion, there are instances of mandatory "stand-down" or "waiting" periods to be introduced into legislation, whereby a pregnant person has to wait a certain period before they have access to abortion services. Whilst a waiting period before a medical procedure may not in and of itself be incompatible with the right to health per se, they can create additional, and potentially unduly burdensome, barriers to access to safe and legal abortions which would interfere with this right. They can also deny pregnant people the ability to access safe abortion services as early in pregnancy as possible. The United Nations Committee on Economic, Social and Cultural Rights has indicated that wait periods undermine women's rights to sexual and reproductive health.[17]

29. It is also noted that existing laws and standards that apply to health procedures in New Zealand already require that providers of health care services may only provide services if the patient makes an informed choice and gives informed consent.[18] If a health practitioner cannot be satisfied that a woman seeking an abortion is giving informed consent, the abortion should not proceed.[19] This includes a general duty to ensure a person seeking health services has sufficient time to reflect on the information provided before making a decision.

30. Therefore introducing an additional wait time requirement in this context would not be a justified or necessary limitation under pregnant peoples' right to sexual and reproductive health.

Section 15 – Certain behaviour prohibited in safe areas

31. AIANZ notes the duty on the New Zealand Government to guarantee the right to health, physical integrity, non-discrimination and privacy as people seek healthcare information and services at abortion clinics, as well as of the right of protesters to freedom of expression (including the expression of views which may shock, horrify or disturb).

32. AIANZ also notes that international human rights standards make clear that freedom of expression and peaceful assembly are not absolute; there is a difference between strong and vehement (even offensive) expression, and harassment and intimidation amounting to obstruction of other people's exercise of their human rights.[20]

33. AIANZ does not oppose the potential restriction on freedom of expression, if it can be shown by the New Zealand Government that it meets the "three part test" of reasonable limitations in international human right standards, i.e. is demonstrably necessary and proportionate for stipulated legitimate purposes.

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[17] E/C.12/GC/22 (2 May 2016) at [41].
[18] Law Commission *Alternative approaches to abortion law* (NZLC MB4, 2019), at [9.20].
[19] Under the Code of Rights, sch, cl 2, services may be provided to a consumer only if that consumer makes an informed choice and gives informed consent: right 7(1)
[20] See Article 19 and Article 21 of the International Covenant on Civil and Political Rights, available at http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

34. In this instance the relevant legitimate purpose is to protect and guarantee the right to health, physical integrity, non-discrimination and privacy as people seek healthcare information and services at clinics, free of harassment and intimidation amounting to obstruction of their access to those services. Ultimately it is a question of balancing different rights.

35. AIANZ notes that the Bill as it currently stands does not create blanket safe zones outside clinics. Rather the Bill defers this assessment to the Minister of Health to make an assessment of whether it would be a reasonable limit on people's rights and freedoms to create a "safe zone" through regulations in the future, and therefore trigger potential restrictions on certain behaviours.

36. AIANZ also notes however that the Law Commission stated that there was no clear evidence that the existing laws around intimidating and anti-social behaviour were inadequate to manage safe and dignified access to abortion providers' premises.[21] The Commission was also mindful that any introduction of safe access zones would have to be considered carefully for consistency with human rights.

37. In Crown Law's later consideration of whether the Bill's restrictions comply with the New Zealand Bill of Rights Act 1990 provisions on freedom of expression and justified limitations, it was noted that "there is good reason to believe that anti-abortion activity could become more widespread and intrusive following the passage of the Bill".[22] This included the change from some abortion services being provided at primary health care providers, lacking the physical and security features of a hospital.[23] It was also found that the proposed new offence has a distinct focus to existing offences, because it is targeted to a specific context, where activity such as a direct action protest aims to disrupt access to a health service.

38. AIANZ therefore does not oppose this section, because the potential regulatory restriction on freedom of expression is a reasonable limitation in order to protect the rights of those seeking health services without obstruction, if necessary in the future.

Amendment to new section 15(3)(b)

39. However, AIANZ does suggest a further amendment to the new section 15(3)(b) which prohibits communicating with or visually recording a person in a manner that is intended to cause the person "emotional distress". This provision most directly engages the right to freedom of expression. The current definition is also out of sync with a comparable New Zealand law which also seeks to carefully balance different rights; that of the Harmful Digital Communications Act 2015 which prohibits communication that rises to the level of "serious emotional distress".

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[21] At [12.14].
[22] Crown Law Office *Abortion Legislation Bill – consistency with New Zealand Bill of Rights Act 1990* (1 August 2019) at [38].
[23] At [38].

40. Crown Law justifies this different wording in the current Bill on the expectation that a "Bill of Rights Act-consistent reading will require courts to maintain a distinction between criminalised harm and mere annoyance."[24]

41. However there is not a guarantee that those who may be enforcing provisions in the first instance in future will undertake a "Bill of Rights Act-consistent reading", and this expectation is potentially creating uncertainty that requires future interpretation by the Courts, rather than in the first instance being robust.

42. AIANZ therefore recommends amending section 15(3)(b)'s definition to "serious emotional distress" in order to have clarity that this protection is against the high levels of discomfort or distress caused by harassment or intimidation that would obstruct other rights.

Sections 19, 20 – Conscientious objection

43. Freedom of thought, conscience and religion is recognised under New Zealand's Bill of Rights Act (as is the right to manifest these beliefs),[25] and internationally in instruments such as the Universal Declaration of Human Rights,[26] and the International Covenant on Civil and Political Rights (ICCPR).[27]

44. However, no international human rights standard recognizes a right per se to "conscientious objection" in the context of providing health services and freedom from discrimination.[28] On the contrary, human rights treaty monitoring bodies have called for limitations on the exercise of conscience claims, when states allow for such claims, in order to ensure that health care providers do not hinder access to reproductive health services and thus infringe on the rights of patients.[29]

45. For example, the Human Rights Committee, in commenting on the right to life under article 6 of the ICCPR in October 2018, noted that:[30]

> State parties should not introduce new barriers and should remove existing barriers that deny effective access by women and girls to safe and legal abortion, including barriers caused as a result of the exercise of conscientious objection by individual medical providers.

46. AIANZ notes that the Bill as it stands has created a referral obligation to somewhat ameliorate this barrier. However several concerns remain regarding this section, including:

    a. It covers very broad reproductive sexual health services, including contraceptive

[24] At [41.3].
[25] New Zealand Bill of Rights Act 1990, ss 13 and 15.
[26] Universal Declaration of Human Rights, available at http://www.un.org/en/universal-declaration-human-rights/
[27] International Covenant on Civil and Political Rights, available at http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.
[28] International Women's Health Coalition *Unconscionable: When providers deny abortion care* (2018) at 14, available at **https://iwhc.org/resources/unconscionable-when-providers-deny-abortion-care/**
[29] Above n 28, at 14-16.
[30] CCPR/C/GC/36, 30 October 2018, at [8].

services, which are likely to be required much more frequently, by many people;

b. It does not require health professionals to provide abortion services in emergency circumstances to save a person's life or prevent serious harm;
c. Access implications are not clear, for example whether there would there be enough alternative providers at reasonable geographical reach, especially in more remote or rural areas around New Zealand, and how this will impact access to services and information, particularly for marginalised groups such as people of low incomes, minorities and adolescents and communities with limited access to services.

47. The UN Committee on Economic, Social and Cultural Rights Committee has made it clear that states should ensure that an adequate number of health-care providers willing and able to provide sexual and reproductive health services are available at all times in both public and private facilities, and within "reasonable geographical reach".[31]

48. AIANZ therefore recommends that this section be reviewed in light of the above concerns, particularly with regards to how the Ministry of Health will ensure equitable coverage of reproductive and sexual health services. This is particularly essential given that it has already been identified that for Māori women, there is already a lack of "timely access at low or no cost to culturally responsive contraceptive and responsive and reproductive health services, including abortion services."[32]

CONCLUSION

49. AIANZ thanks the Committee for an opportunity to make a submission on the *Abortion Legislation Bill*. We call on the New Zealand Government to guarantee the right of women and girls, and all those who can become pregnant, to make decisions about their bodies and to determine the course of their lives in light of their conscience, lived experiences, plans and aspirations.

[31] E/C.12/GC/22, 2 May 2016, at [14].
[32] Te Whāriki Takapou, the Abortion Law Reform Association of New Zealand and Family Planning New Zealand *Alternate Report to the 70th CEDAW Pre-sessional Working Group* (October 2017) at [6].