

EMILY THOM

**FREEDOM OF EXPRESSION AND MANIFESTATION
OF RELIGION IN ABORTION SERVICE SAFE AREAS**

Submitted for the LLB (Honours) Degree

Faculty of Law

Victoria University of Wellington

2021

Abstract

Pro-life activity outside of abortion services began in New Zealand shortly after the first abortion clinic opened in 1974. Protest activity has varied from peaceful prayer and offers of support to insults, threats and violent attacks. The Contraception, Sterilisation and Abortion (Safe Areas) Amendment Bill was introduced to New Zealand's Parliament in 2020 with the purpose of curbing all protest activity around abortion services. This paper criticises the broad scope of conduct that will be captured within the Bills prohibition on 'communicating with a person in a manner that the ordinary reasonable person would know would cause emotional distress to a protected person'. This paper considers the burden that this prohibition places upon the rights to freedom of expression and manifestation of religion as protected by the New Zealand Bill of Rights Act 1990. After engaging in a comparative analysis to safe areas legislation implemented in the United States, United Kingdom, Canada and Australia, this paper concludes that the communicating prohibition in New Zealand's Bill is overly broad. It will breach ss 14 and 15 of the New Zealand Bill of Rights Act and, as such, should be removed from the Bill.

Contents

<i>I Introduction</i>	4
<i>II Abortion Protest in New Zealand</i>	5
<i>A The Range of Protest in New Zealand</i>	5
<i>B Engagement of ss 14 and 15</i>	8
<i>III Overview of the Bill</i>	9
<i>IV Safe Areas Legislation Overseas</i>	10
<i>A United States</i>	10
<i>B United Kingdom</i>	10
<i>C Canada</i>	11
<i>D Australia</i>	12
<i>V The Range of Protest Activity Captured by the Bill</i>	12
<i>A The 150 Metre Area</i>	12
<i>B Breadth of ‘Communicating’</i>	13
<i>C Objective ‘Emotional Distress’</i>	15
<i>VI Summary of Objection</i>	16
<i>VII Importance of Pro-Life Activity</i>	17
<i>VIII The Bill of Rights Vet</i>	18
<i>IX Emotional Distress Standard</i>	20
<i>A Emotional Harm and the NZBORA</i>	20
<i>B Emotional Harm and Privacy</i>	21
<i>C Emotional Harm in New Zealand Statute</i>	22
<i>D Conclusion</i>	23
<i>X Overseas Experience</i>	23
<i>A Overseas Standards</i>	23
<i>B Practical Result of Legislation Overseas</i>	26
<i>XI Sufficiency of New Zealand’s Current Law</i>	27
<i>XII Conclusion</i>	30

I Introduction

For one hour every Wednesday a group of three to four elderly ladies meet to pray across the road from a private abortion facility in Auckland.¹ There are four lanes of traffic and two footpaths between the facility and the place where they set up their deckchairs because they cannot stand for the full hour.² Sometimes they set up a sign saying, “you’re not alone”, or bearing the number of a local pregnancy help centre.³ Michele O’Neill, submitting to the Health Select Committee, often meets at this location, evidently compelled by her religious convictions to pray within view of the clinic. O’Neill explained her perplexion as to why her prayers in these circumstances might be prohibited under the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill (the Bill).⁴

The Bill was introduced in response to protest activity outside of abortion services in New Zealand.⁵ It seeks to eradicate this activity within an area of up to 150 metres around prescribed abortion services to protect those accessing or providing such services (protected persons).⁶ However, as I will argue, the communicating provision is overly broad.⁷ The provision will capture religiously motivated activities including pregnancy support offers and prayer. These activities engage both the rights to freedom of expression and manifestation of religion as protected by the New Zealand Bill of Rights Act (NZBORA).⁸ In view of the lack of harm these activities cause, their prohibition within safe areas cannot be demonstrably justified in New Zealand’s society.⁹ The communicating prohibition should be removed from the Bill.

¹ Michele O’Neill “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee A (12 May 2021)”.

² Michele O’Neill “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee A (12 May 2021)”.

³ Michele O’Neill “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee A (12 May 2021)”.

⁴ Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 (310-1).

⁵ (10 March 2021) 750 NZPD (Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – First Reading, Louisa Wall); and Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 (310-1) (explanatory note) at 1.

⁶ Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 (310-1) (explanatory note) at 1.

⁷ Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 (310-1), cl 13A(3)(b).

⁸ New Zealand Bill of Rights Act 1990, ss 14-15.

⁹ New Zealand Bill of Rights Act, s 5.

I will first consider the nature of pro-life protest in New Zealand. This will reveal an inherent connection between religion and protest. A limitation on pro-life protest, thus, also limits the right to manifestation of religion. It will also reveal a very broad scope of conduct, some of which has caused harm to protected persons. This gives legitimacy to the purpose of the Bill. I will then consider the ‘safe areas’ legislation already implemented in the United States, United Kingdom, Canada and Australia, drawing comparisons to New Zealand's Bill. I will conclude this background analysis by examining the range of protest activity that will be captured by the Bill.

Having set the Bill in context I will proceed to consider whether the communicating provision, which limits ss 14 and 15 of the NZBORA, can be demonstrably justified under s 5. Following the *Oakes* test I will weigh the importance of pro-life activities to individuals participating, the harm caused to protected persons by those activities, the emotional distress standard required by the Bill, the impact of safe areas legislation overseas, and the sufficiency of New Zealand’s present law.¹⁰ Having weighed these factors I will conclude that the limits placed upon the rights to manifestation of religion and freedom of expression by the communicating provision cannot be demonstrably justified under s 5. Thus, the Bill should not be allowed to proceed in its present form.

II Abortion Protest in New Zealand

A The Range of Protest in New Zealand

The purpose of establishing safe areas around abortion facilities is to protect the safety and well-being, and respect the privacy and dignity of protected persons.¹¹ The necessary corollary to this purpose is the existence of behaviour that places the safety, well being, privacy and dignity of protected persons at risk. Throughout the select committee submission process competing evidence was heard as to the existence and extremity of pro-

¹⁰ *R v Oakes* [1986] 1 SCR 103.

¹¹ Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 (310-1) (explanatory note) at 1.

life activity throughout New Zealand.¹² This may be explained by the broad range of activity that has occurred throughout history in New Zealand and around the world.

Pro-life activity outside abortion facilities began shortly after New Zealand's first abortion clinic opened in 1974.¹³ The most extreme protests occurred between the 1970s and 1980s and included arson attacks, a firebombing, bomb scares, and threats.¹⁴ In the 1980s and 1990s Operation Rescue gained a reputation for taking measures to prevent people from entering facilities including trespass and obstruction, photography and 'naming and shaming'.¹⁵ While Operation Rescue no longer has a presence in New Zealand, occasional acts of trespass and obstruction still occur.¹⁶

Other pro-life activities outside abortion facilities have included verbal and visual accusations of murder, and signage depicting successful abortions and dismembered foetus parts.¹⁷

More common forms of pro-life activities include signs reading "love them both" and "pregnancy support", sidewalk counselling and the offering of pregnancy support leaflets, and signage depicting foetuses at various stages of development. Many submitters described their pro-life activities as providing one last opportunity to women who may not have

¹² See generally ALRANZ Abortion Rights Aotearoa "Submission to the Health Committee on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020"; and Right to Life New Zealand Inc "Submission to the Health Committee on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020".

¹³ Megan Cook, "Abortion - Controversy: 1974 to 1980s" (5 May 2011) Te Ara The Encyclopedia of New Zealand <teara.govt.nz>

¹⁴ Alison McCulloch *Fighting to Choose: The Abortion Rights Struggle in New Zealand* (Victoria University Press, Wellington, 2013) at 94-95 and 241-242.

¹⁵ McCulloch, above n 14, at 242-244; and Margaret Sparrow "Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee A (12 May 2021)".

¹⁶ Abortion Providers Group Aotearoa New Zealand "Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee A (19 May 2021)"; and Hilary Stapels "Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee A (12 May 2021)".

¹⁷ McCulloch, above n 14 at 244; see generally Royal Australian and New Zealand College of Obstetricians and Gynaecologists "Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee B (19 May 2021)"; and PSA "Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee A (28 May 2021)".

understood the support available to them.¹⁸ These activities are often influenced by religious beliefs.

Finally there are pro-life activities which are expressly religious. These are most commonly in the form of prayer with or without the rosary and singing.¹⁹ 40 Days for Life is one of New Zealand's most sizeable pro-life campaigns. It is an international prayer project which encourages individuals to gather outside of abortion facilities over the 40 days of lent to pray.²⁰ All those participating are required to sign a statement of peace.²¹

This evidence demonstrates that while much pro-life activity is non-violent, this is not always the case. While many pro-life petitioners claim that they intend their prayer, hymns and signs to demonstrate love towards protected persons, these activities are often perceived as judgmental and condemning. Evidence from those accessing abortion services have suggested that prayer can be just as offensive as chanting with placards and that even an offer of help can be condescending and traumatising.²² It is argued that this provides the necessary justification for prohibiting all manner of protest activity.²³ This sentiment was expressed in Canada in *R v Lewis* where the Court considered offers of help and prayer vigils outside of abortion clinics to be expressions of disapproval.²⁴

Submitters also argued that pro-life activities within New Zealand must be considered in the context of protests world-wide. Committee member Elizabeth Kerekere MP suggested that

¹⁸ See Merle Duxford "Submission to the Health Committee on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020"; Frances Posthuma "Submission to the Health Committee on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020"; and Leao Tildsley "Submission to the Health Committee on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020".

¹⁹ See Right to Life New Zealand Inc "Submission to the Health Committee on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020".

²⁰ 40 Days for Life (2021) <www.40daysforlife.com>

²¹ Family Life International New Zealand "Submission to the Health Committee on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020" at 4.

²² PSA "Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee A (28 May 2021)"; and Otago University Student Association "Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence (5 May 2021)".

²³ ALRANZ Abortion Rights Aotearoa "Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee B (19 May 2021)"; and PSA "Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee A (28 May 2021)".

²⁴ *R v Lewis* (1996) 139 DLR (4th) 480 (BCSC), at [27] and [63].

even offers of pregnancy support are part of a bigger rhetoric.²⁵ Similarly the Abortion Law Reform Association of New Zealand (ALRANZ) submitted that it is the fear of escalation of violence which makes protest behaviour unacceptable.²⁶

Protest activity overseas has frequently included more violent forms of protest than in New Zealand. In the United States, protests outside of clinics have been substantial and often violent. Assault and battery occur frequently and death threats and threats of harm directed at abortion service providers are not uncommon.²⁷ Bomb threats and arson attacks remain an occasional occurrence.²⁸ Several people have also been killed in attacks on abortion clinics, the last death occurring in 2015.²⁹ Deaths related to pro-life protests have also occurred in Canada and Australia. However, most recorded protest activity in all of these countries has been non-violent.³⁰ Pro-life protests in New Zealand should be considered against the backdrop of more violent protest overseas, however, the importation of a violent sentiment to New Zealand should not be overstated.

Protest activity outside of abortion services in New Zealand has harmed the safety, well being, of protected persons. These concerns are pressing and substantial and, thus, are sufficiently important to permit the limitation of a right.³¹

B Engagement of ss 14 and 15

In *Fighting to Choose: The Abortion Rights Struggle in New Zealand*, Alison McCulloch maintains that the pro-life movement is essentially a religious one.³² This is illustrated in the Catechism of the Catholic Church which holds that human life must be respected and protected absolutely from the moment of conception.³³ The nature of pro-life activities

²⁵ “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee B (12 May 21) B.

²⁶ ALRANZ Abortion Rights Aotearoa “Submission to the Health Committee on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020” at 2.

²⁷ *2019 Violence and Disruption Statistics* (National Abortion Federation, 2019) at 5 and 8.

²⁸ *2019 Violence and Disruption Statistics* (National Abortion Federation, 2019) at 6 and 8.

²⁹ *2019 Violence and Disruption Statistics* (National Abortion Federation, 2019) at 8-11.

³⁰ *2019 Violence and Disruption Statistics* (National Abortion Federation, 2019).

³¹ *R v Oakes*, above n 10.

³² McCulloch, above n 14, at 53.

³³ *Catechism of the Catholic Church* (St Pauls, Homebush (NSW), 1994), at [2270].

outside of abortion facilities largely reflect this religious conviction. Pro-life groups including the ‘Helpers of God’s Precious Infants’ draw a parallel to Jesus’ mother Mary, his disciple John and other followers who stood at the foot of the cross on the day of Jesus’ crucifixion.³⁴ Like these three individuals, the Helpers of God’s Precious Infants wish to remain outside abortion facilities beside the unborn children in the hour of their crucifixion.³⁵ This sentiment is echoed across pro-life organisations.³⁶

The engagement of freedom of religion in the context of protest within abortion service safe areas has been recognised in courts overseas.³⁷ The Canadian case *R v Lewis* directly considered whether freedom of conscience and religion enshrined in the Canadian Charter, upon which New Zealand’s Bill of Rights Act was modelled, was engaged by pro-life protests within a safe area.³⁸ In *Lewis* the Charter’s protection of freedom of religion as well as freedom of expression was found to be engaged.³⁹ Freedom of expression includes the freedom to seek, receive, and impart information and opinions of any kind in any form.⁴⁰ This encompasses pro-life protests.

III Overview of the Bill

The Bill will establish ‘safe areas’ around prescribed abortion services within which certain conduct is prohibited. An area will extend no further than 150 metres from any part of the abortion service premises.⁴¹ Safe areas will not automatically apply, rather, they may be established on the recommendation of the Minister of Health after consultation with the Minister of Justice.⁴² The Minister of Health must be satisfied that the safe area is necessary in light of the purpose of the Bill, and that the safe area can be demonstrably justified in a

³⁴ “The Helpers of God’s Precious Infants” Eternal World Television Network <ewtn.com>

³⁵ “The Helpers of God’s Precious Infants” Eternal World Television Network <ewtn.com>

³⁶ See John Scheidler “At the Foot of the Cross” (31 March 2010) Pro-Life Action League <<https://proliffeaction.org>>

³⁷ See *R v Lewis*, above n 24, at [5]; and *Dulgheriu v Ealing* [2019] EWCA Civ 1490, [2020] 1 WLR 609 at [81].

³⁸ Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK), s 2(a); *R v Lewis*, above n 24, at [5].

³⁹ *R v Lewis*, above n 24 at [65] and [69]-[71].

⁴⁰ New Zealand Bill of Rights Act 1990, s 14.

⁴¹ Clause 13C(1)(b).

⁴² Clause 13C(1).

free and democratic society as a reasonable limitation on people's rights and freedoms.⁴³
The necessity for and justification of the safe area will be reviewed every five years.⁴⁴

The Bill states that a person must not engage in any 'prohibited behaviour' in a safe area.⁴⁵
Prohibited behaviour is defined as follows:⁴⁶

- (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 the ordinary reasonable person would know would cause emotional distress to a protected person.

If a constable reasonably believes that a person is engaging in prohibited behaviour in a safe area, and that person fails to stop upon request, a constable may arrest and take that person into custody without a warrant.⁴⁷ They will be liable on conviction to a fine not exceeding \$1,000.⁴⁸

The Bill is clear that religiously motivated intimidation, interference or obstruction of protected persons will be captured by s 13A(3)(a). However, on its face, it is unclear how far the net of liability will be cast under the s 13A(3)(b) communicating provision.

IV Safe Areas Legislation Overseas

Several other jurisdictions have established safe areas around abortion facilities. These include the United States, England, Canada and Australia. I will consider each of their provisions in turn.

⁴³ Clause 13C(2)(b).

⁴⁴ Clause 13C(3).

⁴⁵ Clause 13A(1).

⁴⁶ Clause 13A(3)(a)-(b).

⁴⁷ Clause 13B.

⁴⁸ Clause 13A(2).

A United States

The rights landscape in the United States differs from that in New Zealand. Safe areas legislation, in the few states where it has been implemented, is tightly restrained reflecting the primacy given to freedom of expression. In Colorado, for example, 30 metre safe areas have been established around all medical facilities. At their most restrictive these areas prohibit approaching within two metres of another person, without consent, for educational or counselling purposes.⁴⁹ All forms of legal protest including picketing, pregnancy support offers and prayer are otherwise permitted within a safe area.

B United Kingdom

The United Kingdom does not have legislative provision for safe areas around abortion facilities. Rather, Public Space Protection Orders (PSPO) have been used to create safe areas around three abortion facilities to date.⁵⁰ Established by the local council, each safe area is uniquely prescribed, however, all three have prohibited essentially the same conduct. At their most restrictive they prohibit engaging in any act or attempted act of approval or disapproval in relation to abortion services.⁵¹ This can be via graphic, verbal or written means and includes counselling and prayer. The display of text or images relating directly or indirectly to the termination of pregnancy is also prohibited.⁵²

These PSPOs are more restrictive of protest activity than New Zealand's Bill. Once established they create a blanket ban on specified activities and unlike in the United States, no exception of consent is provided for persons accessing abortion services who wish to pray with or discuss issues of abortion within a safe area.

While the safe areas established in the United Kingdom are very restrictive, they are also difficult to establish. Under the Anti-social Behaviour, Crime and Policing Act several

⁴⁹ CO Rev Stat, title 18 § 18.9.122.

⁵⁰ Public Spaces Protection Order (Mattock Lane) 2018; Public Spaces Protection Order (Rosslyn Road) 2019; and Manchester City Council (Wynnstay Grove) Public Spaces Protection Order 2020.

⁵¹ Public Spaces Protection Order (Mattock Lane), art 4(i); Public Spaces Protection Order (Rosslyn Road), art 1(a); and Manchester City Council (Wynnstay Grove) Public Spaces Protection Order, art 1.

⁵² Public Spaces Protection Order (Mattock Lane), art 4(v); Public Spaces Protection Order (Rosslyn Road), art 1(e); and Manchester City Council (Wynnstay Grove) Public Spaces Protection Order, art 6.

conditions have to be met before a PSPO can be established.⁵³ At the very least the protests must be likely to have a detrimental effect on the quality of life of those in the locality and be of a persistent or continuing nature such as to make the activities unreasonable and justify the restrictions imposed by the notice.⁵⁴ A rigorous consultation process must be undertaken before a PSPO can be established.⁵⁵ In New Zealand's Bill, the Minister of Health's responsibility to ensure the necessity and justification for a prescribed safe area is far less exacting.⁵⁶

C Canada

Five provinces in Canada have passed safe areas legislation. British Columbia was the first, and several other provinces have modelled their safe areas provisions off of this legislation.⁵⁷ The safe areas extend up to 50 metres from the boundary of abortion facilities and are established by the Lieutenant Governor in Council by regulation. At their most restrictive, British Columbia's safe areas prohibit informing or attempting to inform a person concerning issues relating to abortion services by any means, and prohibit any act of disapproval in relation to abortion services by any means.⁵⁸ In contrast to New Zealand's Bill this provision is less restrictive of conduct where it requires a prohibited act to be in relation to abortion services, however, is more restrictive in that it does not require harm to be objectively likely to result.

D Australia

In Australia, Victoria's legislation in particular bears resemblance to New Zealand's Bill. Both prohibit communicating and extend up to 150 metres from prescribed facilities.⁵⁹ One notable difference is that a prohibited communication must be in relation to abortion and it

⁵³ Anti-social Behaviour, Crime and Policing Act 2014 (UK), s 59.

⁵⁴ Anti-social Behaviour, Crime and Policing Act, s 59(1)-(3).

⁵⁵ See generally *Public Spaces Protection Order to address behaviours outside the Marie Stopes Clinic, Mattock Lane: Consultation Report* (Ealing Council, March 2018).

⁵⁶ Section 13C(2).

⁵⁷ Access to Abortion Services Act RSBC 1996 c 1; Access to Abortion Services Act SNL 2016 c A-1.02; Respecting Health Services and Social Services Act RSQ 2016 c S-4.2; Safe Access to Abortion Services Act SO 2017 c 19; Protecting Choice for Women Accessing Health Care Act SA 2018 c P-26.83; Protecting Access to Reproductive Health Care Act SNS 2020 c 5.

⁵⁸ Access to Abortion Services Act RSBC 1996 c 1, s 21(1)(a)(ii) and (b).

⁵⁹ Public Health and Wellbeing Act 2008 (Vic), s 185B(1); and Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill, cl 13C(1)(b).

must be able to be seen or heard by a protected person.⁶⁰ This narrows the conduct that will be captured. Furthermore, a prohibited communication must be reasonably likely to cause distress or anxiety.⁶¹ Because this provision does not require distress or anxiety to relate to a protected person, courts may choose to import an ‘ordinary reasonable person’ standard into the provision. This would narrow the conduct captured so that tolerable protests would not be criminalised by the particular sensibilities of persons accessing abortion services.

V The Range of Protest Activity Captured by the Bill

A The 150 Metre Area

It is likely that a safe area of up to 150 metres was decided upon for New Zealand’s Bill because this was the distance adopted in similar legislation in Victoria. The 150 metre area was chosen in Victoria after consultation with a wide range of stakeholders.⁶² Australian hospitals and clinics provided examples of the locations where protesters would stand.⁶³ In *Clubb v Edwards* Gageler J warned against the arbitrary application of a 150 metre area on the basis of legislation implemented in another state where the protest and legislative context may be different.⁶⁴ Gageler J emphasised that a 150 metre area is not trivial but must be close to the maximum justifiable reach.⁶⁵ It remains unclear why the distance of up to 150 metres has also been considered appropriate for New Zealand.

B Breadth of ‘Communicating’

Looking at the plain language of s 13A(3)(b), the word ‘communicating’ is very broad. In ordinary usage, communication can be carried out verbally or nonverbally.⁶⁶ Therefore, it can encompass conduct ranging from speaking and signage to silent prayer. A very broad reading of ‘communicating’ was supported by MPs during the first reading of the Bill. Jan Logie MP stated that pro-life protesters will still be able to hold prayer sessions, however,

⁶⁰ Public Health and Wellbeing Act, s 185B(1).

⁶¹ Section 185B(1).

⁶² Victorian Parliamentary Debates, Legislative Assembly, (22 October 2015) at 3976.

⁶³ At 3976.

⁶⁴ *Clubb v Edwards* [2019] HCA 11, (2019) 267 CLR 171 at [209].

⁶⁵ *Clubb v Edwards*, above n 64, at [213].

⁶⁶ *Concise Oxford English Dictionary* (12th ed, Oxford University Press, Oxford, 2011).

they may have to do this 150 metres down the road.⁶⁷ Sarah Pallett MP noted that prayer to God is effective irrespective of where it is carried out.⁶⁸ These references to prayer demonstrate that some MPs anticipate that prayer will be captured by the Bill. Support for a broad interpretation is also found in the select committee submissions where silent prayer was named as a form of conduct that disturbs the dignity of protected persons.⁶⁹

Crown Law’s further briefing to the Attorney-General noted that in its current form the Bill risks criminalising helpful conversations with a legitimate purpose.⁷⁰ In particular Crown Law expressed concerns that difficult conversations with clinicians and family members could be criminalised.⁷¹ Accepting that ‘communication’ may include some conversations with clinicians and family members, it is also likely to capture potentially helpful conversations with pro-life petitioners. Crown Law recommended that the Bill be amended to set out the specific forms of communication to be criminalised.⁷²

Case law from Australia, Canada and the United Kingdom also supports the conclusion that New Zealand courts would find ‘communicating’ to include silent prayer. In the Australian case *Clubb v Edwards* the Court considered the constitutionality of safe areas provisions in the states of Victoria and Tasmania.⁷³ The Victorian legislation, similar to New Zealand’s Bill, prohibits “communicating by any means in relation to abortion”.⁷⁴ Tasmania’s provision is more narrow, prohibiting “a protest in relation to terminations” that is able to be seen or heard by protected persons.⁷⁵ Gageler and Edelman JJ both considered whether silent prayer might be captured within these provisions.⁷⁶ Gageler J recognised that silent

⁶⁷ (10 March 2021) 750 NZPD (Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill – First Reading, Jan Logie).

⁶⁸ (10 March 2021) 750 NZPD (Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill – First Reading, Sarah Pallett).

⁶⁹ PSA “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee A (28 May 2021)”; and Otago University Student Association “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence (5 May 2021)”.

⁷⁰ Matt McKillop *Contraception, Sterilisation and Abortion (Safe Areas) Amendment Bill Our Ref: ATT395/322* (Crown Law, May 2021) at [6.1].

⁷¹ At [6.1].

⁷² At [7]-[8].

⁷³ *Clubb v Edwards*, above n 64.

⁷⁴ Public Health and Wellbeing Act, s 185B(b).

⁷⁵ Reproductive Health (Access to Terminations) Act 2013 (Tas), s 9(1)(b).

⁷⁶ At [167] and [475].

prayer might in particular circumstances amount to a public demonstration or protest.⁷⁷ With reference to prayer, Edelman J stated that silent or quiet action can be a powerful form of protest and political communication.⁷⁸ He referenced communicative power of silent action including wearing symbols of dissent, participating in a silent vigil, public prayer and meditation. Edelman J also noted that the Parliament of Tasmania intended for the protest prohibition to capture silent protests and vigils outside of termination clinics.⁷⁹ New Zealand’s Bill appears to have drawn upon the Victorian safe areas legislation. Thus, *Clubb v Edwards* provides a strong indication that the New Zealand Courts would similarly consider silent prayer to be included within the scope of ‘communicating’. This is strengthened by the Courts suggestion that silent prayer would also fall within the more narrow Tasmanian prohibition on ‘protest’.

In the Canadian case *R v Lewis* the Court considered the constitutionality of a safe areas provision in British Columbia.⁸⁰ The provision prohibits protest including any act or attempted act of disapproval with respect to issues related to abortion services, by any means.⁸¹ Saunders J held that the Act prohibited the defendant from expressing his sincerely held religious views, that abortion is not justifiable, in a safe area.⁸² Furthermore, he considered it would prevent the defendant from participating in prayer vigils within a safe area during which disapproval of abortion is expressed.⁸³ This case again shows that religious views and silent prayer would likely be caught within New Zealand’s broader ‘communicating’ prohibition.

The United Kingdom’s three PSPOs all expressly prohibit acts of approval or disapproval of issues relating to abortion services including prayer, whether silent or otherwise.⁸⁴ This express inclusion of prayer within the definition of “acts of approval or disapproval” further indicates that prayer will be captured by New Zealand’s Bill.

⁷⁷ At [167].

⁷⁸ At [475].

⁷⁹ At [475]; and see Tasmania Parliamentary Debates, House of Assembly, (16 April 2013), p 50.

⁸⁰ *R v Lewis*, above n 24.

⁸¹ Access to Abortion Services Act RSBC 1996 c 1, s 2(1)(b).

⁸² At [63].

⁸³ At [63].

⁸⁴ Public Spaces Protection Order (Mattock Lane) 2018; Public Spaces Protection Order (Rosslyn Road) 2019; and Manchester City Council (Wynnstay Grove) Public Spaces Protection Order 2020.

Overall, it is highly likely that the Bill’s prohibition against ‘communicating’ will include religiously motivated verbal communication and offers of support, religious symbols, scriptural signage and verbal or non-verbal prayer. The ordinary reading of the safe areas provision, discussion in Parliament, the Crown Law Office’s further briefing to the Attorney-General, and legislation and case law from Australia, Canada and the United Kingdom all support this conclusion.

C Objective ‘Emotional Distress’

The scope of activity captured by the Bill is limited by the requirement that communication be carried out, “in a manner that an ordinary reasonable person would know would cause emotional distress to a protected person.”⁸⁵ This is an objective requirement. The first draft of this provision, as drafted for the Abortion Legislation Bill, included a genuine mens rea requirement.⁸⁶ Communication had to be carried out, in a manner that was intended to cause the protected person emotional distress, and would in fact cause emotional distress to an ordinary reasonable person in their position.⁸⁷ However, a majority of the Abortion Legislation Committee considered that the thresholds for ‘prohibited behaviour’ were too high.⁸⁸ They recommended that the subjective intention requirement be removed.⁸⁹ Their recommendations also included a slight change to the wording of the objective emotional distress requirement. Namely, emotional distress need not be objectively caused to the ordinary reasonable person in the position of a protected person, but merely to a protected person. These recommendations were adopted and have remained in the Safe Areas Bill.⁹⁰

The objective standard proves difficult when it comes to the divergence between the intention of pro-life petitioners and how they are received by protected persons. In general, pro-life petitioners say that their prayers and offers of support come from a place of love and a desire to help. However, protected persons often receive silent prayer as judgment and offers of support as condescension. As the representative for ALRANZ stated in her submission, referring to prayer and song, “There’s abuse and then there’s condescension,

⁸⁵ Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill s 13A(3)(b).

⁸⁶ Abortion Legislation Bill 2020 (164-2), s 15(3)(b)(i).

⁸⁷ Section 15(3)(b)(i).

⁸⁸ Abortion Legislation Bill (164-2) (commentary) at 20-21.

⁸⁹ Abortion Legislation Bill (164-2) (commentary) at 20-21.

⁹⁰ See s 13A(3)(b).

but it kind of all amounts to the same thing.”⁹¹ In *Clubb v Edwards*, Gageler and Edelman JJ both considered silent prayer within safe zones to explicitly or impliedly convey disapproval.⁹² It is this conveyance of disapproval that pro-choice advocates and protected persons in New Zealand object to as emotionally distressing.⁹³ Gageler and Edelman JJ both considered silent prayer to fall within Victoria’s safe areas provision despite the requirement that captured communication be reasonably likely to cause distress or anxiety.⁹⁴

The reference to a protected person in s 13A(3)(b) creates further issues. It is conceivable that protected persons accessing abortion services may be in a more vulnerable state than an ordinary reasonable person. It is widely accepted that the decision to have an abortion is difficult and emotionally challenging. A protected person may more readily be caused emotional distress by well-intended and kind-natured communications, such as an offer of prayer or a prayerful presence across the street. As such, the emotional distress limitation upon prohibited communication does little to protect petitioners who, compelled by their religious beliefs, pray silently or offer pregnancy support out of love for protected persons.

VI *Summary of Objection*

The rights contained within the NZBORA are not absolute but under s 5 are, “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” The Legislation Guidelines outline the approach to be taken to determine whether s 5 has been breached by the relevant bill.⁹⁵ The approach broadly follows the two-part *Oakes* test adopted from Canada.⁹⁶ The first part of this test asks whether the purpose of the proposed limit on the right is sufficiently important to justify its limitation. The purpose of protecting persons accessing and providing services at abortion facilities from harmful protect activity fulfils this requirement.

⁹¹ ALRANZ Abortion Rights Aotearoa “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee B (19 May 2021)”

⁹² *Clubb v Edwards*, above n 64, at [167] and [475].

⁹³ ALRANZ Abortion Rights Aotearoa “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee B (19 May 2021)”; PSA “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee A (28 May 2021)”; and Otago University Student Association “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence (5 May 2021)”.

⁹⁴ *Clubb v Edwards*, above n 64, at [167] and [475]; Public Health and Wellbeing Act 2008 (Vic), s 185B(b).

⁹⁵ *Legislation Guidelines* (Legislation Design and Advisory Committee, March 2018) at 32-35.

⁹⁶ *R v Oakes*, above n 10; see also *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

The second part involves a three-step proportionality analysis:

- (1) whether the limiting provision is rationally connected to its purpose;
- (2) whether it impairs the right no more than is reasonably necessary for the sufficient achievement of its purpose; and
- (3) whether the limit is proportionate to the importance of the objective.

If all parts of the test are answered in the affirmative then, despite the engagement of a right, no breach of the NZBORA will be found.

The first step in the proportionality analysis is satisfied. Limiting communication in safe areas will facilitate the protection of protected persons. This will uphold the purpose of the Bill. The second and third steps of the proportionality analysis are more contestable. These steps question whether the prohibition in safe areas of activities such as prayer and pregnancy support offers, is reasonably necessary for and proportionate to the protection of protected persons. I will conclude that in its present form, the Bill is not proportionate but breaches the NZBORA.

VII Importance of Pro-Life Activity

Religion is of fundamental importance to the lives of many. The 2018 census found that just over 50 percent of New Zealand’s population were affiliated with at least one religion.⁹⁷ The United Kingdom Court of Appeal, discussing pro-life activity, held that religion is one of the most vital elements that go to make up the identity of believers and their conception of life.⁹⁸ One of the defining characteristics of religion as affirmed by New Zealand’s courts is that it relates to a person’s nature and place in the universe.⁹⁹ As such, it is axiomatic that one’s religious convictions are deeply important.

In *Hansen v R*, one of New Zealand’s leading Bill of Rights cases, the Supreme Court held that the more severe the deleterious effects of a measure are, the more important its purpose must be for proportionality to be found.¹⁰⁰ The ‘communicating’ provision prohibits pro-

⁹⁷ “Losing our religion” (3 October 2019) StatsNZ <stats.govt.nz>

⁹⁸ *Dulgheriu v Ealing London Borough Council*, above n 37, at [78].

⁹⁹ *Centrepont Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673 (HC), at 694-695.

¹⁰⁰ *Hansen v R*, above n 96, at [103].

life activities which are deeply important to those participating. Thus, a particularly compelling justification is necessary for the limitation of these rights to be considered proportionate.

VIII The Bill of Rights Vet

Under s 7 of the NZBORA, the Attorney-General is required to report to Parliament where a Bill appears to be inconsistent with New Zealand's Bill of Rights. The *Oakes* test is employed to make this determination.¹⁰¹ By convention the Attorney-General will not report an inconsistency if a right is engaged, but not breached in light of s 5.

After receiving advice from the Crown Law Office, the Attorney-General found the Bill to be in breach of freedom of expression under s 14 of the NZBORA.¹⁰² He found the term 'communicating' in s 13A(3)(b) to be overly broad, capturing activity beyond that which is necessary to achieve the Bill's purpose.¹⁰³ Thus, failing the proportionality analysis, the Bill's prohibition of 'communication' could not be a justifiable limit on s 14 of the NZBORA.¹⁰⁴ The Attorney-General's report provides strong support for the conclusion that the Bill's communicating provision does in fact breach freedom of expression.

What strikes as concerning about the Attorney-General's analysis is the absence of any mention of manifestation of religion. The conclusion from this is that either the Attorney-General considered that manifestation of religion is not burdened by the Bill, or that, in contrast to freedom of expression, the burden placed upon manifestation of religion is demonstrably justified under s 5. As previously established, the right to manifestation of religion must be burdened by the Bill. Concluding on his proportionality analysis relating to freedom of expression, the Attorney-General stated that the purpose of the Bill could not support a broad criminalisation of emotionally harmful communication within safe areas.¹⁰⁵

¹⁰¹ Matt McKillop *Contraception, Sterilisation and Abortion (Safe Areas) Amendment Bill Our Ref: ATT395/322* (Crown Law, May 2021) at [3].

¹⁰² David Parker *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill* (February 2021) at [2].

¹⁰³ Parker, above n 102, at [15].

¹⁰⁴ Parker, above n 102, at [15]-[21].

¹⁰⁵ Parker, above n 102, at [18].

Further, it could not support the prohibition of silent distant protest.¹⁰⁶ As the epitomical example of this is silent prayer it is unclear how the Attorney-General found the Bill to be in breach of freedom of expression, but not manifestation of religion.

A similar oversight of manifestation of religion can be observed in Parliament. Throughout Parliament's consideration of safe areas, the right to manifestation of religion has seldom been discussed.¹⁰⁷ Despite suggesting that silent prayer would be captured by the Bill,¹⁰⁸ the vast majority of discussion has concentrated on freedom of speech.

While some crossover between the two rights is undeniable, the rights are distinct. Manifestation of religion incorporates rights of observance and practise which go beyond mere expression.¹⁰⁹ Many pro-life petitioners feel compelled for religious reasons to pray and offer support outside of abortion facilities. While this invariably involves some element of expression, it also involves the practise of one's belief. The Bill is more severe in its deleterious effects because it limits petitioners' rights to both expression and religious practices within safe areas. The purpose of the Bill must accordingly be sufficiently important to justify this substantial limitation.

IX Emotional Distress Standard

A Emotional Harm and the NZBORA

In their further briefing to the Attorney-General, Crown Law noted that emotional harm is at the lowest end of harms addressed by New Zealand's criminal law.¹¹⁰ Despite the Bill engaging the NZBORA and encompassing a vast range of different protest activities, this low standard has been utilised. This creates inconsistency with other similar offences.

¹⁰⁶ Parker, above n 102, at [18].

¹⁰⁷ See generally (3 March 2020) 744 NZPD (Abortion Legislation Bill – Second Reading); and (10 March 2021) 750 NZPD (Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill – First Reading).

¹⁰⁸ (10 March 2021) 750 NZPD (Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill – First Reading).

¹⁰⁹ *Report of the Special Rapporteur on freedom of religion or belief* UN Doc A/HRC/31/18 (23 December 2015) at 19; see generally *Human Rights in New Zealand 2010* (Human Rights Commission, December 2010) at 141.

¹¹⁰ Matt McKillop *Contraception, Sterilisation and Abortion (Safe Areas) Amendment Bill Our Ref: ATT395/322* (Crown Law, May 2021) at [5.2].

The New Zealand case *Brooker v Police* provides an example of an interaction between offensive language and behaviour under s 4(1)(a) of the Summary Offences Act (SOA), and freedom of expression under s 14 of the NZBORA.¹¹¹ The defendant Brooker, believing a constable had acted unfairly towards him, sang, played his guitar and displayed a placard referring to police conduct outside of that constable's house.¹¹²

The location of Brooker's actions is important. Similar to pro-life protests, Brookers protest was targeted, taking place outside the constable's private home. Also like pro-life protests, Brookers conduct was comprised of song and the display of a placard. The Court expressed concern that this offence could directly impact personal freedom and liberty and had the capacity to be used as a tool to control unpopular and unwelcome speech.¹¹³ Despite the private setting and targeted nature of Brooker's protest, Elias CJ stressed that, "Unpopular expression will often be unsettling and annoying to those who do not agree with it."¹¹⁴ It may create unrest, dissatisfaction and even stir people to anger. However, it should be protected unless it is "likely to produce a clear and present danger of a serious substantial evil."¹¹⁵ The majority of the Court concluded that offenses concerning public order should not be capable of being committed by mere emotional upset or anxiety.¹¹⁶ Mere 'emotional distress' is precisely the standard which will allow for the commission of an offence under the Bill. While the courts may require more than mere discomfort or hurt feelings,¹¹⁷ they would be hard pressed to limit 'emotional distress' so as to capture only particularly distressing communications. The Bill does not require emotional distress to be 'serious' as in the Harmful Digital Communications Act (HDCA),¹¹⁸ and the Bill has been drafted so as to capture a broad range of conduct, including silent prayer.

Morse v Police is another New Zealand case which considered the interaction between s 4(1)(a) of the SOA and s 14 of the NZBORA.¹¹⁹ The Court held that where rights are

¹¹¹ *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [1]-[4].

¹¹² *Brooker v Police*, above n 111, at [13] and [14].

¹¹³ *Brooker v Police*, above n 111, at [34].

¹¹⁴ *Brooker v Police*, above n 111, at [12].

¹¹⁵ *Brooker v Police*, above n 111, at [12].

¹¹⁶ *Brooker v Police*, above n 111, at [34], [42].

¹¹⁷ See *Clubb v Edwards*, above n 64, at [58].

¹¹⁸ Harmful Digital Communications Act 2015, s 4.

¹¹⁹ *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR at [1].

engaged, offensive or disorderly behaviour must be considered through the eyes of the reasonable person who displays tolerance, takes a “balanced, rights-sensitive view”, and is, “not unreasonably moved to wounded feelings...particularly when confronted by a protester”.¹²⁰ While the Bill clearly engages the NZBORA, it does not import the standard of a reasonable person but the lower standard of a protected person.¹²¹ This may allow for a greater limitation of expression in light of the particular sensibilities of individuals accessing abortion services.

Rees v Police concerned the balance of intimidation under s 21(1)(d) of the SOA and s 14 of the NZBORA when animal rights activists protested outside a shop.¹²² The Court again emphasised that in light of the NZBORA, the fact that activities are troubling or annoying is insufficient.¹²³

There is a necessity for high standards of harm where rights are engaged. Sections 14 and 15 both encompass elements of expression and are engaged by the Bill. While the above cases have focused on s 14, the principle that rights should not be curtailed on the basis of low level harms equally applies to s 15. Nonetheless the low ‘emotional distress’ standard has been utilised. This weighs against the Bill’s proportionality.

B Emotional Harm and Privacy

One of the purposes of the Bill is to respect the privacy of protected persons. The “right to privacy” has been suggested as justification for limiting expression under the Bill of Rights Act. New Zealand does not have an enshrined right to privacy, however, the right to privacy has been recognised in several international instruments including the International Covenant on Civil and Political Rights which New Zealand ratified in 1978.¹²⁴

¹²⁰ *Morse v Police*, above n 119, at [64]; see also at [40], [70] and [117].

¹²¹ Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 (310-1), cl 13A(3)(b).

¹²² *Rees v Police* [2007] DCR 9 (DC) at [10].

¹²³ *Rees v Police*, above n 122, at [10].

¹²⁴ International Covenant on Civil and Political Rights 999 UNTS 171, (opened for signature 19 December 1966, entered into force 23 March 1976), art 17; and see “Constitutional Issues & Human Rights” (19 August 2020) Ministry of Justice <www.justice.govt.nz>

Privacy is protected at common law through the torts of wrongful publication of private information and intrusion into seclusion.¹²⁵ Both of these torts require a very high threshold to be met before they can be established. Namely, an intrusion of privacy must be highly offensive to the objective reasonable person with ordinary sensibilities.¹²⁶ This high threshold shows a reluctance by the Courts to find a breach on the basis of mere emotional distress, especially in light of the need to protect freedom of expression.

C Emotional Harm in New Zealand Statute

The reluctance to criminalise on the basis of mere emotional distress is also reflected in New Zealand's legislation. In the HDCA 'harm' is defined as 'serious emotional distress'.¹²⁷ Under s 22, an offence may only be committed by the posting of a digital communication if the communication was objectively harmful, harm was intended, and harm was in fact caused.¹²⁸ In contrast, the Safe Areas Bill only requires a communication to be objectively emotionally distressing and emotional distress need not in fact be caused. This is a far lower standard.

The Harassment Act allows for a court to make a restraining order where mere 'distress' has been caused.¹²⁹ However, the Act expressly requires that the degree of distress caused or threatened justifies the making of an order.¹³⁰ Further, harassment must first be proved, distress must be objectively caused or threatened, and caused or threatened in fact.¹³¹ While the Harassment Act provides for a low "distress" standard, unlike the Safe Areas Bill, this is tightly constrained by further requirements.

D Conclusion

Generally the law is reluctant to criminalise for the cause of emotional distress, especially where the NZBORA is engaged. While the Bill must be considered in light of the increasing

¹²⁵ *Hosking v Runting* [2005] 1 NZLR 1 (CA); *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672.

¹²⁶ *Hosking v Runting*, above n 125 at [42]; *Andrews v TVNZ* [2009] 1 NZLR 220 (HC) at [1]; *C v Holland*, above n 125, at [3].

¹²⁷ Harmful Digital Communications Act, s 4.

¹²⁸ Harmful Digital Communications Act, s 22(1).

¹²⁹ Harassment Act 1997, s 16(1).

¹³⁰ Harassment Act, s 16(1)(b)(iii).

¹³¹ Harassment Act, s 16(1)(b)(i) and (ii).

recognition given to privacy, overall its provisions apportion far less protection to rights than comparable statutes. The Bill will, thus, be an outlier in the law for its lack of rights protections. This points against the proportionality of the Bill.

X Overseas Experience

A Overseas Standards

Across the United States, Canada and Australia where safe areas have been successfully implemented, the proportionality analysis adopted by Courts considering them has been similar in essence to the *Oakes* test applied in New Zealand.

The two United States Supreme Court decisions concerning safe areas, *McCullen v Coakley* and *Hill v Colorado* placed great emphasis on freedom of expression yet very little emphasis on manifestation of religion.¹³² Both of these rights are enshrined in the First Amendment and are burdened by the existing safe areas.¹³³

In *McCullen* the Court found that a safe areas provision in Massachusetts, creating a 10 metre area around abortion facilities within which only protected persons could enter, violated the First Amendment.¹³⁴ The Court accepted the respondents' contended distinction between protesters and petitioners. While protesters seek to express their opposition to abortion, petitioners seek to inform women of the alternatives to abortion and offer support.¹³⁵ Much pro-life activity outside of abortion facilities in New Zealand falls into the latter category, yet both will be captured by the Bill's 'communicating' provision. The Massachusetts provision failed the 'narrow tailoring' test as the burden placed upon petitioners was found to be substantially broader than necessary to serve the purpose of the provision.¹³⁶ In contrast, the Court in *Hill* upheld a safe area in Colorado which created two metre bubbles around persons within 30 metres of abortion facilities.¹³⁷

¹³² *McCullen v Coakley* 573 US 464 (2014); *Hill v Colorado* 530 US 703 (2000).

¹³³ United States Constitution, Art I.

¹³⁴ *McCullen v Coakley*, above n 132, at 496-497.

¹³⁵ *McCullen v Coakley*, above n 132, at 490.

¹³⁶ *McCullen v Coakley*, above n 132, at 490-496.

¹³⁷ *Hill v Colorado*, above n 132, at 734-735 and 740.

The constitutionality of 50 metre safe areas in British Columbia was considered in *R v Lewis* when a group of seven persons sang hymns and recited psalms for 20 minutes in a safe area.¹³⁸ Later another individual displayed a sign saying, “Our Lady Guadeloupe, Patroness of the Unborn...Please help us stop abortion”.¹³⁹ The British Columbia Provincial Court found the Act to be inconsistent with the Canadian Charter on the basis of a breach of freedom of expression, association and religion which could not be demonstrably justified due to a lack of proportionality.¹⁴⁰ This decision was subsequently overturned by the British Columbia Supreme Court which considered the Act to fall within the range of the least intrusive legislative responses to achieve its important objective.¹⁴¹ Thus, the Act’s limitation of rights was demonstrably justified.

Australia’s state of Victoria has a similar rights analysis mechanism for Bills to New Zealand. On the second reading of a Bill the relevant minister or member must table a statement of the Bill’s consistency with the Charter of Human Rights and Responsibilities Act (Victoria Charter). Unlike the Attorney-General’s report on New Zealand’s Bill, the Minister of Health did give consideration to freedom of religion as protected by s 14 of the Victorian Charter.¹⁴² The Minister noted the strong connection between abortion views and religious beliefs and recognised that religious practices such as prayer could fall within the ‘communication’ provision.¹⁴³ However, she considered the burden to be demonstrably justified as the Bill would only prohibit prayer about abortions that is ‘reasonably likely to cause distress or anxiety’.¹⁴⁴

This reasoning raises concerns. The weight of authority demonstrates that prayer outside of abortion services is inherently considered to be ‘in relation to’ abortions. England’s the three PSPOs expressly include prayer within their definition of “protesting in relation to abortion

¹³⁸ *R v Lewis* [1996] 4 WWR 27 (BCPC) at [4].

¹³⁹ *R v Lewis*, above n 138, at [6]-[9].

¹⁴⁰ *R v Lewis*, above n 138, at [53]-[54].

¹⁴¹ *R v Lewis*, above n 24 at [126] and [149].

¹⁴² Victorian Parliamentary Debates, Legislative Assembly, (22 October 2015) at 3974.

¹⁴³ Victorian Parliamentary Debates, Legislative Assembly, (22 October 2015) at 3974.

¹⁴⁴ Charter of Human Rights and Responsibilities Act 2006 (Vic), s 7; Victorian Parliamentary Debates, Legislative Assembly, (22 October 2015) at 3974.

services”.¹⁴⁵ The distress or anxiety requirement is also unlikely to mitigate the range of conduct captured. In New Zealand throughout the select committee process submitters attested that the mere existence of people praying outside of abortion facilities can be emotionally distressing.¹⁴⁶ Thus, the reasons provided by the Minister for the justification of the Victorian Bill in light of its limitation of freedom of religion are unconvincing.

Australia’s Minister for Health also concluded that freedom of expression was demonstrably justified under s 7 of the Victorian Charter.¹⁴⁷ Factors that lead the Minister to come to this conclusion, which is contrary to that of New Zealand’s Attorney-General, include the severity of protests experienced by Australia, and the Victorian Charter’s express inclusion of a right to privacy.¹⁴⁸ What is most notable about the Minister’s conclusions is their consistency. Both manifestation of religion and freedom of expression were recognised as being burdened by the proposed safe areas, and both burdens were considered demonstrably justified. Again this raises a question as to whether New Zealand’s Attorney-General gave adequate consideration to the right to manifestation of religion.

In *Clubb v Edwards* the High Court of Australia upheld the constitutionality of safe areas legislation in Victoria and Tasmania against allegations that they breached the implied freedom of political communication.¹⁴⁹ In Victoria a pro-life petitioner had approached and offered a pregnancy-support pamphlet to a couple within a safe area.¹⁵⁰ In Tasmania, an individual twice stood on a street corner in a safe area holding placards stating that every child has the right to life and depicting a foetus.¹⁵¹ The Court considered the Bill’s limitation of political communication to be demonstrably justified in light of the Bill’s purpose.¹⁵²

¹⁴⁵ Public Spaces Protection Order (Mattock Lane) 2018; Public Spaces Protection Order (Rosslyn Road) 2019; and Manchester City Council (Wynnstay Grove) Public Spaces Protection Order 2020.

¹⁴⁶ PSA “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee A (28 May 2021)”; and Otago University Student Association “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence (5 May 2021)”.

¹⁴⁷ Victorian Parliamentary Debates, Legislative Assembly, (22 October 2015) at 3974.

¹⁴⁸ Victorian Parliamentary Debates, Legislative Assembly, (22 October 2015) at 3973-3974; and see Charter of Human Rights and Responsibilities Act (Vic), s 13.

¹⁴⁹ *Clubb v Edwards*, above n 64.

¹⁵⁰ *Clubb v Edwards*, above n 64, at [11].

¹⁵¹ *Clubb v Edwards*, above n 64, at [106].

¹⁵² *Clubb v Edwards*, above n 64.

The above examples provide support for finding safe areas in some circumstances to be a demonstrably justifiable response to pro-life protest. However, there are limits to what a court will be willing to find proportionate. In New Zealand, where pro-life protest has generally involved less violence than overseas, it is dubious whether the Bill's wide prohibitions would similarly be found to be proportionate. The Attorney-General's conclusion of the Bill's inconsistency with freedom of expression reflects this.

B Practical Result of Legislation Overseas

Pro-life organisations overseas accept and inform their readers that counsel and prayer are prohibited by safe area provisions.¹⁵³ On the day safe areas came into force in Victoria, news agencies reported that an elderly man praying outside of a clinic was asked by police to leave.¹⁵⁴ He did so voluntarily. Similarly in Australian Capital Territory (ACT) eight participants reportedly received an official warning from police after engaging in a prayer vigil in a safe area.¹⁵⁵ On another occasion three defendants were charged with breaching ACT's prohibition on protest in relation to abortions within a safe area.¹⁵⁶ The third defendant had sat down on a bench holding rosary beads and once briefly bowed his head.¹⁵⁷ He did not engage with anyone walking past. The magistrate accepted that all of the defendants had engaged in silent prayer, but this had involved no component of expression, communication or message to those around them.¹⁵⁸ While the magistrate expressed reservation as to the rosary beads, he noted that this was not accompanied by any other symbolic display or gesture and the defendants were not gathered.¹⁵⁹ As a result, the charges were dismissed.¹⁶⁰ A different outcome may well have been reached had the defendants gathered together for prayer, signed the cross while praying, or held a sign saying "love them both".

¹⁵³ See generally Yasir Naqvi "Ontario's Bubble Zones Coming Into Force" (15 December 2017) Campaign Life Coalition <www.campaignlifecoalition.com>; and "Abortion Laws in Australia" LifeChoice <www.lifechoice.org.au>

¹⁵⁴ Beau Donnelly "Women avoid pro-life protesters for the first time in decades" *The Age* (online ed, Australia, 2 May 2016).

¹⁵⁵ Monica Doumit "How new abortion clinic laws prey on those who pray" *The Catholic Weekly* (online ed, Australia, 12 May 2016).

¹⁵⁶ *Bluett v Popplewell* [2018] ACTMC 2; and Health Act 1993 (ACT), s 87(1).

¹⁵⁷ *Bluett v Popplewell*, above n 156, at [82].

¹⁵⁸ *Bluett v Popplewell*, above n 156, at [85].

¹⁵⁹ *Bluett v Popplewell*, above n 156, at [84]-[85].

¹⁶⁰ *Bluett v Popplewell*, above n 156, at [100].

New Zealand's Bill expressly provides that a person engaging in prohibited behaviour must refuse to stop on the request of a constable before they can be taken into custody.¹⁶¹ This will reduce the number of individuals convicted for their protests, petitions and prayers outside of abortion facilities. It is also likely that most individuals who currently protest, petition and pray outside of abortion facilities will cease doing so if the Bill is passed. Thus, while the Bill may not in effect lead to the conviction of many well-intended petitioners, it is likely to have the effect of eradicating prayer and other manifestations of religion and expression in prescribed areas.

XI Sufficiency of New Zealand's Current Law

The insufficiency of the current law in protecting those accessing or providing abortion services from intimidation and harassment is commonly cited as a reason for the necessity of safe areas. The Law Commission disagreed with this suggestion in their report on alternative approaches to abortion law.¹⁶² There they noted several laws in New Zealand that can address intimidating and anti-social behaviour near to abortion facilities including ss 4, 21 and 22 of the SOA as well as s 3 of the Trespass Act.¹⁶³

Proponents of the Bill claim that the current laws under the SOA are insufficient as they are retrospective, only criminalising conduct after the fact of its occurrence.¹⁶⁴ Under s 4(1) of the SOA, offensive behaviour or language must actually occur before the provision is breached. Section 22 similarly requires that the obstruction of a public way occurs and, after a warning, continues to occur before the provision is breached. By the time either of these offences is committed, harmful conduct must have already occurred. The Bill, on the other hand, criminalises communication before a protected person necessarily receives it, or before it can escalate to become intimidatory or obstructing.

¹⁶¹ Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill, s 13B.

¹⁶² Law Commission *Alternative approaches to abortion law* (NZLC SP23534, 2018) at 176-177.

¹⁶³ Law Commission *Alternative approaches to abortion law* (NZLC SP23534, 2018) at 176-177.

¹⁶⁴ Royal Australian and New Zealand College of Obstetricians and Gynaecologists "Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee B (19 May 2021)"; Human Rights Commission "Submission to the Health Committee on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill" at [56].

Another objection to the present law is the high mens rea standard required for the commission of certain offences. This criticism is relevant to ss 4(1)(b) and 21 of the SOA. Section 4(1)(b) will not apply to words addressed to a person unless they are said with the intention to threaten, alarm, insult, or offend that person. The offense of intimidation cannot be committed without proof of intention to cause, or knowledge that one's conduct is likely to cause, a person reasonably to be frightened or intimidated. These high mens rea standards of intention and knowledge can be difficult to prove.

Section 3 of the Trespass Act has proved useful over the years for removing pro-life protesters on facility premises.¹⁶⁵ However, advocates for the Bill contend that the Trespass Act remains insufficient as trespass can only be committed on private property. Therefore, the Act cannot prevent pro-life protesters from gathering at the entrance to facilities where they can be seen and heard by protected persons, sometimes even from inside the facility. The Bill will prevent such conduct.

Where a protected person is confronted or threatened, the perpetrator cannot currently be found liable for the commission of the offense unless the protected person reports the conduct to the police. Several submitters to the Select Committee suggested that protected persons do not report such conduct as this would involve dwelling upon their negative experience and could result in a loss of privacy.¹⁶⁶ Right to Life New Zealand made Official Information Act requests to the 20 District Health Boards in New Zealand asking for the number of written and oral complaints of harassment received from women accessing and staff entering and exiting abortion facilities between 2019 and 31 January 2021.¹⁶⁷ Of the 17 responses received at the time of their oral submission, all stated that they had not received any such verbal or written complaints.¹⁶⁸ This evidence indicates that there is a

¹⁶⁵ See Margaret Sparrow “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee A (12 May 2021)”.

¹⁶⁶ See Margaret Sparrow “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee A (12 May 2021)” Human Rights Commission “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee A (28 May 2021); and Otago University Student Association “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence (5 May 2021).

¹⁶⁷ Right to Life New Zealand Inc “Submission to the Health Committee on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill”.

¹⁶⁸ Right to Life New Zealand Inc “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee A (5 May 2021)”.

lack of pro-life activity that warrants complaint. Limiting the rights of all pro-life petitioners by prohibiting activities which have not been complained of does not seem a proportionate response. The Law Commission also reported that a majority of health professional bodies, abortion service providers and health practitioners felt that safe areas were unnecessary,¹⁶⁹ though the providers subsequently redacted this statement.

While New Zealand's present law does not cover all protest activity outside of abortion services, it does cover the more objectionable conduct. If a protester intentionally applies or attempts to apply force to a protected person this will constitute the offense of common assault.¹⁷⁰ A threat to apply force to a protected person may also constitute common assault.¹⁷¹ Offensive or disorderly behaviour from protesters will be captured by s 4(1)(a) of the SOA and further threats and insults may be captured under s 4(1)(c). A protester who obstructs the footpath outside or entrance to an abortion facility may be found liable under s 22 of the SOA. Where these offences are difficult to prove criminally, they still operate to deter protest activity.

Section 13A(3)(a) of the Bill will largely address any shortcomings in the present law without the need to prohibit communication. This paragraph prohibits intimidating, interfering with, or obstructing a protected person in a safe area. It will allow for intimidating conduct to be captured without the need to prove a high mens rea standard.¹⁷² Protesters who yell at protected persons or display disturbing signs such as those depicting dismembered foetuses may be captured within the provision provided they meet the objective emotional distress requirement. Side-walk counselling may at times fall within the prohibition on 'interfering with' where that counsel oversteps the line from a consensual conversation. Finally, the prohibition on 'obstructing a protected person' will curtail obstructive behaviours which are not carried out on private property and do not obstruct a public way. Thus, the objections to the adequacy of the present law can be addressed without the need to extend the prohibition to communication. The Bill fails to meet the minimal impairment requirement of the proportionality test.

¹⁶⁹ Law Commission *Alternative approaches to abortion law* (NZLC SP23534, 2018) at 178.

¹⁷⁰ Crimes Act 1961, ss 2 and 196.

¹⁷¹ Crimes Act 1961, ss 2 and 196.

¹⁷² See Summary Offences Act 1981, s 21(1).

XII Conclusion

Pro-life protests in New Zealand have in some instances caused harm to protected persons. Legislative action to mitigate this harm is a rational response. However, the communication provision in the Bill is disproportionate and unnecessary. New Zealand has experienced relatively low-level harms as a result of pro-life protests as compared to overseas jurisdictions. Many New Zealanders are compelled for religious reasons, which the law recognises as deeply important, to pray and offer support outside abortion services. A limitation of these activities requires a particularly compelling justification as this places a burden upon both ss 14 and 15 of the NZBORA. This threshold has not been met. New Zealand's current law covers much of the more objectionable protest activity. To the extent that it fails to do so, s 13A(3)(a) of the Bill sufficiently addresses these shortcomings. An additional communicating prohibition is not reasonably necessary. If the Bill is passed in its present form it will be in breach of ss 14 and 15 of the NZBORA. It will prevent individuals such as Michele O'Neill from gathering to pray the rosary and offer pregnancy support within view of prescribed abortion services. The communicating prohibition should be removed from the Bill.

Bibliography

A Cases

1 New Zealand

Andrews v TVNZ [2009] 1 NZLR 220 (HC).

Brooker v Police [2007] NZSC 30, [2007] 3 NZLR 91.

Centrepont Community Growth Trust v Commissioner of Inland Revenue [1985] 1 NZLR 673 (HC).

C v Holland [2012] NZHC 2155, [2012] 3 NZLR 672

Hosking v Runting [2005] 1 NZLR 1 (CA).

Morse v Police [2011] NZSC 45, [2012] 2 NZLR.

Rees v Police [2007] DCR 9 (DC).

R v Hansen [2007] NZSC 7, [2007] 3 NZLR 1.

2 Australia

Clubb v Edwards [2019] HCA 11, (2019) 267 CLR 171.

3 England and Wales

Dulgheriu v Ealing [2019] EWCA Civ 1490, [2020] 1 WLR 609.

4 Canada

R v Oakes [1986] 1 SCR 103.

R v Lewis (1996) 139 DLR (4th) 480 (BCSC).

R v Lewis [1996] 4 WWR 27 (BCPC).

5 United States

McCullen v Coakley 573 US 464 (2014).

Hill v Colorado 530 US 703 (2000).

B Legislation

1 New Zealand

Abortion Legislation Bill 2020 (164-2).

Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 (310-1).

Crimes Act 1961.

Harassment Act 1997.

Harmful Digital Communications Act 2015.

New Zealand Bill of Rights Act 1990.

Summary Offences Act 1981.

2 Australia

Charter of Human Rights and Responsibilities Act 2006 (Vic).

Health Act 1993 (ACT).

Public Health and Wellbeing Act 2008 (Vic).

Reproductive Health (Access to Terminations) Act 2013 (Tas).

3 England and Wales

Anti-social Behaviour, Crime and Policing Act 2014 (UK).

Manchester City Council (Wynnstay Grove) Public Spaces Protection Order 2020.

Public Spaces Protection Order (Mattock Lane) 2018.

Public Spaces Protection Order (Rosslyn Road) 2019.

4 Canada

Access to Abortion Services Act RSBC 1996.

Access to Abortion Services Act SNL 2016 c A-1.02.

Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK).

Protecting Access to Reproductive Health Care Act SNS 2020.

Protecting Choice for Women Accessing Health Care Act SA 2018.

Respecting Health Services and Social Services Act RSQ 2016.

Safe Access to Abortion Services Act SO 2017.

5 *United States*

CO Rev Stat, title 18 § 18.9.122.

United States Constitution, Art I.

C *Hansard*

1 *New Zealand*

(3 March 2020) 744 NZPD (Abortion Legislation Bill – Second Reading).

(10 March 2021) 750 NZPD (Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020).

2 *Australia*

Bluett v Popplewell [2018] ACTMC 2.

Victorian Parliamentary Debates, Legislative Assembly, (22 October 2015).

Tasmania Parliamentary Debates, House of Assembly, (16 April 2013).

D *Submissions to the Health Committee*

Abortion Providers Group Aotearoa New Zealand “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee A (19 May 2021)”.

ALRANZ Abortion Rights Aotearoa “Submission to the Health Committee on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020”.

ALRANZ Abortion Rights Aotearoa “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee B (19 May 2021)”

Family Life International New Zealand “Submission to the Health Committee on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020”

Frances Posthuma “Submission to the Health Committee on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020”.

Hilary Staples “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee A (12 May 2021)”.

Human Rights Commission “Submission to the Health Committee on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill”.

Human Rights Commission “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee A (28 May 2021).

Leao Tildsley “Submission to the Health Committee on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020”.

Margaret Sparrow “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee A (12 May 2021)”.

Matt McKillop *Contraception, Sterilisation and Abortion (Safe Areas) Amendment Bill Our Ref: ATT395/322* (Crown Law, May 2021).

Merle Duxford “Submission to the Health Committee on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020”.

Michele O’Neill “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee A (12 May 2021)”.

Otago University Student Association “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence (5 May 2021)”.

PSA “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee A (28 May 2021)”.

Right to Life New Zealand Inc “Submission to the Health Committee on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020”.

Right to Life New Zealand Inc “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee A (5 May 2021)”.

Royal Australian and New Zealand College of Obstetricians and Gynaecologists “Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill 2020 – hearing of evidence subcommittee B (19 May 2021)”.

E International Materials

International Covenant on Civil and Political Rights 999 UNTS 171, (opened for signature 19 December 1966, entered into force 23 March 1976).

F Secondary Materials and Reports

2019 Violence and Disruption Statistics (National Abortion Federation, 2019).

Alison McCulloch *Fighting to Choose: The Abortion Rights Struggle in New Zealand* (Victoria University Press, Wellington, 2013).

Catechism of the Catholic Church (St Pauls, Homebush (NSW), 1994).

Concise Oxford English Dictionary (12th ed, Oxford University Press, Oxford, 2011).

David Parker *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill* (February 2021).

Human Rights in New Zealand 2010 (Human Rights Commission, December 2010).

Law Commission *Alternative approaches to abortion law* (NZLC SP23534, 2018).

Legislation Guidelines (Legislation Design and Advisory Committee, March 2018).

Public Spaces Protection Order to address behaviours outside the Marie Stopes Clinic, Mattock Lane: Consultation Report (Ealing Council, March 2018).

Report of the Special Rapporteur on freedom of religion or belief UN Doc A/HRC/31/18 (23 December 2015).

G Internet Materials

40 Days for Life (2021) <www.40daysforlife.com>

“Abortion Laws in Australia” LifeChoice <www.lifechoice.org.au>

Beau Donnelly “Women avoid pro-life protesters for the first time in decades” *The Age* (online ed, Australia, 2 May 2016).

“Constitutional Issues & Human Rights” (19 August 2020) Ministry of Justice <www.justice.govt.nz>

John Scheidler “At the Foot of the Cross” (31 March 2010) Pro-Life Action League <<https://prolifeaction.org>>

“Losing our religion” (3 October 2019) StatsNZ <stats.govt.nz>

Megan Cook, "Abortion - Controversy: 1974 to 1980s" (5 May 2011) Te Ara The Encyclopedia of New Zealand <teara.govt.nz>

Monica Doumit "How new abortion clinic laws prey on those who pray" *The Catholic Weekly* (online ed, Australia, 12 May 2016).

"The Helpers of God's Precious Infants" Eternal World Television Network <ewtn.com>

Yasir Naqvi "Ontario's Bubble Zones Coming Into Force" (15 December 2017) Campaign Life Coalition <www.campaignlifecoalition.com>

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 7,945 words.