

Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill

Member's Bill

As reported from the Health Committee

Commentary

Recommendation

The Health Committee has examined the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill and recommends by majority that it be passed. We recommend all amendments unanimously.

About the bill as introduced

The Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill is a Member's bill in the name of Louisa Wall, MP. It would amend the Contraception, Sterilisation, and Abortion Act 1977.

The bill aims to protect the safety and wellbeing, and respect the privacy and dignity, of women accessing abortion facilities and practitioners providing and helping with abortion services. It seeks to do so by providing a regulation-making power that would enable safe areas to be set up around specific abortion facilities.

Under the bill, the Minister of Health, in consultation with the Minister of Justice, could recommend that regulations be made to create a safe area at specified premises where abortion services were provided. The size and location of the safe area would be determined after taking into account the circumstances of the individual facility. The bill provides that the safe area could be no more than 150 metres from any part of a protected facility.

The bill would prohibit certain behaviour towards specified people within safe areas. A person convicted of engaging in prohibited behaviour within a safe area would be liable for a fine of up to \$1,000.

Our consideration of this conscience issue

The Speaker of the House has declared that this bill is a conscience issue for members. As a result, voting is on a personal basis rather than by party. We appreciate that abortion is a sensitive topic about which people have a range of opinions. Like the people who submitted on this bill and other members of Parliament, we as a committee also hold a range of views.

Given that abortion is a health service, some of us believe that the legislation is necessary to protect consumer rights under the Code of Health and Disability Services Consumers' Rights. Some of us also consider that the bill is needed to ensure that employers of abortion providers can meet their obligations under health and safety legislation.

Conversely, others of us consider that the absence of information about complaints to district health boards and the Police demonstrates that safe areas are not needed. Those of us with this view believe that existing legislation that deals with harassment and intimidation is sufficient. Examples of the legislation include the Summary Offences Act 1981, the Trespass Act 1980, and the Harassment Act 1997.

Some of us believe that the bill represents a balance of rights and were particularly concerned that the bill include a process that would remove the requirement for a person seeking abortion advice to have to give evidence in court if they experienced behaviour prohibited under this legislation.

Some of us consider that the duty to uphold freedom of expression is paramount, and highlighted the concerns raised by the Attorney-General in his report on the bill. We discuss these concerns in more detail later in this commentary.

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We have no issues regarding the legislation's design to bring to the attention of the House.

Report of the Attorney-General under the New Zealand Bill of Rights Act

Section 7 of the New Zealand Bill of Rights Act 1990 (NZBORA) and Standing Order 269 set out what the Attorney-General must do when a provision in a bill appears to be inconsistent with any of the rights and freedoms contained in NZBORA. Section 7 requires the Attorney-General to bring the provision to the attention of the House of Representatives. Standing Order 269(1) specifies that the Attorney-General must indicate the provision to the House and how it appears to be inconsistent with NZBORA.

On 17 February 2021, the Attorney-General presented a report on the bill to the House under section 7 of NZBORA and Standing Order 269. He concluded that clause 5 of the bill appeared to be inconsistent with the right to freedom of expression as affirmed in section 14 of NZBORA. In particular, he was concerned that the bill

would criminalise “communicating” in a way that was objectively emotionally distressing. We set out his concerns about the clause in more detail below.

The Attorney-General’s concerns about the “communicating” provision

Clause 5 of the bill as introduced would insert new sections 13A to 13C into the Contraception, Sterilisation, and Abortion Act 1977. New section 13A(3) defines the behaviour that would be prohibited in safe areas. It would include intimidating, interfering with, or obstructing a protected person:

- with the intention of frustrating the purpose for which the protected person is in the safe area (section 13A(3)(a)(i)); or
- in a manner that an ordinary reasonable person would know would cause emotional distress to a protected person (section 13A(3)(a)(ii)).

New section 13A(3)(b) would prohibit a person from communicating with, or visually recording, a person in a manner that an ordinary reasonable person would know would cause emotional distress to a protected person.

A protected person is defined as a person who is in a safe area for the purpose of:

- accessing abortion services
- providing, or assisting with providing, abortion services
- seeking advice or information about abortion services
- providing, or assisting with providing, advice or information about abortion services.

The Attorney-General concluded that new section 13A(3)(b) was overly broad and was not a justifiable limit on section 14 of NZBORA. He considered that the term “communicating” had an apparently broad scope for the following reasons:

- It appears to cover any speech or behaviour with a communicative element rather than focusing on the forms of communication that are common to anti-abortion activism.
- The subject matter of the prohibited communication is not limited to abortion or related matters.
- It is unlikely that a person would need to intentionally direct communication towards a protected person knowing that they were a protected person. Instead, it appears to be sufficient that a person’s speech or behaviour is communicative.

The Attorney-General considered that the proposed offence was likely to have a “chilling effect” on all forms of communication within a safe area. This was due to the absence of a clear understanding of the types of communication that would be criminalised by new section 13A.

The Attorney-General observed that the policy rationale for the legislation is to protect the safety, wellbeing, privacy, and dignity of protected persons. However, he did not believe that this rationale supported the broad criminalisation of emotionally

harmful communication within a safe area. The Attorney-General highlighted several examples of behaviour that could be inadvertently captured. They include discussions between family members about the advantages and disadvantages of abortion or a clinician providing bad news about the health of a fetus. He also pointed out that the lack of an intention to cause emotional harm could lead to a broader range of communicative activity being criminalised, such as distant silent protest.

The Attorney-General suggested two options for changes to clause 5 that could make it consistent with the rights and freedoms affirmed by the Bill of Rights Act. The first would be to substitute a narrower definition of “prohibited behaviour”, rather than covering all forms of “communicating”. The second would be to require that the offence of committing prohibited behaviour in a safe area entail an intention to cause harm.

Examples of legislation in other jurisdictions

As part of our consideration of the bill, we asked the Crown Law Office to give evidence on behalf of the Attorney-General. Crown Law provided several examples of a narrower approach used in legislation in other jurisdictions that have safe areas around abortion service providers:

- In British Columbia, Canada, the Access to Abortion Services Act, RSBC 1996 prohibits “protest” and “sidewalk interference” in ways that distinguish those activities from other forms of communication.
- In Victoria, Australia, the Public Health and Wellbeing Act 2008 criminalises “communication” in a safe area. However, the communication must relate to abortions and be by people other than abortion service providers.
- In Ontario, Canada, the Safe Access to Abortion Services Act 2017 provides that communication-related offences inside safe areas do not apply to employees of abortion service providers. They also do not apply to people accompanying someone who is accessing abortion services.

We acknowledge the comments from the Attorney-General and Crown Law. We have recommended amendments to the bill, which we describe in our next section, to address the inconsistency with NZBORA. We also sought feedback from the Attorney-General about our proposed amendments. This feedback is detailed later in our commentary.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Behaviour to be prohibited in a safe area

We spent some time discussing how clause 5 of the bill could be amended to make it consistent with NZBORA so that the limitations on a person’s right to freedom of expression were minimal and could be justified.

As introduced, clause 5, new section 13A(3)(b), would prohibit a person from communicating with, or visually recording, a person in a manner that an ordinary reasonable person would know would cause emotional distress to a protected person. We accept the Attorney-General's conclusion that the term "communicating" is too broad. Accordingly, we recommend amending clause 5 by replacing proposed section 13A. Our amendment would remove the definitions of "prohibited behaviour" and "protected person" and specifically define the types of behaviour that would be prohibited in a safe area.

Visually recording another person in a safe area

Our proposed new section 13A(1)(b) would prohibit a person from visually recording another person in a safe area in a certain manner. They could not do so in a way that was likely to cause emotional distress to a person accessing, providing, or assisting with providing, abortion services.

Other activities prohibited in a safe area

Our proposed new section 13A(1)(c) would prohibit a person from undertaking certain activities in a safe area. The activities would be ones that could easily be seen or heard by another person (A) who may be accessing, providing, or assisting with providing abortion services. The prohibited activities would be:

- advising or persuading A to refrain from accessing or providing abortion services (new section 13A(1)(c)(i))
- informing A about matters relating to the provision of abortion services unless it was when the services were being provided (new section 13A(1)(c)(ii))
- engaging in protest about matters relating to the provision of abortion services (new section 13A(1)(c)(iii)).

However, a person could carry out the activities in new subparagraphs (i) and (ii) while accompanying A with A's consent. This would avoid it being an offence to have a private conversation in a safe area where A was being dissuaded by a person accompanying them from accessing or providing abortion services.

Some of us expressed concern at the possibility that individuals silently praying without any visual aids or placards could be included in the definition of prohibited behaviour, even in circumstances where their prayer was for matters unrelated to abortion, such as the illness or death of a loved one within a hospital. We were advised that silent prayer of this nature would not meet the definition of a protest.

Reducing the need for a person to testify that they were seeking or providing abortion services

In the bill as introduced, new section 13A(3)(a) would prohibit a person from intimidating, interfering with, or obstructing a protected person in a safe area. They would be prohibited if they were doing so with the intention of frustrating the purpose for which the protected person was in the safe area. Equally, they would be prohibited if

they were doing so in a way that an ordinary reasonable person would know would cause emotional distress to a protected person.

The bill as introduced would require the prosecution to demonstrate that the person subject to the prohibited behaviour was a “protected person”—that is, that they were in the safe area to access or provide abortion services.¹ We recognise that some people may not be willing to testify that they were accessing or providing abortion services. We believe that this could be distressing for some people and could deter them from making complaints. We considered whether the bill could be amended so that people would be less likely to have to provide evidence about why they were in the safe area. We have recommended that the bill be amended to remove the reference to a “protected person”. Consequently, the fact that the complainant was in the safe area to seek or provide abortion services would no longer be an element of the offence. Although evidence would still be needed that the behaviour occurred, the witness would not have to be the person that the behaviour was aimed at.

We received advice about how the Police would be likely to interpret the reference to “intimidating” in section 13A(3)(a) of the bill as introduced. It would require intent to cause or instil fear to influence conduct or deter the victim from action by threat or violence. We were also advised that the term “intimidate” could be problematic because it could be interpreted in multiple ways. Our proposed amendment therefore removes the references to “intimidating” and “interfering”. Under our proposed new section 13A(1)(a), a person could not obstruct a person in a safe area who was approaching, entering, or leaving any building in which abortion services were provided. We note that intimidation is already an offence under section 21 of the Summary Offences Act 1981. Interfering with a person in a safe area would likely be covered by obstructing, or the new prohibited behaviour proposed under section 13A(1)(c).

Parts of the definition of prohibited behaviour in the bill do not explicitly require that someone undertakes the behaviour with any specific intent or knowledge (*mens rea*). Therefore, we understand that the Court could interpret the offence as being one of strict liability. We sought advice on whether this would be proportionate and appropriate. We were advised that the maximum penalty for the prohibited behaviour in the bill is relatively low and aligns with other similar offences. We note that the accused could also avoid liability if they could show the existence of a defence or an absence of fault.

Giving evidence that a person was visually recording another person

Our proposed new section 13A(1)(b) would prohibit a person from making a visual recording of another person in a safe area in a manner that was likely to cause emotional distress to a person accessing, providing, or assisting with providing, abortion services. We were advised that it is likely that the Police would interpret this provi-

¹ The bill would also require a constable to demonstrate that the person was a “protected person” when a police officer was arresting someone for failing to stop the prohibited behaviour.

sion to mean that a person would need to give evidence about their reason for being in the safe area. We are comfortable with this approach because it would only apply in situations involving visual recording. We note that the intention of the legislation is primarily to prevent harm. However, our proposed amendment would still provide a route for prosecution in situations where there were clear problems.

Expediting the process for establishing safe areas

Most of us do not want abortion providers to have to wait for a long time for a safe area to be established. We discussed how this type of situation could be mitigated and whether the application process could be streamlined. We considered whether a “blanket” approach could be used to create safe areas rather than by a case-by-case basis. The options we considered included prescribing safe areas for all “bricks and mortar” premises (as opposed to mobile abortion providers) or for providers of surgical abortions. We also considered whether the locations of a list of providers specified in the bill could be automatically covered by a safe area for a period of 12 months after the bill was enacted. This would provide protection during the time required to enable providers to determine whether they wanted to apply for a safe area and for an application to be considered and taken through the regulation-making process.

We understand that a blanket approach is less likely to comply with NZBORA, and believe that a case-by-case approach would be simpler. However, most of us would like the process for applying for a safe area to be relatively simple without delays for providers.

We sought advice on whether the bill could be amended to enable any parts of the application process to progress more quickly. We note that the approval process for a safe area, which the Ministry of Health would administer, would generally involve the following steps:

- An abortion provider would likely make a request stating that they considered that a safe area was needed at the site where they provided services. The request would include the reason for it, details about the size and location of the premises, and the type and use of surrounding premises.
- The ministry would consider the request on a case-by-case basis depending on the circumstances of the provider. It would apply the criteria in new section 13C(2) as proposed by the bill and consult the Ministry of Justice about any NZBORA matters.
- The ministry would then advise the Minister of Health about the application based on its consideration relevant to the specific premises.
- The Minister of Health would consult the Minister of Justice according to the requirement in new section 13C(1) and then make a decision.
- If the Minister approved an application, they could recommend that a regulation be made to apply a safe area to the provider. The regulation would need to be approved by Cabinet and authorised by the Governor-General.

- The regulation would be published in the Gazette and on the New Zealand legislation website. It would come into force 28 days later.

We discussed whether a time frame for the application process should be included in legislation. However, we note that the time frame for processing an application would depend on a range of factors. They include the complexity of the application and whether the safe area intersects with private property, which may require owners to be consulted. A time frame could also result in an application being analysed less carefully so that the deadline could be met. For these reasons, we consider that it could be difficult to prescribe an appropriate time frame.

We have therefore not included a time frame in the legislation. However, we would still expect the Ministry of Health to provide advice to the Minister of Health within a reasonable period and for applications to be processed promptly.

Matters that the Minister must be satisfied of when prescribing a safe area

Clause 5, which would insert new section 13C(2), provides that the Minister of Health could recommend the making of regulations. As introduced, the Minister would need to be satisfied that prescribing a safe area was necessary to protect the safety and wellbeing of certain people, and to respect their privacy and dignity. The people are: those accessing abortion services, providing or assisting with providing abortion services, seeking advice or information about abortion services, or those providing or assisting with providing advice or information about abortion services.

We do not believe that providers should need to wait for harm to occur before a safe area was established. We consider that this is particularly important given that the regulation-making process for safe areas could take some time.

Accordingly, we recommend amending section 13C(2)(a). Our proposed amendment would require the Minister to be satisfied that the safe area was desirable to address any risk to safety and well-being, rather than that it was necessary.

New section 13C(3)(a)(i), inserted by clause 5, would require the Director-General to review the regulations to determine whether the prescribed safe area was still necessary. This would need to be no later than 5 years after regulations were made, followed by subsequent intervals of no more than 5 years. To align with our previous amendment, we recommend that the reference to “necessary” be replaced with “desirable”.

Definition of “premises”

As introduced, the bill does not contain a definition of “premises”. We recommend inserting a definition of “premises” in clause 4, amending section 2. This term would be defined as “the building in which the abortion services are provided” and “the land on which that building is sited”. We consider that this amendment is needed to make it clear whether land is included in the definition of premises. This is because differ-

ent interpretations could significantly change the maximum permitted extent of a safe area.

We acknowledge that “premises” could be a very large area if, for example, a hospital that provided abortion services was situated on a very large parcel of land. We note that the Minister would need to take into account the individual circumstances of each location and the size of the premises when deciding whether to recommend a safe area, and the extent of any safe area.

Inclusion of private premises

Many of us are particularly concerned that private premises could be included as part of a safe area. Many of us do not believe that safe areas should apply to private properties. Many of us consider that instances of harm that occur on private property should be addressed through other legislation, such as the Summary Offences Act.

We also note that our new proposed new section 13A(1)(c) would require the prohibited behaviour to be easily seen or heard by people accessing or providing abortion services. We consider that excluding behaviour that could not be seen or heard would partly address concerns about behaviour on private property. We understand that enabling safe areas to be made on a case-by-case basis would mean that private property could be excluded, following consultation with the property owner.

Consistency of our amended bill with the New Zealand Bill of Rights Act

On 25 August 2021, we invited the Attorney-General to comment on whether our recommended amendments to the bill were consistent with the rights and freedoms affirmed in NZBORA. On 1 September 2021, the Attorney-General responded to us stating the following:

The revised draft you have provided to me (PCO 23098/9.0) addresses the concerns I expressed about the Bill as introduced. The communicative behaviour criminalised by clause 13A(1)(c) is narrower than the original proposal. The broad phrase “communicating with” has been replaced by three new tests, which are all narrower than the original proposal and have appropriate exemptions built in. In particular, I note that:

- 1. there appears to be little prospect that communication from support persons or service providers would be criminalised under the revised draft, as a result of the exemptions in clause 13A(1)(c)(i)-(ii); and*
- 2. “engaging in protest” in clause 13A(1)(c)(iii) is narrower than the previous phrase “communicating with”, which means that communicative activities which cannot be regarded as a “protest” and might commonly be seen at or nearby a hospital (such as an individual engaging in silent prayer) will not risk being criminalised.*

I consider that, while the revised draft of the Bill would limit freedom of expression within a safe area under section 14 of the Bill of Rights Act, it

would do so in a way that is demonstrably justified in a free and democratic society under section 5.

I have reached that view because I consider that the safe area restrictions would serve the important purpose of protecting people providing and accessing abortion services from intimidation and emotional harm, and that the proposal would not limit rights and freedoms more than is necessary to achieve that purpose. Freedom to protest in relation to abortion would be maintained in all places outside of safe areas.

We thank the Attorney-General for providing this feedback. We would also like to recommend that he table a formal paper to the House outlining his opinion on the amendments recommended by the committee. We consider that this would be very helpful for other members of Parliament during the second reading of the bill.

Appendix

Committee process

The Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill was referred to the committee on 10 March 2021.

The closing date for submissions on the bill was 28 April 2021. We received and considered submissions from 890 interested groups and individuals. We heard oral evidence from 97 submitters at hearings in Wellington and by videoconference.

We received advice on the bill from the Ministry of Health and the Ministry of Justice. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

We considered the bill alongside the Report of the Attorney-General on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill.

Committee membership

Dr Liz Craig (Chairperson)

Chris Bishop

Dr Elizabeth Kerekere

Dr Anae Neru Leavasa

Dr Tracey McLellan

Debbie Ngarewa-Packer

Sarah Pallett

Dr Gaurav Sharma

Penny Simmonds

Tangi Utikere

Brooke van Velden

Simon Watts

Jan Logie took part in the consideration of this item of business.

**Contraception, Sterilisation, and Abortion (Safe Areas)
Amendment Bill**

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Louisa Wall

Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill

Member's Bill

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The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Act **2020**.
- 2 Commencement** 5
This Act comes into force on the day after the date on which it receives the Royal assent.
- 3 Principal Act** 10
This Act amends the Contraception, Sterilisation, and Abortion Act 1977 ~~(the principal Act)~~.

4 Section 2 amended (Interpretation)

- (1) In section 2, definition of **safe area**, replace “section 17(1)” with “section **13C(1)**”.
- (2) In section 2, insert in its appropriate alphabetical order:

premises, in relation to the provision of abortion services, means—

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- (a) the building in which the abortion services are provided; and
- (b) the land on which that building is sited

5 New sections 13A to 13C inserted

After section 13, insert:

13A ~~Certain behaviour prohibited in safe areas~~

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- (1) ~~A person must not engage in any prohibited behaviour in a safe area.~~
- (2) ~~A person who contravenes this section commits an offence and is liable on conviction to a fine not exceeding \$1,000.~~
- (3) ~~In this section,—~~

~~**prohibited behaviour** means—~~

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- (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 an ordinary reasonable person would know would cause emotional distress to a protected person~~

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~~**protected person** means a person who is in a safe area for the purpose of—~~

- (a) ~~accessing abortion services; or~~
- (b) ~~providing, or assisting with providing, abortion services; or~~
- (c) ~~seeking advice or information about abortion services; or~~
- (d) ~~providing, or assisting with providing, advice or information about abortion services.~~

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13A Certain behaviour prohibited in safe areas

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- (1) A person must not—
- (a) obstruct a person in a safe area who is approaching, entering, or leaving any building in which abortion services are provided; or
- (b) make 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

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- (c) do any of the following in a safe area in a manner that could be easily seen or heard by another person (A) who may be accessing, providing, or assisting with providing, abortion services:
- (i) advise or persuade A to refrain from accessing or providing abortion services (unless the advice or persuasion is by a person who is, with the consent of A, accompanying A): 5
 - (ii) inform A about matters related to the provision of abortion services, other than during the course of providing those services, or assisting with provision of those services (unless the information is provided by a person who is, with the consent of A, accompanying A): 10
 - (iii) engage in protest about matters relating to the provision of abortion services.
- (2) A person who contravenes this section commits an offence and is liable on conviction to a fine not exceeding \$1,000. 15
- 13B Power of constable to arrest without warrant**
- If a constable reasonably believes that a person is engaging in prohibited behaviour in a safe area, the constable may—
- (a) require the person to stop engaging in the prohibited behaviour; and
 - (b) if the person fails to stop engaging in the prohibited behaviour, arrest the person and take the person into custody without a warrant. 20
- 13C Regulations: safe areas**
- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister of Health after consultation with the Minister of Justice, make regulations for the purposes of **section 13A** prescribing as a safe area— 25
- (a) any specified premises at which abortion services are provided; and
 - (b) an area around those premises that is an area having a boundary of not more than 150 metres from the perimeter of the premises.
- (2) The Minister of Health may recommend the making of regulations under **subsection (1)** if the Minister is satisfied that prescribing a safe area— 30
- (a) is necessary to protect the safety and well-being, and respect the privacy and dignity, of persons—is desirable to address any risk to the safety and well-being of persons doing any of the following, and to respect the privacy and dignity of those persons:
 - (i) accessing abortion services: 35
 - (ii) providing, or assisting with providing, abortion services:
 - (iii) seeking advice or information about abortion services:

- (iv) providing, or assisting with providing, advice or information about abortion services; and
- (b) can be demonstrably justified in a free and democratic society as a reasonable limitation on people’s rights and freedoms.
- (3) Not later than 5 years after making any regulations under **subsection (1)** prescribing a particular safe area, and then at subsequent intervals of not more than 5 years, the Director-General, in consultation with the Secretary for Justice, must— 5
- (a) review the regulations (if they are still in force) to determine whether that prescribed safe area is still— 10
- (i) ~~necessary~~desirable for the purposes specified in **subsection (2)(a)**; and
- (ii) demonstrably justified as specified in **subsection (2)(b)**; and
- (b) report to the Minister of Health and the Minister of Justice on whether the regulations should be— 15
- (i) continued without amendment; or
- (ii) continued with amendment; or
- (iii) revoked.
- (4) An Order in Council made under this section is secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements). 20

Legislative history

28 July 2020
10 March 2021

Introduction (Bill 310–1)
First reading and referral to Health Committee