Regulatory Impact Statement: Establishment of Safe Areas under the Contraception, Sterilisation and Abortion Act 1977

Coversheet

Purpose of Document	
Decision sought:	*This analysis has been prepared to inform decisions by Cabinet in its consideration to establish safe areas around abortion provider premises as specified in the Contraception, Sterilisation and Abortion Act 1977*
Advising agencies:	*Ministry of Health in consultation with Ministry of Justice and the New Zealand Police*
Proposing Ministers:	*Minister of Health and Associate Minister of Health*
Date finalised:	*27 March 2023*

Problem Definition

Protestors outside abortion clinics risk the mental, spiritual, and physical wellbeing of the people seeking or delivering abortion services in New Zealand. The protest activity can be distressing for vulnerable people seeking to access abortion services. Staff and patients alike have been the subject of physical abuse including intimidation, physically blocking patients from accessing buildings, and slashing vehicle tyres. Due to this behaviour, some abortion providers have asked for a Safe Area around their premises. The rights of people using and providing these abortion services need to be balanced against the right to freedom of expression.

Executive Summary

The proposa wi l provide information on the analysis carried out as part of the first round of provider appli ations (administered by the Ministry of Health), and the recommendations being put forward to Cabinet for agreement to the creation of Safe Areas. Also included is the NZ Bill o Rights Act 1990 (NZ BORA) analysis and consultation with the Ministry of Just ce, as well as the anticipated process for the implementation of the new regulations by the New Zealand Police (the NZ Police), and the options for future application rounds.

Limitations and Constraints on Analysis

There is the need to balance rights related to accessing and providing abortion, as part of health care, alongside those that have rights to conscientiously object to abortion provision.

The main constraint is that the key policy decisions have already been made and therefore options for Safe Areas are limited to the scope of the legislation.

Responsible Manager(s) (completed by relevant manager)
Clare Perry *Deputy Director-General* *Regulatory Services* *Manatū Hauora*  *28 March 2023*

Quality Assurance (completed by QA panel)	
Reviewing Agency:	Ministry of Health
Panel Assessment & Comment:	The Ministry QA panel has reviewed the Impact Statement titled "Establishment of Safe Area's under the Contraception, Sterilisation and Abortion Act 1977", produced by the Ministry of Health and dated March 2023. The panel considers that the Impact Statement **partially meets** the quality assurance criteria. The Impact Statement is clear, complete and consulted. The analysis is balanced in its presentation of the information and impacts are identified and assessed. The reason the Statement has been assessed as partially meets relates to limitations relating to concision, where the Panel considered it could be further refined and in some cases, the analysis for the safe areas was not always consistent.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

The Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Act 2022 received Royal Assent on 18 March 2022 and was incorporated into the Contraception, Sterilisation and Abortion Act 1977 (the Act) on 19 March 2022 as new sections 13A to 13C. The amendment provides a regulatory making power for the creation of Safe Areas under section 13C of the Contraception, Sterilisation and Abortion Act 1977. Within Safe Areas, the following behaviours are prohibited under section 13A:

- obstructing a person in a safe area who is approaching, entering, or leaving any building in which abortion services are provided; or
- making a visual recording of another person in a safe area in a manner that is likely to cause emotional distress to a person accessing, providing, or assisting with providing, abortion services; or
- advising or persuading people accessing abortion services to refrain from doing so
- informing people seeking abortion services about matters relating to the provision of those services (unless during the course of or assisting with providing those services); or
- engaging in protest activity in relation to abortion services provision of abortion services.

The purpose of a Safe Area is to address any risk to the safety and wellbeing, and to respect the privacy and dignity of, any persons accessing abortion services, seeking advice or information about abortion services, or providing or assisting in the provision of abortion services. This is achieved through the restriction of activities that can occur within a Safe Area.

The legislation also gives power to the NZ Police to require people engaging in these behaviours within a Safe Area to stop, to allow people accessing or providing these services to do so without being negatively impacted by these behaviours.

If Safe Areas are not established, it is expected that there will be continued and possibly increased protest activity outside the premises of abortion service providers which will impact on individuals' rights to healthcare services and on their wellbeing.

There is a history of protest activity and other behaviours which would be prohibited under section 13A of the Act (prohibited behaviours) outside known abortion providers around the country. Prohibited behaviour such as protest activity can vary depending on the location, time of year, and intensity. While some providers have experienced little to no prohibited behaviours, others have experienced prohibited behaviours on a consistent basis.

Some examples include:

- anti-abortion groups handing out leaflets, displaying signs and leaving emotionally distressing messages on footpaths
- protestors holding distressing images and slogans outside the entrance to an abortion provider's premises
- protestors offering money to people to stop th m accessing services
- protestors following staff of providers and instances of assaulting staff members and damaging cars
- protestors entering the provider's premises and treatment areas.

Key stakeholders include patients, health practitioners, patients' whānau, Manatū Hauora – the Ministry of Health (as regulator), Ministry of Justice, and the NZ Police.

Manatū Hauora, in conjunction with Te Whatu Ora, have several workstreams involved in the support, delivery and regulation of abortion services in New Zealand with a strong focus on equity and accessibility Safe Areas would support this work.

What is the policy problem or opportunity?

The balance f rights between staff involved with abortion care, patients seeking abortion services and those protesting against abortion services. The right to access abortion care as a health service is significantly challenged by protest around abortion providers.

The Code of Health and Disability Services Consumers' Rights (the Code) outlines the rights all people have when accessing a health service. As abortion is a health service, people engaging with abortion services are therefore protected by this code. This includes the rights to be treated with respect, freedom from discrimination, coercion, harassment and exploitation and the right to dignity and independence.

Over 13,000 people access abortion services throughout New Zealand each year. The recent introduction of a national abortion telehealth service has led to an uptake of abortion procedures occurring without in-person service provision. However, there will always be a need for in-person services.

Equity- Current arrangements leave people vulnerable to the impact of prohibited behaviours on those seeking or delivering abortion services. Māori, Pasifica, Asian and disabled populations face stronger issues around equity and accessibility for healthcare generally. Manatū Hauora and Te Whatu Ora are working to improve equity and accessibility for abortion survives but this is hindered by patients not feeling safe to access abortion services.

Abortion services also disproportionately impact women who already face challenges to accessing health services.

Impact on the abortion workforce- Effects of protest activities and behaviour which would be prohibited within a safe area can also have significant impact on the health practitioners involved in providing abortion services (both publicly and privately). Staff have shared that they are often impacted by working in this space. With experiences of violence and harassment. This impacts an already limited workforce, further restricting the availability/accessibility of abortion services and may deter new providers from entering the workforce.

Protest activity can aggravate an already vulnerable situation and can be inflammatory to individuals' wellbeing when attempting to access services. For s me, the more stressful part for their wellbeing is having to walk past or encounter these prohibi ed behaviours while accessing abortion care.

The Act allows Safe Areas to be created to prohibit behav ours that negatively impact people providing and accessing abortion services. It recognises people's right to protest but restricts the behaviours and areas where this can be performed.

We believe that balance with the New Zealand Bill of Rights Act 1990 (NZBORA) (as discussed during the select committee process) can be achieved through the individualised assessment of each Safe Area application, and the tailored considerations of the individual needs of each applicant.

What objectives are sought in relation to the policy problem?

The objective is to balance the rights of those accessing and providing services with the rights of others to protest. The overall focus is on accessible and equitable services and the autonomy of peop e to make a choice about what services they access, while placing only justifiable limitations on the rights of others.

The intended o tcome is therefore improving the privacy, safety, equity and accessibility of abortion serv ces for patients and health practitioners, while allowing freedom of speech outside of the safe area.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

Each Safe Area is assessed on a case-by-case basis. Manatū Hauora considers several factors when undertaking an individualised assessment for a Safe Area.

Manatū Hauora applied the requirements of section 13C of the Act as the primary criteria for assessing provider applications and prescribing new Safe Areas. In accordance with section 13C(2)(a), this included ensuring that a Safe Area was desirable to address any risks to the safety and wellbeing, and to protect the dignity and privacy, of persons accessing or providing abortion services at the premises.

Analysis under the section 13C(2)(a), included consideration of the following;

- the current or potential risks to the safety and wellbeing of persons accessing and/or providing services at a premises (A)
- the current or potential impacts to the privacy and dignity of persons accessing and/or providing services at a premises (B)
- the anticipated benefits of the establishment of a proposed safe area in addressing (A) and (B)
- specific consideration or circumstances specific to the provider and premises, such as regarding their location, local area, or externalities.
- considerations regarding the size/shape of any proposed safe area and the limitations on others imposed within the area for consistency New Zealand Bill of Rights Act 1990 (NZBORA)

In accordance with section 13C(2)(b) of the Act, and consultation with the Ministry of Justice, Manatū Hauora undertook a Bill of Rights analysis to ensure that any limitation on the rights of others can be demonstrably justified in a free and democratic society as a reasonable limitation on people's rights and freedoms. This included reviewing all proposed Safe Areas against identified New Zealand Bill of Rights Act 1990 (NZBORA) vetting criteria, and the consideration of whether:

- the policy objective of the Safe Area is important enough to justify some limit on rights and freedoms in a democratic society
- a rational connection exists between the limit on the right of others and the policy objective of ensuring safe access of an individual to the premises
- the limit on the rights of others is no greater than reasonably necessary – that is, the Safe Area is no larger than is reasonably needed to manage the risks to safety and wellbeing, and to respect the privacy and dignity of people accessing or providing abortion services
- the limit on the right to freedom of expression is in proportion to the policy objective of Safe Areas.

As part of the assessment this included consideration of the size of the premises, location of current or likely protest activity, and access points to services including public transport links.

The criteria used and the individualised focus of the regulation making process, has ensured that each Safe Area is considered on its own unique characteristics. In practical terms, this

means that the shape and size of each Safe Area will look different and will be applied in a manner that is specific that providers situation.

What scope will options be considered within?

The scope of the options is limited to the provisions outlined in the legislation and in consideration of NZBORA. This includes a restriction on the maximum of 150 metres (150m) from the perimeter of premises, thus limitations of overall area coverage of the Safe Area and the types of behaviour that are prohibited.

What options are being considered?

Option One – [*Counterfactual*]

> Do not administer any Safe Areas under the Contraception, Sterilisation and Abortion Act. Continue with the current status quo where the ability to create Safe Areas exists but is not exercised.

Option Two - [*Tailored approach]*

> Consider each Safe Area application on a case-by-case basis. Safe Areas will be created based off an individual assessment and have unique land areas depending on the needs of the applicant.

A blanket approach of 150m for every provider was considered by the health select committee but was decided against in favour of the tailored approach. The blanket approach does not adequately balance the rights of people to access healthcare along with the rights of people to protest.

How do the options compare to the status quo/counterfactual?

The counterfactual means there is no limitation on people's rights to protest which satisfies NZBORA considerations. However, it does impede people's right to healthcare and does not address the risk identified in this analysis.

Actions available to abortion providers under the counterfactual (such as trespass notices, calling police, employing security guards) are not sufficient at minimising the impact of prohibited behaviours on staff and patients. In instances where these measures have been used, protestors have continued to return and currently have no reason not to stand outside clinics as there is no deterrent to move them to a further distance.

A tailored approach to each Safe Area with consideration for the frequency, type and likelihood of prohibited behaviours limits people's right to protest but achieves the overall objective with as minimal impact as possible on the rights of people to protest while ensuring that people's rights to healthcare is not unnecessarily impacted.

A more detailed analysis of each Safe Area application (for the first round - March 2023) is attached to this document as Appendix One.

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

To address the key problem and meet the policy objective, Safe Areas must be considered on a case-by-case basis. Option two strikes the balance between the right to accessing health care and the NZBORA. A tailored, unique safe area for each eligible abortion provider

that applies will ensure that Safe Areas do not overstep the purpose of the Safe Area or limit the freedom of expression more than what is necessary.

What are the marginal costs and benefits of the option?

There are minimal costs on implementation of this option – costs are accounted for and covered within existing budgets. The only costs that are likely are those related to a fine of $1000 if individuals are convicted.

The benefits of creating individualised Safe Areas include:

- improved wellbeing and protection for those seeking or delivering abortion care
- potential cost reduction for public hospitals who would have to divert security resources
- reduced stigma surrounding abortion care
- recognition of the importance of the Code for those seeking health care services
- a demonstratively justified impact on those expressing opinions against abortion services

Section 3: Delivering an option

How will the new arrangements be implemented?

The regulations will come into force 28 days following notice in the *New Zealand Gazette*.

Manatū Hauora, as the administrator of the Act, is responsible for administering the Safe Areas application process and overseeing all new Safe Area regulations. Manatū Hauora already has information on its website about Safe Areas and what it means. Once new Safe Area regulations come into effect the website will be updated to include additional information about each Safe Area that has been created and a map outlining the parameters of the Safe Area.

The responsibility for the implementation and enforcement of any Safe Areas sits with abortion providers and the NZ Police (primarily the local police districts). The NZ Police have advised that they will take a preventative and educational approach to the es ablishment of Safe Areas. They will provide advice and information into the Police Manual on Safe Area's and each district has provided input and feedback to Manatū Hauora on the proposed area's and what will be enforceable.

Once a Safe Area is confirmed to be made regulation, the NZ Police will use the 28 days from Gazette notice to establishment in order to ensure that their districts are aware of the new regulations that will fall to their responsibility.

Manatū Hauora has encouraged providers to discuss with their local council about Safe Areas and potential preventative measures to ensure people know about Safe Areas. This includes consideration of ways to make the Safe Area visible or known within the area.

How will the new arrangements be monitored, evaluated, and reviewed?

The Act requires each Safe Area to be reviewed every 5 years. Manatū Hauora will facilitate these reviews and at subsequent in ervals after that, in consultation with the Secretary for Justice. The findings from these reviews will be reported to the Minister of Health and Minister of Justice with r gards to whether any current Safe Area regulations should be continued, amended, or revoked.

As part of this review the e will be scope for refining the process and regulations following further provider feedback.

This review may also consider feedback from providers about the positive and negative impacts that Sa e Areas has had on their service and peoples' access. It will also consider how many offences or fines upon conviction have occurred since the establishment of Safe Areas.

Manatū Hauora holds responsibility for ongoing monitoring and regulation of abortion services and will ensure that any opportunities for improvement are incorporated into the ongoing work.

RIS Appendix 1: Comparison table – Assessment of provider applications against Safe Area criteria (ie, Section 13C(2) of the Act)

Key/Scale: ++ much better than the counterfactual; **+** better than the counterfactual; **0** the counterfactual; **-** worse than the counterfactual; **--** much worse than the counterfactual

	Current/identified risks to safety and wellbeing of persons accessing and providing services at premises (A) [Analysis 1]	**Current/identified impacts to the respect, privacy, and dignity of persons accessing and providing services at premises (B)** [Analysis 2]	**Anticipated benefit of establishing proposed Safe Area in addressing (A) and (B)**	**NZBORA Considerations –Rights and freedoms limited to the extent necessary to address the risks**	**Criteria for Safe Area met** **[Yes/No]**
Counterfactual	A significant history and ongoing issues of prohibited behaviours happening around at the six provider locations. Varying in number and severity. Significant impact on the safety and wellbeing of both those seeking and providing abortion services as the behaviour is not restricted.	People are having their privacy and dignity impacted by prohibited behaviours while accessing services. Abortion care is the only health service that is targeted in this manner and violates people's privacy by prohibited behaviour (including protestors directly engaging with individuals). Staff at abortion services at these six provider locations have experienced situations where protestors seek to identify them, harassment, and physical assault. Likelihood of putting off existing staff and deterring new staff from entering the workforce.	**N/A**	**0** No impact on rights and freedoms under NZBORA. Prohibited behaviour can occur with little to no restriction or limitation.	No

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	Current/identified risks to safety and wellbeing of persons accessing and providing services at premises (A) [Analysis 1]	**Current/identified impacts to the respect, privacy, and dignity of persons accessing and providing services at premises (B)** [Analysis 2]	**Anticipated benefit of establishing proposed Safe Area in addressing (A) and (B)**	**NZBORA Considerations –Rights and freedoms limited to the extent necessary to address the risks**	**Criteria for Safe Area met** **[Yes/No]**
Auckland Medical Aid Centre [AMAC]	Well established and consistent weekly issues with antiabortion groups and prohibited behaviours at and around vicinity of centre. Several incidences of prohibited behaviours and targeted demonstrations at and near premises, which have included Police response and injury to staff. Current high level of risk to safety and wellbeing of individuals. Increased at times due to central location of centre, single entry point and nearby shopping area with members of the public walking right past the entry point.	Location of centre and access points mean staff and individuals must pass protest activities when accessing centre and services. Occasions of individuals being followed when entering and leaving the centre. Protest groups and activities are visible from most patient and staff areas inside centre. Identifiable impacts on individuals' privacy and rights to access services caused by current location of protest activities.	++	++	Yes
Epsom Day Unit (EDU) - Greenlane Clinical centre	Consistent historical issues with antiabortion groups and prohibited behaviours in and around vicinity of the unit. Activities mostly at the main entrance to the centre and on	Location of centre and access points mean staff and individuals have to pass protest activities when accessing centre and unit services. Occasions of individuals being followed when entering	++	++	Yes

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	a main road junction (just outside the proposed safe area). Past incidences of prohibited behaviours at and near premises, which have included Police response. Identified level of risk to safety and wellbeing of persons. Potential increased risk due to central location of clinic and opening of new commercial area directly across road.	unit. Protest groups and activities visible from some patient and staff areas inside unit. Identifiable impacts on individuals' privacy and rights to access services caused by current protest activities.			
Te Mahoe Unit (Wellington Regional Hospital)	Well established antiabortion groups and prohibited behaviours in and around vicinity of unit. Consistent issues, with increased activities seen over Lent ('40 days for life') and Christmas. Past incidences of prohibited behaviours at and near premises, have included Police responses and protestors	Location of centre and access points mean staff and individuals often have to pass protest activities when accessing hospital and services. Occasions of individuals being followed when entering and leaving unit or harassed in waiting areas and photos being taken	++	++	Yes

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	Current/identified risks to safety and wellbeing of persons accessing and providing services at premises (A) [Analysis 1]	**Current/identified impacts to the respect, privacy, and dignity of persons accessing and providing services at premises (B)** [Analysis 2]	**Anticipated benefit of establishing proposed Safe Area in addressing (A) and (B)**	**NZBORA Considerations –Rights and freedoms limited to the extent necessary to address the risks**	**Criteria for Safe Area met** **[Yes/No]**
	barring access to clinic, and offering money. Current high level of risk to safety and wellbeing of individuals due to central location, multiple entry point where prohibited behaviours can occur and busy nearby commercial areas.	Protest groups and activities visible from most patient and staff areas inside centre. Identifiable impacts on individuals' privacy and rights to access services caused by current location of protest activities.			
Te Nikau Health and Hospital Centre – Greymouth Hospital	New service – only providing abortion care since April 2022 so current public awareness of the service is low. However, we anticipate that as the service is more established the likelihood of prohibited behaviours will become heightened. Safe Area is a preventative measure, noting past experiences elsewhere and likelihood of increased public awareness will bring opportunities for prohibited behaviours to occur.	Location of services and access points mean staff and individuals would have to pass protest activities when accessing centre, especially if using footbridge. Protest groups and activities if occurring, would be visible from some patient and staff areas when inside unit. Preventative measure to mitigate impacts on individuals' privacy and rights to access services if there were protest activities.	+	+	Yes

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	s 9(2)(c) [redacted]				
Christchurch Hospital (Gynaecology Procedure Unit and Women's Hospital)	Well established antiabortion groups and prohibited behaviours in and around vicinity. Consistent issues of prohibited behaviours at and near premises, eg, protestors at the front, providing antiabortion rhetoric and protestors entering hospital complex. Current high level of risk to safety and wellbeing of individuals. Increased due to central and exposed location (Hagley Park), multiple entry points and busy nearby public areas.	Central location of hospital complex and access points means staff and individuals have to pass protest activities when accessing hospital and unit services. Occasions of individuals being followed when entering and leaving unit or harassed in public areas. Protest groups and activities visible from most patient and staff areas inside centre. Identifiable impacts on individuals' privacy and rights to access services caused by current location of protest activities.	++	++	Yes
Dunedin	Well established and weekly	Location of hospital and limited			Yes

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	Current/identified risks to safety and wellbeing of persons accessing and providing services at premises (A) [Analysis 1]	**Current/identified impacts to the respect, privacy, and dignity of persons accessing and providing services at premises (B)** [Analysis 2]	**Anticipated benefit of establishing proposed Safe Area in addressing (A) and (B)**	**NZBORA Considerations –Rights and freedoms limited to the extent necessary to address the risks**	**Criteria for Safe Area met** **[Yes/No]**
Women's Hospital (Dunedin Hospital)	issues with antiabortion groups and prohibited behaviours at and around vicinity of centre. Particularly prevalent on Fridays when they have the surgical abortion list. Several incidences of prohibited behaviours and target actions at and near premises, which have included Police response and media interest. Increased issues when COVID-19 restrictions were in place as hospital restricted to using only one entrance, so all patients and staff had to walk past protesters at main entrance. Current high level of risk to safety and wellbeing of individuals. Increased at times due to central location, limited	access points mean staff and individuals have to pass protest activities when accessing services. Protestors hold distressing images and slogans, and occasionally go inside building. Identifiable impacts on individuals' privacy and rights to access services caused by current location of protest activities.	++	++	

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	entry points and nearby commercial area.				