Review of the Abortion Laws in New Zealand
Submission to the Law Commission – May 2018

Joint submission by the New Zealand Catholic Bishops Conference & The Nathaniel Centre

The New Zealand Catholic Bishops Conference is the national assembly of the Catholic Bishops of Aotearoa New Zealand.

The Nathaniel Centre is an agency of the New Zealand Catholic Bishops Conference, responsible for addressing bioethical and biotechnology issues on behalf of the Catholic Church in New Zealand.

The Status of Unborn Human Life: Our Position

The debate about when human life begins is uncontroversial. As reported by the Royal Commission on Contraception, Sterilisation and Abortion (1977): "From a biological point of view there is no argument as to when life begins. Evidence was given to us by eminent scientists from all over the world. None of them suggested that human life begins at any time other than conception."

The ethical questions around abortion and research on embryos centre on the sort of respect or protection we should accord human life; in particular, whether it is ethically consistent to accord a different level of respect to humans in the earliest stages of life, as well as whether there are ever factors that mitigate the respect due to human life at any stage of development.

Most people, whatever their position on issues such as abortion or embryo research, agree that human life deserves a 'special' status even if they do not accord unborn human life the same moral status as human life post-birth. The belief held by some that the life of a human embryo matters less than other human life at a more developed stage may reflect the fact that it is largely unseen. However, an embryo is not simply a collection of cells that happen to be contiguous. These cells are a human embryo, a new human individual and part of the human family. Embryos and foetuses become children just as children become adults, not by some addition to what they are, but simply by developing further as the kind of beings they already are.

The common understanding of 'person' in our culture has, latterly, been shaped by an emphasis on self-consciousness as the mark of personhood. A much older understanding of person, however, locates personhood in the dignity of a being's rational nature, irrespective of whether that being is even 'conscious' at a particular phase in his or her life. According to this traditional view, there is nothing problematic about saying that an unborn child or a persistently unconscious patient is a person, for they are truly our fellow human beings.

Recognising that the status of the human embryo or fetus flows from their inherent connection to the human family is key to understanding why *Catholic teaching holds they ought to be treated with unconditional respect whatever the stage of development* – a life is begun which is neither that of the mother nor the father. It is already the human being it will always be and will only grow in size and complexity. Mothers instinctively recognise this by invariably referring to the embryo or foetus within the womb as their baby.

On that basis, embryos and foetuses are entitled to be granted a place in the human family and treated with the same respect as persons. As the Royal Commission stated: "The unborn child, as one of the weakest, the most vulnerable, and most defenceless forms of humanity, should receive protection."

Introductory Comments:

1. There is a lack of clarity that has led to confusion in the community about the precise meaning of the brief that has been given to the Law Commission by the Minister of Justice. We are assuming that the wish to treat abortion as "a health issue that is a reproductive choice for women"[1] centres around a wish to provide for 'abortion on demand' in New Zealand – that is, a wish to make it a decision solely between a woman and a doctor as is the case for reproductive choices involving contraception. However, this is nowhere clearly spelled out, something which makes it difficult to comment on your brief in a truly informed way.

2. *If our assumption is correct, then what the Law Commission is being asked to do represents a significant policy change.* As we understand it, the current law, as set out in the Contraception, Sterilisation, and Abortion (CS&A) Act 1977 and the Crimes Act 1961, sets up a 'tension' between the needs and desires of the woman and the rights of the foetus/unborn child and seeks to balance both. Making abortion solely "a health issue that is a reproductive choice" would ignore this tension, removing any requirement to consider the rights of the unborn child.

3. Meanwhile, we note that in public comments explaining your brief,[2] you state that the Law Commission will not be commenting on policy issues.

4. In our minds there is a degree of incongruity between the brief and your public comments. In which case we interpret your comments about policy to mean that it is not part of your task to recommend that any changes be made to the eligibility criteria for abortion or to promote any alternative approaches as preferable to the existing policy approach.

5. The public and other interested parties have a right to be fully consulted on any changes to the current policy approach, including eligibility criteria. It concerns us that the Law Commission could potentially be cooperating in a policy change by stealth.

6. That your brief falls short of the "full review of the legislation" that Justice Minister Andrew Little was reported as saying "would first take place" adds to our concern about a lack of proper process on what is a critically important piece of legislation.[3]

7. In line with the Catholic position stated above, we are opposed to any change in the law which would either lessen or, worse, totally remove the (limited) rights the current law accords to the unborn child. The changes we would advocate for (and which would not constitute a policy change) are those which would (i) ensure continued consideration of the rights of the unborn child and (ii) promote the well-being of women, including better processes to ensure adequate informed consent.

8. Indeed, along with the 65% of New Zealanders identified in the 2017 Curia Poll,[4] we would like to see changes implemented that would further reduce the number of abortions occurring in New Zealand.

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[1] Letter from Rt Hon Jacinda Ardern to Hon Andrew Little, released under the Official Information Act – not dated.
[2] Radio New Zealand, Sunday 22 April, "Commissioning Changes". Interview with Hon Sir Douglas White, QC, Law Commission. https://www.radionz.co.nz/audio/player?audio_id=2018640535
[3] See Craig McCulloch, "No abortion changes until 'well into next year'", 2 November 2017, https://www.radionz.co.nz/news/political/342899/no-abortion-changes-until-well-into-next-year, accessed 17 May 2018.
[4] Curia Market Research. Abortion Poll, February 8, 2018, https://www.curia.co.nz/2018/02/abortion-poll-2/

9. We understand that under current law there is no 'right' to have an abortion in New Zealand and that administering (or supplying the means for procuring) an abortion is unlawful except when certain eligibility criteria are met as spelt out in Sec 187A of the Crimes Act 1961. The current situation is arguably well-described as providing for 'abortion on request' insofar as any discussion about abortion must be initiated by the woman but ultimately depends on two appointed doctors being satisfied that critical eligibility criteria are met.

10. We note that there are certain groups and individuals pushing for change who claim that the current law criminalises women. Sec. 183 of the Crimes Act 1961 specifically states that "a woman (or girl) shall not be charged as a party to an offence against this section" (the relevant section being that which describes "unlawful abortions"). We therefore regard such claims as both inaccurate and mischievous – under current abortion legislation, women are not liable for prosecution except in situations where they attempt to procure their own abortion, something we comment on below.

Our Key Arguments:

11. The 'tension' that we believe characterises the current regime (see above) is revealed in the legislation in several places:

    a. It is spelt out in Section 30(5) of the CS&A Act which stipulates that the appointment of members to the Abortion Supervisory Committee should have regard to views 'incompatible' with the tenor of the CS&A Act. The views described as 'incompatible' are: (*a) that an abortion should not be performed in any circumstances:*
    (b) that the question of whether an abortion should or should not be performed in any case is entirely a matter for the woman and a doctor to decide.

    b. It is also evident in the longer title of the CS&A Act: *An Act … to provide for the circumstances and procedures under which abortions may be authorised after having full regard to the rights of the unborn child …*

    c. That the unborn child has a status that gives it rights is also upheld in Section 182 of the Crimes Act ("Killing unborn child") which, we note, you have been instructed need not be reviewed (Letter from Minister of Justice Hon Andrew Little to Hon Sir Justice White QC, 27 February 2018 – letter released under the Official Information Act). Logically speaking, the ongoing existence of Section 182 *and* the existence of a parallel law making abortions solely a matter between the woman and her doctor, would set up an inherent contradiction between two laws.

12. Making abortion solely a health issue, in the sense of making it merely a matter between a woman and her doctor, will deny many women the chance to manage the tension that lies at the heart of all abortion decisions. That is, it will deny women the chance to deal with abortion as a significant 'moral issue' involving the ending of a human life. This, we argue, would not be in women's interests. As the feminist writer Naomi Wolf has stated: "I will maintain that we need to contextualise the fight to defend abortion rights within a moral framework that admits that the death of a foetus is a real death: that there are degrees of culpability, judgment and responsibility involved in the decision to abort a pregnancy; that the best understanding of feminism involves holding women as well as men to the responsibilities that are inseparable from their rights…"[5].

[5] "Naomi Wolf on Abortion: 'Our Bodies, Our Souls'". New Statesman 27 January 2013 http://www.newstatesman.com/politics/politics/2013/01/naomi-wolf-abortion-our-bodies-our-souls

13. Most women understand that an abortion, whatever the reason they are contemplating it, has significant moral implications. This is signified, among other things, by the way women who have had abortions commonly speak of their 'child' rather than using terms such as 'the products of conception'. In a peer-reviewed qualitative exploration of women's needs and preferences in clinical care during the process of having an abortion, one of the strong themes to emerge was that women want to be recognised as "grappling with a real-life moral decision"; to be affirmed as "moral decision-makers", something that only occurs "when medical personnel recognized this conflict and affirmed the decision as moral …"[6]

14. Using language which either denies what is happening or which disguises the complexity and moral dimensions of abortion, is ultimately not in the interests of women. Equally, and even while it might be presented as empowering women to make their own decisions without interference from the State or others, creating an altered legal regime that frames abortion as being solely about the well-being of the mother will potentially undermine women's sense that abortion is a serious moral issue and, consequently, their moral agency. Were that to eventuate, the State would be party to undermining the true 'moral' dimension of abortion and would be potentially contributing to poorer outcomes for many women.

15. It is our considered and strongly held view that the tension that characterises the current legal approach must be retained. To be retained, it must be reflected in the legal framework governing access to abortion.

16. There are three other important reasons for retaining certain provisions relating to abortion in the Crimes Act that we wish to highlight:

    a. Under the current law, there is protection provided to women from unscrupulous abortion providers. This needs to remain and it is proper that the Crimes Act continue to spell out sanctions to prevent and/or punish such actions.
    b. The increased use of medical abortifacients and their ready availability from other countries via the internet, means that some women may seek to import such drugs and take them without proper medical supervision. This is particularly a risk for young women who feel the need to keep their pregnancy and abortion decision secret. Whether they import the drugs directly or fall prey to unscrupulous providers, it is for the protection of these women that the importation of such drugs must be restricted in law.
    c. If treating abortion as a 'health issue that is a reproductive choice' means, as we suggested above, 'abortion on demand', then this allows for abortion for any reason, including gender selection and disability. These reasons for abortion are highly contentious. We note here the Curia poll of 1,000 New Zealand residents[7] which found that only 9 percent of respondents supported sex selective abortions, and 90 percent were opposed. For females, only 1 percent supported sex selective abortion while 94 percent opposed it.

17. For all the reasons spelled out above, we argue that abortion needs to be treated as <u>both a justice and a health issue</u>. We argue this requires legislation which clearly and precisely specifies the circumstances under which abortion remains unlawful and under which abortion providers will be prosecuted for unlawful abortions.

18. In support of our position we note that the Abortion Supervisory Committee (ASC) has <u>not</u> been advocating for a significant change in the way that abortions are administered in New Zealand. In the 2017 Report to Parliament's Justice Select Committee, the ASC stated that: "The ASC does not

[6] Altshuler, A. L., Ojanen-Goldsmith, A., Blumenthal, P. D., & Freedman, L. R. (2017). A good abortion experience: A qualitative exploration of women's needs and preferences in clinical care. *Social Science & Medicine*, *191*, 109-116.
[7] Curia Market Research. Abortion Poll, February 8, 2018, https://www.curia.co.nz/2018/02/abortion-poll-2/

propose amendments that would change the original intent of the Act."

19. Furthermore, and importantly, in the same 2017 Report it is written that "[T]he ASC recognises the merit in having a robust pathway in place, which requires certifying consultants to assess and certify patients and to ensure counselling is offered." While there are some who argue that the current law disempowers women because it makes what should be a personal decision subject to external interference, to cumbersome and intrusive legal and procedural obstacles, we argue that choices are always limited by the constraints of knowledge and by context, including coercion[8,9]. As The Nathaniel Centre has previously stated:

> Many women, after the event, report feeling that they had no other option at the time but to proceed, often because of pressure from parents, partner and/or peers. At times this pressure is also experienced as coming from staff at the Termination of Pregnancy Units. For other women, the pressure they feel is generated by employment or social factors. In the words of another commentator, in such situations, the decision for an abortion is best described as a tragic response to lack of choice.[10]

20. It is therefore in the interest of free and informed consent that all women should be offered *independent counselling* that (i) addresses the coercive realities surrounding many abortions and (ii) canvasses the other options that exist. The law has an important role in ensuring that women are given the opportunity to understand and work with the complex moral, personal, family and social contexts within which they find themselves contemplating an abortion. 'Abortion on demand' will not achieve this. In other words, it is important to keep in place carefully considered eligibility criteria as well as providing a robust pathway of options that is clearly laid out in law.

21. Furthermore, reducing abortion decision-making to 'a reproductive choice for women' denies the fact that many others are involved in and/or impacted by the decision. As Germaine Greer has written:

> Pregnancy is unlike other patient-doctor relations in that there are two other individuals involved - the father-to-be and the child-to-be … What women 'won' was the 'right' to undergo invasive procedures in order to terminate unwanted pregnancies - unwanted not just by them but by their parents, their sexual partners, the governments who would not support mothers, the employers who would not employ mothers, the landlords who would not accept tenants with children, the schools that would not accept students with children.[11]

22. Women are reported in the literature as taking into account a range of persons and factors when contemplating an abortion including "the woman herself, the potential child, her sexual partner,

[8] Jones, R. K., Frohwirth, L., & Moore, A. M. (2013). More than poverty: Disruptive events among women having abortions in the USA. *The Journal of Family Planning and Reproductive Health Care, 39*(1), 36: "More than half (57%) of the women obtaining abortions experienced a potentially disruptive event within the last year, most commonly unemployment (20%), separation from a partner (16%), falling behind on rent/mortgage (14%) and/or moving multiple times (12%)."

[9] Hall, M., Chappell, L. C., Parnell, B. L., Seed, P. T., & Bewley, S. (2014). Associations between intimate partner violence and termination of pregnancy: A systematic review and meta-analysis. *PLoS Medicine, 11*(1): "Among women who underwent TOP, reported rates of IPV in the preceding year ranged from 2.5% to 30%, while lifetime rates of IPV in this population varied from 14% to 40%." (TOP refers to "termination of pregnancy" and IPV refers to "intimate partner violence".)

[10] Piper, C. and Kleinsman, J. Editorial – Why are abortion advocates afraid of informed choice? The Nathaniel Report, 51, April 2017.

[11] Greer, Germaine. The Whole Woman. Black Swan. London. 2011.

existing children, the extended family, and financial matters."[12] Women contemplating an abortion are well aware of the broader ramifications of such a decision and it would be a moral and social disservice to them if the language and regulatory frameworks around abortion conveyed something different. The legal model for regulating abortions in New Zealand must acknowledge and account for this broader reality. A narrow framework focussed solely on the mother will not achieve this.

23. If the law is to protect and promote genuine informed consent, then women contemplating abortion must be given the time and support required to make a genuine decision. A decision for an abortion can only be described as a truly 'free' choice' if the woman knows there is tangible support (familial, financial, emotional, social) that enables her to choose to keep the child. This requires a parallel review of the social support structures that our society offers to women who are pregnant.

24. We note that the health risks associated with an abortion are widely acknowledged in the research literature. While there is some disagreement in the research literature about the extent of the negative health consequences of abortion for women, the negative effects on some women are incontestable. This provides a further reason in our minds for clearly laid out and robust processes, including the funding and availability of independent counselling provided by an individual or organisation <u>other</u> than the abortion provider.

25. Referring again to the 2017 ASC Report, as well as the 2016 Report, we do agree that some of the language used in the present CS&A Act is outdated and clumsy and needs to be reviewed.

26. Public awareness of the complexities of this issue is illustrated in the Curia Poll[13] referred to above. Some of the findings of this poll include:

    a. 52 percent of respondents 'generally support abortion' but 29 percent 'oppose' and 19 percent were 'unsure/refuse';
    b. Of respondents aged 18 to 40 years, only 47 percent 'support' abortion, with 34 percent opposed and 19 percent 'unsure/refuse'.
    c. 65 percent of respondents agree that society should work together to reduce the number of abortions; only 17 percent disagree;
    d. Of those who generally support abortion, 63 percent agree we should reduce the number of abortions.
    e. Only 9 percent of respondents support a time limit of 20 weeks (the current legal limit); 4 percent support time limits over 20 weeks; 41 percent support time limits of 15 weeks or less.

27. It is noteworthy that in New Zealand, abortion numbers and rates have been declining since 2007. That is, the numbers of abortions, the ratio of abortions (number of abortions per 1000 pregnancies) and the rate of abortion (number of abortions per 1000 women aged 15-44) have all declined. While the reasons for this are not understood, those on both sides of the divide can agree this is a good thing. We suggest that while the reasons for this decline are not understood, it is a precarious time to tamper with the law. Any proposed changes should be considered keeping this in mind.

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[12] Kirkman, M., Rosenthal, D., Mallett, S., Rowe, H., & Hardiman, A. (2010). Reasons women give for contemplating or undergoing abortion: A qualitative investigation in Victoria, Australia. *Sexual & Reproductive Healthcare*, *1*(4), p. 152. See also Biggs, M. A., Gould, H., & Foster, D. G. (2013). Understanding why women seek abortions in the US. *BMC women's health*, *13*(1), 29.

[13] The full results for this poll can be found at: https://www.familyfirst.org.nz/wp-content/uploads/2018/01/Abortion-Poll-Results-January-2018.pdf

Conclusion: 'Abortion is both a health and a justice issue'

28. Human life begins at conception and is entitled to the full protections offered to human persons from that point forward.

29. The inherent dignity of human life from conception means that the starting presumption should always be in favour of human life, whether born or unborn. It's on this basis that we oppose establishing a 'right' to abortion. This being so, it is appropriate that the unborn enjoy the same fundamental protections the Crimes Act provides for all other human beings. Therefore, if the State is to continue providing abortions in certain situations, the law should only ever provide for abortion as an 'exception' to the fundamental right to life.

30. Our considered view is that abortion is both a health and a justice issue and it should be treated by the law as such.

31. There is much at stake in a review of the abortion laws; it is a deeply moral issue involving the future of a human life as well as the well-being of the woman and her family. The State has an essential responsibility to protect and care for all human life. It would abdicate this responsibility by making abortion solely a matter between a woman and her doctor.

32. We need legislation which clearly specifies the circumstances under which abortions remain unlawful and under which abortion providers will be prosecuted for unlawful abortions.

33. We do not support changing the original intent of the Contraception, Sterilisation, and Abortion Act 1977. The current law acknowledges and upholds a 'tension' between the effect of the pregnancy on the woman and the rights of the unborn child. This must not be lost in any review of the current laws.

34. The changes we would advocate for are those which would (i) further recognise the rights of the unborn child, (ii) promote the well-being of women, including better processes to ensure adequate informed consent and (iii) lead to fewer abortions occurring in New Zealand.

35. We want to see the law provide a more "robust pathway" governing abortions in New Zealand, one that acknowledges women's need for full and independent information and support in order that genuine informed consent can take place. To this end, we want to see the provision of independent and publicly funded counselling for all women considering an abortion.

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