

Privacy Commissioner's Submission to the Law Commission on Abortion Law Reform

1. Executive summary

- 1.1 The Government has asked the Law Commission to provide advice on alternative approaches for abortion legal frameworks to align with a health approach. The purpose of this request is to ensure that New Zealand's abortion laws are consistent with treating abortion as a health issue. The Commission has requested views from the public in order to develop their advice.
- 1.2 Abortion engages a fundamental privacy right inherent in bodily autonomy and self-determination. Abortion also engages the informational privacy rights as set out in the Privacy Act 1993 and the Health Information Privacy Code 1994. This Code and the expectation of doctor/patient confidentiality carry with them a high threshold and expectation of privacy and confidentiality in relation to health information.
- 1.3 I support the Government's goal to ensure that New Zealand law treats abortion as a health issue and does not govern it by the criminal law. Handling abortion solely as a health matter will better ensure that the decision to abort is treated consistently with the fundamental privacy in bodily self-determination. It will also ensure abortion is governed consistently by the law governing the privacy of health information.
- 1.4 The inclusion of abortion in the criminal law raises major issues with the exposure of sensitive health information to the criminal justice system. In this submission I have taken a first principles approach to the issue of abortion law reform regarding alternative approaches that could be taken and the overarching privacy right involved.
- 1.5 I have looked at Canada and Australia as examples of decriminalisation. I prefer the Canadian framework where abortion is decriminalised, and is now covered by the health legislation without any abortion-specific legislation governing its provision and operation.
- 1.6 I consider that the Canadian approach is the most appropriate for New Zealand to follow. This approach best reflects fundamental privacy rights, without over-regulating abortion comparative to other medical procedures. The simplest and most appropriate approach to treating abortion as a health issue is to remove abortion from the criminal law.
- 1.7 As the Law Commission develops their advice further, I am happy to provide more detailed advice as required. Should any draft legislation be prepared as a result of the Law Commission's work, my Office will be available to assist in providing support for the practical implications engaged by that process, and in assisting in the drafting so as to best protect individual privacy.

2. Background

Abortion law in New Zealand – current treatment

- 2.1 Abortion in New Zealand is governed by the Crimes Act of 1961 and the Contraception, Sterilisation and Abortion Act 1977. Abortion is treated as a criminal offence, with legal exceptions for abortions (until the 20th week of pregnancy) in the cases of serious danger to the life or mental health of the woman, cases of severe mental or physical handicap of the foetus, incest, or severe mental subnormality of the woman. After the 20th week of pregnancy abortion is only legal to save the life of the woman, or to prevent serious permanent injury to the physical or mental health of the woman.¹ Two certifying consultants must issue a certificate confirming they believe one of these exception grounds applies.²
- 2.2 Around one quarter of all pregnancies in New Zealand end in abortion.³ Approximately 97 percent of all abortions in 2013 were approved under the ‘danger to mental health’ ground. This has led to legal challenges from anti-abortionist groups on the grounds that many of these abortions are not technically legal and that the Abortion Supervisory Committee is not fulfilling its statutory functions in reviewing or scrutinising decisions of certifying consultants.⁴

New Zealand privacy legislation

- 2.3 New Zealand’s Privacy Act establishes privacy rights for individuals and provides for codes of practice to be developed for sectors. For the health sector, the Health Information Privacy Code 1994 governs the collection, use, disclosure, storage, disposal and access to personal health information relevant to a particular individual.

My Office’s engagement with abortion law

- 2.4 The Privacy Commissioner has a wide range of functions in protecting and promoting privacy, including the collection, use, disclosure, and access to personal information. Section 13 of the Privacy Act grants the Privacy Commissioner the broad ambit and ability to both comment on privacy generally and on any matters affecting the privacy of the individual. This includes the need or desirability of taking legislative, administrative, or other action to give protection or better protection of the individual.
- 2.5 In 2015 I submitted to Parliament’s Justice and Electoral Committee on the petition by Hillary Kieft and six others requesting that Parliament legislate to provide for parental notification of pregnancy for a woman under 16 years of age, before she is referred for any resulting medical procedure. My submission stated that if a young woman, who has been found to be mentally competent, is able to give or refuse consent for a termination, she also has the right to keep her personal medical information private

¹ Crimes Act 1961, section 187A.

² Contraception, Sterilisation, and Abortion Act 1977, section 32.

³ http://alranz.org/wp-content/uploads/2017/02/factsfigures_2015.pdf

⁴ See, for example, *Right to Life New Zealand Inc v the Abortion Supervisory Committee* [2012] NZSC 68.

from her parents.⁵ Current privacy laws protect a minor's right to privacy while also giving an appropriate level of discretion to doctors when faced with whether or not to disclose their personal information.

- 2.6 In considering the petition, the Committee found that mandatory unconditional parental notification of pregnancy could result in some young people being forced into making a decision against their own wishes. Accordingly, they found that a requirement to notify parents should not be introduced.⁶

3. International examples of abortion decriminalisation

Australia

- 3.1 Abortion law in Australia differs state-by-state. The Australian Capital Territory, Northern Territory, South Australia, Tasmania, Victoria, and Western Australia all treat abortion as legal with various restrictions on accessibility and gestational term limits. Of those states, Western Australia is the only state to include a provision requiring parental notification where a woman is under 16 years of age, with exceptions where permission has been granted by the court or where the woman does not live with her parents.
- 3.2 The two remaining states, New South Wales and Queensland, treat abortion as unlawful under criminal legislation, but subject to exceptions to preserve the woman involved from serious danger to her life or physical or mental health. This is similar to the current New Zealand legislative framework.
- 3.3 In 2006, a case in Sydney gave rise to significant debate in New South Wales as to whether the criminal law should continue to apply to health practices such as abortion, or whether abortion should rather be regulated by the Health Act.⁷ In this case, a doctor was found guilty of carrying out an illegal abortion on the basis that she had not appropriately questioned or determined whether this exception ground applied.⁸
- 3.4 The debate in New South Wales included observations that re-framing abortion as a health issue rather than a criminal issue would ensure better regulation. This regulation could occur through the existing mechanisms in place to regulate other medical procedures and practitioners (e.g. the Medical Board).

⁵ Privacy Commissioner, submission to Parliament's Justice and Electoral Committee on the petition by Hillary Kieft and six others, 15 June 2015 <https://privacy.org.nz/assets/Files/Reports-to-ParlGovt/OPC-Submission-on-Petition-of-Hilary-Keift-15-June-2015-amended.pdf>

⁶ Petition 2014/11 of Hillary Kieft and 6 others, Report of the Justice and Electoral Committee https://www.parliament.nz/resource/en-NZ/51DBSCH_SCR69571_1/ee578f2ba3c744ab5a21d4d5196b68a26c5e542d.

⁷ See discussion for example <http://www.abc.net.au/radionational/programs/lawreport/the-sood-abortion-trial/3343452>, with comment from Leslie Cannold, ethicist and spokesperson for Reproductive Choice Australia.

⁸ *R v Sood* (Ruling No 3) [2006] NSWSC 762 (15 September 2006).

Canada

- 3.5 Canada governs abortions by the Canada Health Act 1984 and treats abortions as legal at all stages of pregnancy, with no gestational limits or restrictions. Abortion had been in the Canadian Criminal Code (with exceptions for when the health of the woman was in danger) until the Supreme Court of Canada overturned the abortion law as unconstitutional in 1988.⁹
- 3.6 The Court in *R v Morgentaler* found that “state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person.”¹⁰ The Court did not consider it necessary to consider whether the right to security of the person extended so as to protect interests such as a right to privacy which are central to personal autonomy. This finding was due to the breach of security already being such a profound interference with bodily and physical integrity. The Court did find that “if the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹¹
- 3.7 As no Canadian government has since introduced abortion-specific legislation, Canada has no specific abortion law and is instead regulated through the Canada Health Act. Abortion has no further regulation than other similar medical procedures.

4. Abortion and privacy

Privacy is a matter of personal and bodily autonomy and self-determination

- 4.1 Privacy relates inalienably to the ability to make important decisions about one’s own life. The concept of privacy embodies the idea of individual and bodily autonomy: that an individual belongs to themselves and not to others or to society as a whole.¹² In the United States case *Bowers v Hardwich*, commenting on the sphere of privacy and individual liberty in relation to the reach of the government or the state, Judge Blackmun observed that “we protect the decision whether to have a child because parenthood alters so dramatically an individual’s self-definition.”¹³
- 4.2 *Roe v Wade* is perhaps the most well-known case regarding abortion rights and was decided on privacy grounds. In that case the United States Supreme Court found that a statute criminalising all abortions violated the right of privacy. The Court found that this right is “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”¹⁴

⁹ *R v Morgentaler* [1988] 1 SCR 30.

¹⁰ Above, at 56.

¹¹ Above, at 168.

¹² Blackmun J, dissenting, in *Bowers v Hardwich* [1986] USSC 194.

¹³ Blackmun J, above, at II.

¹⁴ *Roe v Wade* [1973] USSC 43; 410 US 113 (1973) at 153.

- 4.3 Privacy rights are recognised in international law, including the International Covenant on Civil and Political Rights (“the right not to be subjected to arbitrary or unlawful interference with privacy or family”)¹⁵ and the European Convention on Human Rights (“a right to respect for private and family life”).¹⁶
- 4.4 Cases decided under international law have held that these privacy-related rights include the decision over whether to have or not to have a child, demonstrating a growing consensus in the international arena that restricting abortion access may amount to a violation of the right to privacy.¹⁷
- 4.5 The Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the United Nations General Assembly in 1979, reaffirms women’s reproductive rights as a matter of human rights. Article 16(1)(e) provides that women should have equality in deciding “freely and responsibly on the number and spacing of their children.”

Health information such as the decision to terminate should not be exposed to the criminal justice system

- 4.6 Medical information is universally understood to be sensitive information, especially if it concerns reproduction. Abortion being treated as a criminal issue exposes this sensitive reproductive health information to the criminal justice system in a way that is not the case for any other healthcare or medical decision. For example, criminal cases can be prosecuted against a person for performing an abortion, or against a woman attempting to procure her own miscarriage.
- 4.7 If a potentially unlawful abortion was being investigated or prosecuted by the Police, a doctor or clinic could be compelled to provide personal and sensitive medical information via a production order. These records would then be made public in the course of that criminal prosecution.
- 4.8 Rule 11(i) of the Health Information Privacy Code also permits disclosure of health information where necessary for the maintenance of the law or for the conduct of proceedings in court. As abortion is currently a criminal issue, a clinic has the discretion to disclose abortion information under this provision even where no Police production order exists.
- 4.9 The potential for harmful disclosure of sensitive personal information was recognised by the Court of Appeal in *Right to Life v Abortion Supervisory Committee*, when considering whether the Abortion Supervisory Committee had a power of after-the-fact review of authorising certificates: “[t]he disclosure of records kept had the potential to

¹⁵ International Covenant on Civil and Political Rights, Article 17.

¹⁶ European Convention on Human Rights, Article 8.

¹⁷ Alawi, Sarah, ‘Privacy law in the abortion context’ [2014] NZPubIntLawJl 6; (2014) PILJNZ 151.

impact on the privacy of both the patient and the relevant medical practitioner or provider.”¹⁸

- 4.10 Even were a suppression order in place to prevent publication of information, a woman having sought an abortion could suffer the exposure of her health information to other parties including the Police in investigating and prosecuting the case.
- 4.11 The potential impact on privacy in relation to particularly sensitive health information means the existing law is inadequate to protect women seeking to exercise a choice relating to their own reproductive rights. It is inconsistent with the treatment of health information and the expectation of patient/doctor confidentiality. Removing abortion from the criminal justice system so that it is simply governed by the relevant health legislation and not subject to criminal law will prevent this potential exposure and disclosure.

5. Conclusion – ensuring abortion is treated as a health issue

- 5.1 The simplest and most appropriate approach to ensure New Zealand’s abortion laws are consistent with treating abortion as a health issue is to remove abortion from the criminal law. Abortion is already managed within the health context and does not require further legislative regulation within that sphere. The decision to abort is no different from any other medical decision a woman may have to make. Abortion should not be a criminal issue requiring significant exceptions to be considered legal, such as a risk to life or health whether physical or mental.
- 5.2 Removing abortion from the criminal law will better ensure that the privacy of that health information is treated consistently with the Health Information Privacy Code. It will prevent the potential for exposure of sensitive personal health information to the criminal justice system. It also better respects the privacy right involved in individual autonomy.
- 5.3 Both the decriminalised legislative framework in various Australian states, and the Canadian model, operate as appropriate examples of an alternative framing for New Zealand. I prefer the Canadian framework for New Zealand reform, involving simply decriminalising abortion without creating abortion-specific legislation to govern its provision and operation. This framework better reflects the privacy right integral to exercising choice over abortion as a medical procedure, without over-regulating it comparative to other similar procedures.
- 5.4 I would be happy to speak with the Law Commission or to provide any further information that will assist the Law Commission in relation to this matter.

¹⁸ *Right to Life New Zealand Inc v the Abortion Supervisory Committee* [2012] NZSC 68, at [28] citing the Court of Appeal at [103].