Abortion Law Reform

Submission from the Auckland Women's Health Council

to the Law Commission

The Auckland Women's Health Council is a voluntary organisation of individual women and women's groups who have an interest in and commitment to women's health issues. The organisation was formed in 1988 to provide a voice on women's health issues in the Auckland region.

The Council has a special interest in patient rights, informed consent and decision-making in health care, health consumer advocacy, the Code of Health and Disability Services Consumers' Rights, the National Cervical Screening Programme, and ethics. Our vision is that all women in Auckland have agency over their physical, mental, emotional and spiritual well-being and are fully informed of health services available and have access to them, and while we specifically serve and support Auckland women, we believe in this vision for all New Zealand women.

Our philosophy is that:

- Women users of health services have the right to make informed decisions regarding their own health care and treatment
- Women have the right to the information necessary to enable them to make informed decisions
- Health care must be accessible, affordable and available as well as culturally appropriate and acceptable to women
- Consumer participation on all decision-making processes for health care services is essential.

The Auckland Women's Health Council advocates for and supports freely available access to, and information about, contraception, sterilisation and abortion services, and this is mentioned specifically in our constitution. We have made submissions in the past on various issues to do with the availability of abortion and the information provided to women on abortion and remain committed to the concept of women being able to make informed decisions around this highly emotional topic. The decision to have an abortion is never taken lightly but is every woman's right to make.

The essential points from our submission are that:

- abortion is a health issue and should be removed from the crimes act;
- culturally and socially appropriate and acceptable language is used in all governing legislation and regulations;
- free abortion services must be provided within the public health system;
- access through self-referral; or if any medical referral is necessary, any GP or sexual health doctor can refer a woman for an abortion without the need for certifying consultants;
- safe medical abortions are offered to women at home where appropriate;
- that strict criteria for abortions over 20 weeks are maintained, but that those criteria include cases in which the development of the foetus is such that the child will be born with severe and unsurvivable disabilities.

General Comments

The Auckland Women's Health Council (AWHC) believes that abortion should be treated exclusively as a health issue and we oppose the continued inclusion of abortion in the Crimes Act 1961. The decision to terminate a pregnancy is not one that is taken lightly by the vast majority of women; that some women should be criminalised – for example, a woman who might seek to miscarry through the use of drugs, medicinal plants or other methods – at a point of major distress and internal conflict in their lives over what is a health issue is appalling.

The AWHC understands that there needs to be legislation controlling the delivery of abortion services, but with law reform this can be done entirely under the Contraception, Sterilisation and Abortion Act 1977, without any need for abortion to be covered in the Crimes Act 1961.

The Need for the Legislation to be Updated

It is clear that the legislation governing abortion is no longer fit for purpose. The Contraception, Sterilisation and Abortion Act 1977 is 41 years old and is expected to function in a vastly different world to the one that existed in the 1970s; similarly the inclusion of abortion in the Crimes Act 1961 is anachronistic 57 years later.

In 2018, we have seen the Me Too movement, are part of a world in which women have the right to choose what they do with their bodies on almost every other level, including the right to choose or refuse medical treatment under The Code of Health and Disability Services Consumers' Rights. That women cannot choose not to have a child, or continue with a pregnancy that may have far reaching personal, health, cultural, educational and career consequences flies in the face of the level of equality that New Zealand women have achieved over the last 125 years.

Since 1988, the Abortion Supervisory Committee (ASC) in its reports has advised Parliament that the abortion law needs to be reviewed.[1] In their last two annual reports they called for the existing law to be updated, and have been quite specific about the reasons for this and the consequences of it having not been done already.

In the 2017 report[2] for the 2016 year, the ASC wrote:

"Over the last four decades, there have been significant changes to healthcare delivery as well as technological advancements in how we approach medicine. It is important to ensure that the legislation reflects the health sector as it currently is, and modern society."
…
"Some of the wording in the Act is outdated and clumsy. The ASC is often asked to clarify the unnecessarily complicated wording set out in sections of the Act, particularly around referrals and consultation processes. Clearer wording would be of great assistance to medical and other health professionals working in the field."

Some language and terminology is substantially out of date, and in some cases derogatory and offensive, in particular the terms handicapped when referring to a baby that may be born with a

1 ASC: Report of the Abortion Supervisory Committee for 2003, accessed at http://www.moh.govt.nz/notebook/nbbooks.nsf/0/D97BBB8601EEC25DCC256F22007B513A/$file/AbortionSupervisoryCommitteeReport%202003.pdf.

2 ASC: Report of the Abortion Supervisory Committee 2016 accessed at https://www.justice.govt.nz/assets/Documents/Publications/asc-annual-report-2016.pdf

disability and the use of the term 'mentally subnormal' when referring to women who lack the mental capacity to consent.

In addition, all references to a woman's doctor and the certifying consultants in the legislation assume that such medical practitioners are men and all personal pronouns used are male. This is archaic and must be changed.

In the 2017 report[3], the ASC again request a review of the legislation, saying:

"The ASC hopes Parliament will give due regard to the opinions previously expressed by the ASC regarding the significant waste of time and financial resources spent over the last decade on defending court proceedings. Costs associated with previous litigation totalled $470,359.49 to date with only $84,351.43 recovered by way of awarded costs paid by the plaintiff.

At the time of preparation of this report, an anti-abortion group has recently indicated an intention to engage in further litigation against the ASC. The ASC's view is that this wastage could be eliminated or at least reduced by the enactment of legislation that is clearer and more fit for purpose."

The AWHC agrees that this is an appalling waste of money in a public health system that has been significantly underfunded for years, ample evidence for which is observed at every Auckland metro DHB meeting an AWHC representative attends.

Criminal Aspects of Abortion Law

Abortion is a women's health issue and it should be provided as a necessary health service. Statistics on abortion rates in New Zealand show that abortion rates have consistently declined since 2006 and the ASC attributes this, in part, to the widespread uptake of long acting contraceptive devices.[3] Compared with five other western countries, New Zealand has a significantly lower rate of abortion and the ASC says "international trends appear to differ to the rates consistently dropping in New Zealand."[3]

In light of these statistics, and the widespread availability of contraceptives, it is hard to see how decriminalisation could lead to a huge surge in abortions being sought and performed. The grounds for abortion – once reviewed, updated and the language amended to reflect social and cultural changes since it was enacted (see examples above) – should be removed from the Crimes Act 1961 and included in the Contraception, Sterilisation, and Abortion Act 1977.

Decriminalisation of abortion will see more equitable access to abortion services, particularly for women living at distance from a current provider, remove much of the stigma associated with abortion and reduce the cost to the taxpayer of defending against litigation brought by various anti-abortion groups.

All references to abortion should be removed from the Crimes Act 1961 and any need for penalties for breaches or offenses under the Contraception, Sterilisation, and Abortion Act 1977 associated with the provision of abortion services should be covered in that Act, and/or under the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 or Health Act.

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3 ASC: Report of the Abortion Supervisory Committee 2017 accessed at https://www.justice.govt.nz/assets/Documents/Publications/ASC-Annual-Report-2017.pdf

Once abortion is removed from the Crimes Act 1961, the provision of abortion services should be overseen by the Ministry of Health.

Grounds for Lawful Abortions

As discussed above, some of the language used to specify the grounds for legally performing an abortion (currently contained in the Crimes Act 1961) is archaic, derogatory and/or offensive.

There are multiple reasons to review and update the grounds for abortion including that women should have the right to agency over their own bodies, and first and foremost must be able to make informed decisions regarding their health and well-being including the right to access medical treatment including abortion, having been provided with all pertinent information about that treatment.

It is a basic human right for a women to choose for themselves whether to continue a pregnancy or seek a termination, without having to ask permission, thus having grounds for having an abortion, particularly under 20 weeks gestation, is anachronistic.

The grounds for lawful abortion are condescending, patronising and parochial. It should be enough for women to say, 'I don't want to continue with this pregnancy; it will cause me undue stress and have a negative impact on my life and those around me/important to me and I want an abortion' without having to plead that she is so physically or mentally weak that to continue the pregnancy will destroy her. There is still – rightly or wrongly – significant stigma associated with mental illness and for a woman to be forced to say that she will going to suffer mental illness as a means to get an abortion is unnecessarily cruel and degrading. These grounds also ignore the social, economic and personal factors that underlie a woman's decision; there is no need to have specified grounds for an abortion other than that a woman seeks one of her own free will and has made an informed decision.

That pregnancy as a result of sexual violation may only be taken into account in determining whether or not an abortion should be permitted, rather than being sufficient reason in itself, should be changed, and pregnancy as a result of sexual violation should be sufficient grounds for abortion if the woman so determines.

It is right that the grounds for abortion after the first 20 weeks of pregnancy are much narrower. However, the legislation currently allows for abortion after 20 weeks only where necessary to save the life of the woman or girl or to prevent serious permanent injury to her physical or mental health. This must be broadened to include cases in which the development of the foetus is such that the child will be born with severe and unsurvivable disabilities in the very short term, for example, congenital conditions that would lead to death during or soon after birth, and or degenerative conditions that will cause significant pain and suffering to the child for the duration of its short life.

Process for Getting an Abortion

The process for obtaining an abortion must be updated. The current system is outdated, costly, causes unnecessary delays for women seeking abortions, and causes unacceptable stress, discomfort and harm to women.

The current abortion service is cost taxpayers almost $4 million in consultant fees in 2016. The Contraception, Sterilisation, and Abortion Act 1977 requires that a woman see two certifying consultants who must both agree that she has legal grounds for an abortion.

The process contributes to at times lengthy delays in women accessing abortion services; such delays are exacerbated for women living at distance from an abortion provider. Silva *et al.,* found that women wait on average 25 days between the date of the first visit with the referring doctor and the date of their termination procedure.[4] Depending on the stage at which a woman seeks an abortion, this delay can have a significant effect, pushing some women from the first trimester into the second before they are able to have an abortion. For women who may not become aware of their pregnancy until weeks or months after conception, such delays can prevent them having the procedure done under current legislation.[5, 6] Silva *et al*, found that over half the women in their study had their abortions at ten weeks or more, at which medical abortion (as opposed to surgical abortion) is no longer possible. Two of the same researchers found that abortion services were difficult to access for more than one-sixth of women in New Zealand.[7]

When the ASC appeared before the Justice Select Committee in February to present their 2017 Annual Report they said that a change in legislation governing the process for getting an abortion would make them safer for some women. There has been a small but steady increase in the number of medical (drug induced) abortions versus surgical abortions in recent years, with 15.4% of abortions in 2016 being medical/nonsurgical.[3]

They said it would be safer for women having a medical abortion to take the medicine at home, rather than follow an archaic law and travel to a clinic while potentially suffering from bleeding, stomach pain or diarrhoea.[8]

The Justice Select Committee were told that medical abortion meant taking a pill at a registered licensed clinic, followed by a second dose in the same clinic 24 hours later.

ASC chairwoman Professor Dame Linda Holloway said that the requirement to be in a clinic was stressful, outdated and unnecessary.

"[The second dose] takes effect really very quickly. If you're trying to get back to somewhere a few hours away on a bus, or if you were trying to drive yourself, and dealing with abdominal pain, bleeding and diarrhoea, this is less than satisfactory than if you could take the medication in the comfort and privacy of your own home."

Given that Silva and McNeill found that women living in regions not offering abortion services must travel an average of 221 kilometres or a round trip of 442 kilometres, this represents a significant

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4 Silva, M. et al: Ladies in waiting: the timeliness of first trimester services in New Zealand; Reproductive Health, 2010, **7**:19

5 Strongman, S.: No choice: When a legal abortion is denied, New Zealand Herald, 19 September 2017, accessed at https://www.nzherald.co.nz/lifestyle/news/article.cfm?c_id=6&objectid=11923932

6 Harris, S.: Denied abortion: Woman discovers pregnancy at 4 months, 2 weeks, New Zealand Herald, 15 October 2017, accessed at https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11928010

7 Silva, M. and McNeill, R.: Geographical access to termination of pregnancy services in New Zealand; Australian and New Zealand Journal of Public Health. 2008 Dec; 32(6): 519-21.

8 Cheng, D.: Home abortions safest, MPs told, New Zealand Herald, 16 February 2018, accessed at https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11995440

health and safety issue to women seeking a medical abortion, especially if they do not have the means or ability to stay overnight near the abortion clinic.

The Contraception, Sterilisation, and Abortion Act 1977 was written at a time in which surgical abortion was the only option. However, now that medical abortion has been found to be a safe, effective and acceptable method for terminating pregnancy, the legislation must be updated to reflect this, and greater availability to this particularly for women living in regions without a easy access to surgical abortion services must be facilitated. As medical abortion is only available up to nine weeks gestation it is critical that the delays currently experienced by many women are significantly reduced. Changes to the legislation are essential to enabling this to happen. .