

Abortion law update: High Court finds new conscientious objection provisions do not breach NZBORA

Alastair Hercus, Hamish Kynaston, Peter Chemis, Natasha Wilson, Nicola Cuervo, Alastair Sherriff, Catherine Miller, Holly Hedley, Rebecca Dudley-Cobb, Emma von Veh

14 October 2021

In a landmark decision for health and human rights law in New Zealand, the High Court has ruled that the recently reformed conscientious objection provisions in the Contraception, Sterilisation and Abortion Act 1977 (CSA Act) do not breach the New Zealand Bill of Rights Act 1990 (NZBORA).

In March 2020 New Zealand's abortion laws were substantially reformed. As part of a wider focus on decriminalisation and improved access to services, the law relating to conscientious objection was updated, with a new section 14 of the CSA Act now requiring those who do conscientiously object to tell the person seeking services, at the earliest opportunity:

- Of their conscientious objection, and
- How to access the contact details of another person who is the closest provider of the service requested.

In March this year the New Zealand Health Professional Alliance Incorporated (NZHPA), a group of health professionals "*whose members are united in their religious and/or moral opposition to abortion*", challenged the information giving duties imposed through section 14. The NZHPA claimed that the requirements made them "*complicit in the abortion process*" and breached various rights set out in the NZBORA, including the freedom of thought, conscience and religion (section 14); the freedom to manifest religion and beliefs (section 15); and the freedoms of expression, association and from discrimination (sections 14, 17 and 19).

The NZHPA also challenged section 15 of the CSA Act (which requires employers to accommodate workers who conscientiously object unless doing so would "*unreasonably disrupt the...provision of health services*"). The NZHPA claimed that the exceptions within this provision breached their freedom of expression and right to be free from discrimination as well as the rights of minorities (section 20 of NZBORA).

The decision

In a detailed and sometimes groundbreaking decision, Justice Ellis ultimately did not find the NZHPA's claims to be made out, concluding, overall, that the conscientious objection provisions (sections 14 and 15 of the CSA Act) did not limit or infringe any of the rights claimed under the NZBORA.

In reaching her decision Justice Ellis considered the issues through the "*wider lens of women's rights generally*" and emphasised that "*it cannot be disputed that the ability of women to access legal and safe abortions is a matter of fundamental rights*". In finding that the information giving requirements in the conscientious objection provisions did not engage or interfere with the right to manifest religion or belief (section 15 of NZBORA) Justice Ellis noted that "*the reality is the obligations imposed by s14 [to give information] are minimal and – at best – only remotely connected with any abortion that may or may not follow*".

In addition, Justice Ellis noted "*for completeness, and out of an abundance of caution*" that even if the NZBORA rights were infringed, the conscientious objection provisions were nonetheless a justified limitation on those rights (as per section 5 of NZBORA), commenting that "*Parliament was entitled to strike the balance it did*" and that "*the section 14 duty is a necessary safeguard for women and girls who do not have the means to navigate their way through the health system without assistance*".

What does this mean for practitioners and people seeking abortion services?

This decision confirms and clarifies the legal requirements for those who conscientiously object to providing abortion services. Those requirements are set out in section 14 of the CSA Act (and as generally mirrored in section 174 of the Health Practitioners Competence Assurance Act) and mean, in practice, that conscientious objectors must:

- Tell the person seeking services, at the earliest opportunity:
 - of their conscientious objection, and
 - how to access the contact details of another person who is the closest provider of the service requested (and there is a list of providers maintained by the Director General of Health (under section 18 of the CSA Act) published online.)

The decision also provides guidance for those who employ abortion service providers, confirming that section 15 of the CSA Act means employers "*would be permitted to recruit specifically for roles that require the provision of abortion services*" and could consider only those willing to provide the services "*where that is necessary for the employer to start or continue to provide abortion services; otherwise those services would be "unreasonably disrupted"*".

For more information about other aspects of the abortion law reform see our [earlier update](#). If you have any questions or would like to discuss this or any other health and human rights law issues please contact our [team](#).

Auckland

**188 Quay Street
Auckland 1010**

**PO Box 1433
Auckland 1140
New Zealand**

**P: +64 9 358 2555
F: +64 9 358 2055**

Wellington

**Aon Centre
1 Willis Street
Wellington 6011**

**PO Box 2694
Wellington 6140
New Zealand**

**P: +64 4 499 4242
F: +64 4 499 4141**

Christchurch

**83 Victoria Street
Christchurch 8013**

**PO Box 322
Christchurch 8140
New Zealand**

**P: +64 3 379 1747
F: +64 3 379 5659**