

A FEMINIST, HUMAN RIGHTS AND INDIGENOUS CRITIQUE OF THE HOLIDAYS (BEREAVEMENT LEAVE FOR MISCARRIAGE) AMENDMENT ACT

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This article takes a critical view of the Holidays (Bereavement Leave for Miscarriage) Amendment Act 2021, supporting its important step towards providing a compassionate response to people who have suffered a miscarriage or stillbirth, but arguing that it did not go far enough. This article briefly outlines the preceding law and the new provisions. It then considers the legislation from a feminist and human rights standpoint, before examining Te Tiriti o Waitangi and broader te ao Māori implications of the legislation. Finally, the authors recommend that Parliament amend the Holidays Act 2003 to extend bereavement leave to people who have had an abortion and observe that any such amendment should be considered in light of Te Tiriti and other relevant cultural considerations.

I INTRODUCTION

People deserve support, compassion and respect no matter what the outcome of a pregnancy and no matter what their decisions around reproduction.¹

On 30 March 2021, Parliament passed the Holidays (Bereavement Leave for Miscarriage) Amendment Act 2021 (the Act). This extended the scope of paid bereavement leave in Aotearoa New Zealand to include entitlement to three days' leave following a miscarriage or stillbirth. However, the Act is deficient

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1 Family Planning “Submission to the Education and Workforce Committee on the Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2) 2020” at 2.

in two respects: it does not offer the same entitlement to people who have had an abortion, and it fails to consider the indigenous rights of Māori in Aotearoa New Zealand.

In March 2020, Parliament passed the Abortion Legislation Act 2020, which decriminalised abortion in Aotearoa New Zealand and permitted free access to abortion for up to 20 weeks' gestation. This legislation heralded a new era in which abortion is treated as a health issue, reproductive autonomy is enabled and the social stigma around abortion is broken down. However, the recent legislative amendment to provide bereavement leave following a miscarriage or stillbirth has fallen short of this benchmark, instead furthering social division between reproductive decisions.

While the Act is a step in the right direction, this article argues that there are still issues with this reform. This article briefly outlines the previous law and the new provisions. It then considers the legislation from a feminist and human rights standpoint, before examining Te Tiriti and broader te ao Māori implications of the legislation. Finally, the authors recommend that Parliament amend the Holidays Act 2003 to extend bereavement leave for loss of a pregnancy to people affected by an abortion.² Any amendment should consider a Māori perspective as the distinct indigenous peoples of Aotearoa New Zealand and the impacts of the proposed changes on their self-determination and cultural preferences.

Separately to bereavement leave, paid parental leave has already been available to people following stillbirth after 20 weeks of pregnancy.³ This article therefore relates predominantly to pregnancy loss before 20 weeks' gestation and abortions at any stage of pregnancy.

II PREVIOUS LEGAL POSITION

Entitlement to bereavement leave under New Zealand law is dealt with in pt 2, sub-pt 4 of the Holidays Act. An employee is entitled to bereavement leave after they have worked for their employer continuously for six months⁴ or if

2 To acknowledge that not all people who become pregnant identify as women, this article adopts gender-neutral language, unless quoting or referring to another source that uses gendered terms, or referring to research that has been undertaken using gendered groups.

3 Parental Leave and Employment Protection Act 1987, pt 7A; and Births, Deaths, Marriages, and Relationships Registration Act 1995, s 2.

4 Holidays Act 2003, s 63(1)(a).

they have, over a period of six months, worked for their employer for:⁵

- i) at least an average of 10 hours per week during that period; and
- ii) no less than one hour per week during that period or no less than 40 hours per month during that period.

Section 63(3) of the Holidays Act provides the option for an employer and employee to agree for bereavement leave to be taken in advance of that entitlement date. Under the previous provisions, the entitlement was granted to spouses or specified close family members of the deceased, but for other individuals it was left to an employer's discretion as to whether an employee had suffered a bereavement.⁶

If an employee suffered one of the specified bereavements and met the employment threshold, they would be entitled to three days' paid bereavement leave. Under the previous provisions, employees were entitled to bereavement leave on the death of the employee's child,⁷ but it was unclear whether this extended to deaths as a result of miscarriage or stillbirth. This ambiguity left some people in the difficult position of entering into disputes with their employers regarding their entitlement to bereavement leave, at what was a profoundly sensitive time in their lives.⁸

III HOLIDAYS (BEREAVEMENT LEAVE FOR MISCARRIAGE) AMENDMENT ACT 2021

The Holidays (Bereavement Leave for Miscarriage) Amendment Act 2021 extended the scope of paid bereavement leave in Aotearoa New Zealand to include bereavement as a result of miscarriage or stillbirth.

A Background to the Act

The Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2) (the Bill) was introduced to Parliament in a Member's Bill on 27 June 2019 submitted by Ginny Andersen MP, of the Labour Party. The Bill was passed unanimously by Parliament and received Royal assent on 30 March 2021. This was the Bill's second iteration.

⁵ Section 63(1)(b).

⁶ Section 69(2)(a)–(b).

⁷ Section 69(2)(a)(iii).

⁸ (10 December 2019) 743 NZPD 15787.

The Bill stemmed from the efforts of Kathryn van Beek.⁹ After suffering a miscarriage in 2016, Ms van Beek contacted the Ministry for Women and was told that it would be up to “employer and employee to discuss the nature of the loss and reach an agreement over the use and the amount of bereavement leave”.¹⁰ She then approached her local MPs and suggested a change to the law. Clare Curran MP, also of the Labour Party, heeded the call, and after further support had been established from the wider community, the proposed legislative change was brought to Ms Andersen.

B The clarified position

Under the Act, an employee who meets the employment threshold is now expressly entitled to three days’ bereavement leave upon the end of their pregnancy by way of miscarriage or stillbirth.¹¹ This entitlement is extended to employees who:¹²

- i) are the spouse or partner of the pregnant person;
- ii) are the former spouse or partner of the pregnant person, if they would have been a biological parent of the child;
- iii) had undertaken to be the primary carer of the child (such as surrogacy or adoption); or
- iv) are the spouse or partner of a person who had undertaken to be the primary carer of the child.

Section 69(4) of the Act defines both miscarriage and stillbirth to exclude abortions undertaken in accordance with the Contraception, Sterilisation, and Abortion Act 1977.¹³

C The justification for excluding abortion from bereavement leave

At the time of introducing the Bill, Ms Andersen confirmed that she personally supported the provision of bereavement leave to employees after an abortion.¹⁴ Andersen’s position was reflected in the first iteration of the Bill that she

9 (10 December 2019) 743 NZPD 15788.

10 Kathryn van Beek “Changing the Holidays Act” <www.kathrynvaneek.co.nz>.

11 Holidays Act, s 69(2)(c).

12 Section 69(2)(d).

13 Section 69(4).

14 Katarina Williams “Bereavement leave proposed for parents affected by miscarriage and stillbirth” (10 December 2019) Stuff <www.stuff.co.nz>.

introduced in August 2018. The first iteration was broader in its terminology and would have entitled employees to bereavement leave for “the unplanned end of an employee’s [or their spouse or partner’s] confirmed pregnancy by way of the death of the foetus”.¹⁵ Ms Andersen withdrew the first iteration on the date that the second Bill was introduced.¹⁶ However, she chose not to include bereavement leave following abortion in the second iteration of the Bill as she felt that it would politicise the Bill and risk it not passing.¹⁷ Instead, Ms Andersen’s priority was “to give women and their families the reassurance that they have this in law and [Parliament] can do a small technical change to give that reassurance”.¹⁸

Prioritising people who have had a miscarriage or stillbirth over those who have had an abortion ranks the worth and grief of a person who was pregnant based on the manner in which their pregnancy ended. Allowing additional support to certain grieving people and not to others affects the right to reproductive freedom and perpetuates the stigma and judgement around people who seek an abortion.¹⁹

IV A FEMINIST AND HUMAN RIGHTS ANALYSIS OF THE ACT

There are a number of compelling reasons, from a feminist and human rights standpoint, why Parliament should extend the entitlement to bereavement leave to people following an abortion. First, the aim of the Act is to allow people to process the psychological pain of losing a pregnancy, which research demonstrates can be as severe for people following an abortion as it is following a miscarriage or stillbirth.²⁰ Secondly, the human rights to health, equality and freedom from discrimination do not support a distinction being made between reproductive outcomes. Thirdly, there is strong public and parliamentary support for upholding reproductive autonomy. Finally, the restriction does not align with Aotearoa New Zealand’s progressive image.

15 Holidays (Bereavement Leave for Miscarriage) Amendment Bill 2018, cl 4(2).

16 (27 June 2019) 739 NZPD 12388.

17 (10 December 2019) 743 NZPD 15788; and Williams, above n 14.

18 Williams, above n 14.

19 Frances Everard “A bill providing leave after miscarriage should extend to abortion” (16 April 2019) Health Central Pokapū Hauora <www.healthcentral.nz>.

20 (10 December 2019) 743 NZPD 15789; and Carlo V Bellieni and Giuseppe Buonocore “Abortion and subsequent mental health: Review of the literature” (2013) 67(5) *Psychiatry Clin Neurosci* 301 at 307–308.

A The aim of the Act and the experience of grief

1 The purpose of the Act

The express intent of the Bill was to clarify that “the unplanned end of a pregnancy by miscarriage or still-birth constitutes grounds for bereavement leave”.²¹ However, the commentary provided on the Bill from the Education and Workforce Committee (the Committee) offers valuable insight into the underlying motivations and intention for the Act.²² The Committee recommended that the Bill be amended to remove several barriers to entitlement to bereavement leave under the Bill as it was then drafted, including:

- i) removing the requirement for the person to have known they were pregnant;²³
- ii) clarifying that proof of pregnancy would not be required for an employee to take bereavement leave;²⁴ and
- iii) expanding the categories of people who would be eligible for bereavement leave to include the former spouse or partner of the pregnant person (if they would have been a biological parent of the child), a person who had undertaken to be the primary carer of the child (such as surrogacy or adoption) and the spouse or partner of a person who had undertaken to be the primary carer of the child.²⁵

Despite erasing those hurdles, the Committee then recommended that the Bill include clarification that the leave entitlement was not intended to extend to pregnancies ending by abortion.²⁶

The Committee’s report reflected the aim of the Bill: to give people the space to recover psychologically from a miscarriage or stillbirth. For instance, the Committee’s rationale for the recommendation at point (iii) above was that those people “would be adversely psychologically affected by the end of the relevant pregnancy”.²⁷ As demonstrated below, the adverse psychological effects

21 New Zealand Parliament Pāremata Aotearoa “Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2)” (27 June 2019) <www.parliament.nz>.

22 Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2) 2020 (159-2) (select committee report).

23 At 2.

24 At 2.

25 At 3.

26 At 4.

27 At 3.

and grief experienced can be just as significant for people following an abortion as for those who have suffered a miscarriage or stillbirth. Consequently, the exclusion of bereavement leave following an abortion does not align with the purpose of the Bill.

2 *The impact of abortion and the experience of grief*

The distinction in the Act between planned and unplanned pregnancy loss also does not align with leading research on the psychological impacts of pregnancy loss, whether through miscarriage, stillbirth or abortion. While there have been a multitude of studies into the psychological effects of abortion, the significance and applicability of their results are often limited as a result of three key factors. This article’s summary and analysis of the available research must therefore be read with these factors in mind:

- i) Researchers are faced with self-selection bias, as people may refuse to take part and be more likely to refuse if they have been adversely affected by the abortion experience. The level of attrition in participants from most of the large studies is said to be “unacceptable in social science research, especially when the reasons are almost certainly linked to the outcome measures”.²⁸
- ii) It is difficult, if not impossible in a social sense, to conduct a controlled trial to analyse the psychological effects of abortion. To do so would require researchers to place people randomly into two groups — one group to have an abortion and the other to have to carry their pregnancy to term.²⁹ As a result, observations may be linked to unseen factors.
- iii) The available research has used a number of different comparator groups. For example, the mental health of people having an abortion has been compared with that of people who have had a miscarriage, who have given birth, or who have never been pregnant.³⁰ This makes drawing any comparisons across the studies a difficult task.

The research demonstrates that foetal loss is a traumatic experience for a

28 Gregory Pike *Abortion and the Physical & Mental Health of Women: A review of the evidence for health professionals* (2nd ed, Family First NZ, Auckland, 2021) at 25.

29 At 21.

30 At 23.

person, “whether by miscarriage, induced abortion, or stillbirth”.³¹ People have abortions for numerous reasons and, for some, it can cause significant grief. While the authors note that bereavement leave should not be based on the reasons for people seeking an abortion, it is important to remember that some situations, such as an abortion following foetal abnormality, can be “particularly traumatic”.³²

In the same way, the majority of the research demonstrates a strong link between mental health issues and abortion. While there are differing views as to whether the impact on mental health stems from the pregnancy being unintended or from the abortion experience itself, a publication from the United Kingdom found that “women who had undergone an abortion experienced an 81% increased risk of mental health problems”.³³ In addition, the 2008 report of the American Psychological Association’s Task Force on Mental Health and Abortion found that “it is clear that some women do experience sadness, grief, and feelings of loss following termination of a pregnancy, and some experience clinically significant disorders, including depression and anxiety”.³⁴

With this in mind, there is a strong argument to be made that the adverse psychological impacts of abortion on mental health present a serious public health problem.³⁵ Providing bereavement leave to people following an abortion would be a compassionate response to these impacts. It would allow people to process the abortion experience in their own way, decreasing the likelihood of adverse mental health outcomes and reducing the resulting burden on Aotearoa New Zealand’s public health system.³⁶ This correlation was illustrated in the submission of a post-abortion counsellor on the Bill — if people are “better supported in their grief, their pain acknowledged and their lost child respected, there would be a reduction in the long term physical and psychological impacts of abortion”.³⁷

31 Bellieni and Buonocore, above n 20, at 301–310 as cited in Pike, above n 28, at 22.

32 Pike, above n 28, at 30.

33 Priscilla K Coleman “Abortion and mental health: quantitative synthesis and analysis of research published 1995–2009” (2011) 199(3) *Br J Psychiatry* 180 at 180.

34 Brenda Major and others *Report of the APA Task Force on Mental Health and Abortion* (American Psychological Association, 2008) at 4.

35 Bellieni and Buonocore, above n 20, at 308. The publication collated data from 22 studies.

36 Pike, above n 28; Coleman, above n 33; and Natalie P Mota, Margaret Burnett and Jitender Sareen “Associations Between Abortion, Mental Disorders, and Suicidal Behaviour in a Nationally Representative Sample” (2010) 55 *Can J Psychiatry* 239.

37 Catherine Gillies “Submission to the Education and Workforce Committee on the Holidays

Furthermore, legislative acknowledgement that abortion can be a legitimate cause of grief and bereavement would support positive mental health outcomes. Drawing a line between people who have abortions and those who have miscarriages or stillbirths perpetuates the social stigma in relation to abortion, which is likely to exacerbate any negative psychological impact that people are already experiencing following an abortion. It also establishes a legal hierarchy of grief, in which certain categories of loss are seen as more serious or traumatic than others. Making bereavement leave available for people following an abortion would reject that hierarchy and the stigma it represents. For some people accessing abortions, there is also a sense of shame which can result in an environment in which people do not feel able to seek support around an abortion. In that context, legislation should encourage the provision of that support through other avenues.

It should be noted that, in addition to comparable psychological impact, the physical effects of an abortion can also be similar to those during and following a miscarriage.³⁸ Allowing time to heal from the physical impacts of miscarriage and stillbirth was not an express intention of the Act. However, this equivalence again supports the removal of any distinction being drawn between people who have an abortion and those who have a miscarriage or stillbirth.

Abortions are a highly personal experience, and while there is evidence of a strong link between abortion and negative mental health outcomes, not every person who has an abortion will suffer such outcomes. It is worth noting that an entitlement to bereavement leave does not require a person to take it, but instead gives them the autonomy to assess whether bereavement leave would be beneficial to them and to have the ability to process the experience privately and sensitively. People who have had miscarriages and stillbirths now have the right to make this decision. Denying this right to people who have had abortions reinforces the social stigma of elective pregnancy loss.

(Bereavement Leave for Miscarriage) Amendment Bill (No 2) 2020” at 2.

38 National Women’s Health Network “Health Facts: Medical Abortion and Miscarriage” (15 August 2019) <www.nwhn.org>.

B A rights-based analysis of the Act

The Act also engages several fundamental human rights:

- i) All people are equal before the law.³⁹
- ii) All people have the right to be free from discrimination on the basis of sex, which includes pregnancy and childbirth.⁴⁰
- iii) All people have the right to the “highest attainable standard of physical and mental health”.⁴¹
- iv) “Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave”.⁴²

As outlined earlier, distinguishing between people who have had a miscarriage or stillbirth and those who have had an abortion perpetuates the social stigma and shame that is attached to abortion. The distinction also does not sit well with the right to equality before the law and the right to freedom from discrimination. People who have had an abortion do not experience the right to mental and physical health to the same extent as those who have had a miscarriage or stillbirth, as they are being denied the time to process the experience. The right to health includes the right to reproductive health, and a person’s ability to control their own fertility is an important basis for the exercise of other rights.⁴³

A study on the application of the Convention on the Elimination of All Forms of Discrimination against Women reflected on transformative

39 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 26.

40 New Zealand Bill of Rights Act 1990, s 19(1); and Human Rights Act 1993, s 21(1)(a).

41 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 12(1).

42 Article 10(2).

43 *Committee on Economic, Social and Cultural Rights General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/GC/22 (2 May 2016) at 1; *Committee on Economic, Social and Cultural Rights General comment No. 14 (2000) on the right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/2000/4 (11 August 2000) at [2], [8], [11], [16], [21], [23], [34] and [36]; Rebecca J Cook and Bernard M Dickens “Human Rights Dynamics of Abortion Law Reform” (2003) 25 Hum Rts Q 21; and United Nations Beijing Declaration and Platform of Action (signed 15 September 1995, entered into force 27 October 1995) at [97].

equality in the context of abortion.⁴⁴ When considering what would be required for people to be able to make their own reproductive decisions with dignity and without any barriers from stereotypes and stigma, the authors observed that:⁴⁵

Transformative equality requires rethinking unintended pregnancy from the perspective of the women affected, recognizing and remedying the disadvantages that women face in making decisions to terminate or continue pregnancy, and removing the barriers faced in seeking services.

In order to pursue transformative equality and reproductive autonomy, it is vital to remove barriers to enable people to freely choose whether or not to have an abortion. While the Abortion Legislation Act made significant progress towards upholding a person's ability to make autonomous reproductive decisions, barriers to the full enjoyment of those decisions remain in place. People who might otherwise seek to terminate their pregnancy may feel that they are unable to do so, as they would not have time to physically and psychologically recover from the process before having to return to work. Those people will either need to draw on their sick or annual leave, or take unpaid leave, if they feel they need time to psychologically recover. Many people are not in a position to take unpaid leave. In reality, socioeconomic concerns are one of the main reasons that people seek abortions.⁴⁶

People who have an abortion arguably should still be entitled to bereavement leave during a reasonable period after the pregnancy ends. Making bereavement leave available to people who experience loss by an unplanned method, but not those whose pregnancy loss is planned, reinforces the social stigma of abortion. This is a barrier to reproductive autonomy which Parliament could remove by making bereavement leave available to all people who experience pregnancy loss irrespective of the manner in which the pregnancy ends.

C Public and parliamentary support for reproductive autonomy

As set out above, bereavement leave entitlement was not extended to abortion due to the risk of the Bill not passing, as the inclusion of abortion would

44 Rebecca Cook and Susannah Howard "Accommodating Women's Differences under the Women's AntiDiscrimination Convention" (2007) 56 Emory Law J 1039.

45 At 1045.

46 Sophie Chae and others "Reasons why women have induced abortions: a synthesis of findings from 14 countries" (2017) 96 Contraception 233 at 235.

“politicise” the Bill.⁴⁷ However, the submissions on the Bill, the passing of the Abortion Legislation Act and general public sentiment do not support this argument, particularly not to the extent that would justify discriminating against certain people who are exercising their reproductive autonomy.

1 Submissions on the Bill

Of the 37 submissions made on the Bill, 10 commented on the then-implied exclusion of “planned” ends of pregnancies.⁴⁸ All of those 10 submissions were in favour of bereavement leave being extended to people following an abortion.

Family First Aotearoa’s submission emphasised that the “grief and loss that a woman personally experiences from either a miscarriage or an abortion” should not be underestimated.⁴⁹ Other submitters expressed confusion as to the reason for excluding people from the provisions post-abortion, as “it is [not] relevant how or why a pregnancy ended”,⁵⁰ and the perceived intention of the Bill was “not just to remove ambiguity but to treat grieving parents compassionately and equally”.⁵¹

Submitters observed that people often “feel as though they do not have enough support to choose life and end their unborn child’s life by abortion; however the grief is huge.”⁵² Others saw supporting people’s reproductive autonomy and decision-making as encompassing “both the right to grieve pregnancy loss as well as the right to safe, legal abortion.”⁵³ Submissions considered it vital that legislation be “well considered so as not to negatively impact on” that autonomy.⁵⁴

2 Recent decriminalisation of abortion — the Abortion Legislation Act 2020

On 23 March 2020, Parliament passed the Abortion Legislation Act 2020,

47 Williams, above n 14.

48 Ministry of Business, Innovation and Employment “Submission to the Education and Workforce Committee on the Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2) 2020” at 13.

49 Whanau Tahī Aotearoa Family First New Zealand “Submission to the Education and Workforce Committee on the Holidays (Bereavement Leave for Miscarriage) Bill (No 2) 2020” at 2.

50 Wellington Women Lawyers’ Association “Submission to the Education and Workforce Committee on the Holidays (Bereavement Leave for Miscarriage) Bill (No 2) 2020” at 2.

51 Gillies, above n 37, at 1.

52 Frances Posthuma “Submission to the Education and Workforce Committee on the Holidays (Bereavement Leave for Miscarriage) Bill (No 2) 2020”.

53 Graduate Women New Zealand and Graduate Women Wellington “Submission to the Education and Workforce Committee on the Holidays (Bereavement Leave for Miscarriage) Bill (No 2) 2020”.

54 Family Planning, above n 1 at 3.

decriminalising abortion in Aotearoa New Zealand. While there was debate around the Abortion Legislation Bill in the House, parliamentary support for the matter was evident. The Abortion Legislation Bill passed its first reading with 94 votes to 23, its second reading with 81 votes to 39 and its third reading with 68 votes to 51. An important reason for this, alongside changing social views, may be that the number of women in Parliament had increased from just four to 46 since the previous legislation on abortion was enacted in 1977.⁵⁵

The Abortion Legislation Bill was labelled a “conscience vote” in Parliament, which meant that members were not required to vote along party lines. The cross-party support for abortion reform was demonstrated during the passing of the Abortion Legislation Act.

During the readings of the Bill, there was also cross-party support for bereavement leave to be provided to people who have had an abortion. As referenced earlier, Ms Andersen confirmed that she agreed with the provision of bereavement leave to employees after an abortion.⁵⁶ During the second reading of the Bill, Agnes Loheni MP of the National Party raised her concern that the Bill “creates a class of loss, a class of grief, where one is acknowledged and one is not” and was creating “a law which will undoubtedly lead to women having to lie about their abortion so that they can be considered for bereavement leave”.⁵⁷ At the third reading, Erica Stanford MP of the National Party also expressed her discomfort at “[t]he grief and anguish and trauma experienced during an abortion” not being acknowledged by the Bill.⁵⁸

If the Holidays Act is extended to include bereavement leave for abortion, it is likely that it would similarly be on the basis of a conscience vote and gather cross-party support.

3 *General public sentiment towards reproductive autonomy*

In addition to the encouraging parliamentary atmosphere, there is broad public support for the upholding of reproductive autonomy. A 2019 article published in the New Zealand Medical Journal analysed the attitudes of New Zealanders towards abortion.⁵⁹ The authors found that 65 per cent of people who took part in the study supported the legalisation of abortion without any

55 Contraception, Sterilisation, and Abortion Act 1977.

56 Williams, above n 14.

57 (29 July 2020) 748 NZPD 20156.

58 (24 March 2021) 751 NZPD 1755.

59 Yanshu Huang, Dan Osborne and Chris G Sibley “Sociodemographic factors associated with attitudes towards abortion in New Zealand” (2019) 132(1497) NZMJ 9.

specific reason being required, and 89.3 per cent supported abortion when a woman's life was in danger.⁶⁰

Similarly, in January 2017, the Abortion Law Reform Association of New Zealand conducted a poll on abortion issues and found that the majority of New Zealanders polled supported abortion being legal on all grounds.⁶¹

This demonstrates that the current political and social climate should favour the extension of the Act to provide bereavement leave to people who have had abortions, as abortion has become a more accepted reproductive decision.

D Comparative overseas approaches and Aotearoa New Zealand's image

While Aotearoa New Zealand has been heralded as leading the international charge with this Act, there are many other countries that have equivalent provisions for leave following miscarriage and stillbirth, and others still that have taken the additional step to provide leave following an abortion.

India and Indonesia offer six weeks' paid leave following a miscarriage.⁶² An additional month of paid leave is also available to people in India who suffer an illness arising out of a miscarriage.⁶³ Mauritius provides three weeks' paid leave following a miscarriage and 14 weeks' paid leave following a stillbirth.⁶⁴ Workers in Taiwan are entitled to between five days' and four weeks' paid leave following a miscarriage, depending on the gestation of the pregnancy.⁶⁵

Both Québec and the Philippines provide leave for people who have had an abortion. Employees in Québec are entitled to three weeks' unpaid "special maternity leave" if they terminate their pregnancy before 20 weeks' gestation.

60 Hannah Martin "Legalised abortion generally supported by New Zealanders - Auckland University survey" (21 June 2019) Stuff <www.stuff.co.nz>.

61 Abortion Law Reform Association of New Zealand *Abortion Issues Poll* (Curia Market Research, Wellington, 2017) at 2 as cited in Courtney Naughton "Abort Mission: A Recommendation for Reform of New Zealand's Abortion Law" (LLB (Hons) Dissertation, University of Otago, 2017) at 30.

62 Maternity Benefit Act 1961 (as amended by the Maternity Benefit (Amendment) Act 2017) (India), ss 4 and 9; and Indonesian Labour Law 2003 (Indonesia), art 82(2). The authors acknowledge that while this leave is provided for in legislation, local media articles indicate that in practice it may not be made available to many employees in these countries and is to an extent dependent on an individual employee's knowledge of the availability of the leave.

63 Maternity Benefit Act 1961 (as amended by the Maternity Benefit (Amendment) Act 2017) (India), s 10.

64 Workers' Rights Act 2019 (Mauritius), art 52(4).

65 Regulations on Special Leave for Employees of the Executive Yuan and Subordinated Agencies 2001 (as amended in 2020) (Taiwan); and Labor Standards Act 1984 (as amended in 2020) (Taiwan), art 50.

There is scope for the leave to be extended if the employee can provide a medical certificate indicating that they require further leave, such as if injury or illness had occurred as a result of the abortion.⁶⁶ This law has been in place since 2002.

The Philippines is truly paving the way in this arena. Since 2018, Philippine legislation has provided for 60 days of paid leave following a miscarriage, emergency termination or abortion, at any stage of the pregnancy.⁶⁷ This legislation provides people with equal recognition of the physical and psychological impacts that the end of a pregnancy has, regardless of the way that the pregnancy ended.

Since the passing of the new legislation in Aotearoa New Zealand, the Australian federal government has also passed a Bill that provides for two days of paid compassionate leave following a miscarriage before 20 weeks' gestation.⁶⁸ This built upon their existing legislation that provided for unpaid parental leave following a stillbirth over 20 weeks' gestation.⁶⁹

In contrast to the above jurisdictions, Aotearoa New Zealand's legislation grants only three days of paid bereavement leave and denies that to people who have had an abortion.⁷⁰ Multiple media reports lauded Aotearoa New Zealand for being "one of the first nations to bring such a forward-thinking [l]aw".⁷¹ However, it is clear that while this legislative step was much needed, it is not as cutting-edge as the media has portrayed, and it does not go far enough.

V MĀORI PERSPECTIVES AND IMPACT

Throughout the development and passing of the Act, it is not clear that Parliament undertook any consideration of the Bill's alignment with Māori (indigenous to Aotearoa New Zealand) perspectives of abortion, the founding document Te Tiriti o Waitangi (Te Tiriti) or how the Act would impact on Māori and other cultures.

66 Act Respecting Labour Standards RSQ 2021 c N-1.1 at 81.5.2.

67 Republic Act No. 11210 2018 (Philippines), s 3.

68 Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth), sch 1 pt 1.

69 Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020 (Cth).

70 As noted in this article's Introduction section, the authors acknowledge that people are also entitled to paid parental leave if they have a stillbirth after 20 weeks' gestation.

71 Ananya Varma "New Zealand not the first to provide paid miscarriage leave; India has a law since 1960s" (7 April 2021) Republic World <www.republicworld.com>.

In Aotearoa New Zealand, Māori are the indigenous peoples who migrated from Polynesia from as early as the 1200s and who have developed distinct knowledge, language, and culture in response to the local environment.⁷² The colonisation of Aotearoa New Zealand by the British Crown is founded upon a treaty that rangatira (chiefs) signed in 1840.⁷³ Te Tiriti guarantees continued Māori rangatiratanga (sovereignty), protects Māori interests, promotes Māori wellbeing, and provides for Crown settlement and limited kāwanatanga (governance).⁷⁴

The third article of Te Tiriti sets out the right to equal citizenship — a right that “may be imperilled by policy that has a differential impact on Māori”.⁷⁵ This provision places an obligation on the Crown to ensure that Māori can enjoy, at minimum, the same health and wellbeing as nonMāori.⁷⁶ In addition, the ritenga Māori declaration (commonly referred to as the “fourth article” of Te Tiriti) provides for the protection of both religious freedom and traditional spirituality and knowledge in order to “enable Māori to live, thrive and flourish as Māori”.⁷⁷ Te Tiriti is central to ethical public health and legislation that affects health.

All policy and legislation should be considered in light of Te Tiriti to contribute towards fulfilling these rights and obligations and to avoid negative outcomes that disproportionately impact on Māori. This need for consideration is affirmed by the latest Cabinet Manual, which provides that Ministers must “draw attention to any aspects of a bill that have implications for, or may be affected by ... the principles of the Treaty” when submitting bids for bills to be included in the legislation programme.⁷⁸

Currently, Māori make up a significant proportion of the population, at 15 per cent. The available statistics on Māori women who have had an abortion suggest a disparity in relation to their proportion of the Aotearoa New Zealand

72 Atholl Anderson “Speaking of migration, AD 1150–1450” in Atholl Anderson, Judith Binney and Aroha Harris (eds) *Tangata Whenua: An Illustrated History* (Bridget Williams Books, Wellington, 2014) 30.

73 Claudia Orange *Te Tiriti o Waitangi: The Treaty of Waitangi*, 1840 (Bridget Williams Books, Wellington 2017).

74 Te Tiriti o Waitangi 1840.

75 JustSpeak *Māori and the Criminal Justice System: A Youth Perspective* (March 2012) at 37.

76 Ministry of Health *Achieving Equity in Health Outcomes: Summary of a discovery process* (Ministry of Health, Wellington, August 2019) at 2–3.

77 Ministry of Health *Whakamaua: Māori Health Action Plan 2020–2025* (July 2020) at 13.

78 Cabinet Office *Cabinet Manual 2017* at [7.65(a)].

population. In 2018,⁷⁹ Māori women made up 16.60 per cent of the female population, but 22.43 per cent of abortions that took place that year.⁸⁰ Any legislation that impacts on people who have had an abortion may therefore disproportionately impact members of Māori communities.⁸¹

Provisions that may disproportionately exclude Māori from entitlement to leave to heal from and process loss of life such as an abortion must be carefully scrutinised and justified. Considered legislation in this area should aim to support Māori people's tino rangatiratanga (self-determination) when making reproductive decisions.⁸² It is vital that these factors are considered by Parliament in passing new legislation.

Looking at the Act through a te ao Māori lens could raise additional considerations. For example, a distinction between Māori and Pākehā attitudes towards miscarriage and abortion can be seen in the language that is used. In te reo Māori, abortion and miscarriage are not linguistically distinguished from one another: both are referred to using the terms tahe, whakatahe, materotanga and taiki.⁸³ The terms can be used to refer to the outcome of a loss of a pregnancy and do not indicate how this process occurred or whether it was initiated intentionally or not.

In addition, while little research has been done into the attitudes of Māori towards abortion, one perspective is that abortion “disrupts the spiritual element conferred in the conception of a new life ... considered to be whakanoa i te mauri o te tāngata” (extinguishing the life principle).⁸⁴ In te ao Māori, women hold a highly cherished role as te whare tapu o te tangata (the bearers of humanity).⁸⁵

79 This is the most recent date that consistent data is available for.

80 Statistics New Zealand Tatauranga Aotearoa *Estimated resident population (ERP), national population by ethnic group, age, and sex, 30 June 1996, 2001, 2006, 2013, and 2018* (23 September 2020) [ERP]; and Statistics New Zealand Tatauranga Aotearoa *Abortion statistics: Year ended December 2019* (16 June 2020) [*Abortion statistics*] at table 7.

81 The authors note that, as Māori have a younger demographic, higher pregnancy rates and a younger birthing population, this disparity might be lessened if the rate of abortion was compared to the proportion of Māori in the birthing population.

82 Rebekah Laurence *Māori women and abortion: A Kaupapa Māori literature review* (Health Research Council of New Zealand and Te Whāriki Takapou, March 2019) at 3–4.

83 T Smith “Aitanga: Maori Precolonial Conceptual Frameworks and Fertility: A Literature Review” (2009) in Paul Reynolds and Cherryl Waerea-i-te-Rangi Smith *The Gift of Children: Maori and Infertility* (Huia Publishers, 2012) as cited in Jade Sophia Le Grice “Māori and Reproduction, Sexuality Education, Maternity and Abortion” (PhD Thesis, University of Auckland, 2014) at 35.

84 Le Grice, above n 83, at 44 (footnotes omitted); and (28 June 2007) 640 NZPD 10359–10360.

85 Naomi Simmonds and Kirsten Gabel “Ūkaipō: Decolonisation and Māori maternities” in Jessica Hutchings and Jenny Lee-Morgan (eds) *Decolonisation in Aotearoa: Education, Research and Practice* (NZCER Press, Wellington, 2016) 145 at 148.

In this role Māori women have also determined their reproductive outcomes. There are many examples in oral traditions, such as pūrākau (narratives), waiata (song), and karakia (incantations), of women making reproductive choices such as choosing partners and initiating conception. Although less common, there are also examples of women choosing to discontinue a pregnancy that has begun under suboptimal conditions and performing interventions during labour and birth to ensure a particular outcome.⁸⁶ Due to the pivotal role of women in determining whakapapa (genealogy and the key principle underlying te ao Māori), it is likely these reproductive decisions would have been made within a safe and supportive context that would have considered the overall health and wellbeing of the mother and infant. Any loss of life would have been grieved accordingly.

However, the active and systematic suppression of Māori people, knowledge, land and culture by Western frameworks and Crown institutions during colonisation has had a devastating cumulative and ongoing effect on Māori, particularly for women.⁸⁷ The loss of land and economic base, and introduction of new diseases, has negatively impacted on the health of Māori, who continue to carry inequitable health and social outcomes compared with the settler population.⁸⁸ Crown policies of assimilation enforced the view that Māori culture and language were irrelevant, Māori practices were actively discouraged and discarded, and Māori ideologies were no longer perceived as valid.⁸⁹ The impacts of urbanisation on family composition, intergenerational support and knowledge of childrearing, help to explain current reproductive decisions such as abortion. Government policies have heavily affected the ability of whānau, hapū, iwi and Māori communities to support Māori making reproductive decisions.

It is well-established and widely accepted that Māori have poorer healthcare outcomes than non-Māori in Aotearoa New Zealand.⁹⁰ Lack of cultural competence in abortion services and in the care provided around an

86 Indiana Shewen “Tahe; Tikanga and Abortion” (2020) 4 NZWLJ 36.

87 Simmonds and Gabel, above n 85, at 149–150.

88 P Reid, D Cormack and S-J Paine “Colonial histories, racism and health—The experience of Māori and Indigenous peoples” (2019) 172 Public Health 119.

89 Robert Webb “Māori Experiences of Colonisation and Māori Criminology” in Antje Deckert and Rick Sarre (eds) *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice* (Palgrave Macmillan, Cham, 2017) 683.

90 Health Quality & Safety Commission New Zealand *A Window on the Quality of Aotearoa New Zealand's Healthcare 2019 – a view on Māori health equity* (Wellington, May 2019) at 6.

abortion may well result in the subsequent physical and psychological effects being worse for Māori than for Pākehā. It is therefore even more important that legislation relating to abortion is drafted with particular care to empower people to protect their wellbeing.

Parliament should also consider other cultures when progressing legislation. For example, Pasifika women made up 8.17 per cent of the population in 2018, but 10.19 per cent of abortions.⁹¹ A study of Samoan women highlighted the cultural veil of secrecy surrounding the topic of sex and sexuality.⁹² This veil may lead people to seek an abortion in order to avoid bringing shame on themselves or their families.⁹³ The Samoan language used to describe miscarriage and abortion is very different. In response to a miscarriage, people say “*talofa e ia ... ua fafano pe ua pau lana pepe*”, meaning “the poor woman had lost her baby by miscarriage”.⁹⁴ On the other hand, abortion is seen as an act of evil to which people say “*o le fiamama*”,⁹⁵ referencing women terminating a pregnancy because of the need for them to pretend to be pure or perfect.

VI RECOMMENDED AMENDMENTS TO THE HOLIDAYS ACT 2003

Considering the above, the authors recommend that the Holidays Act be amended in the following ways:

- i) In ss 69(2)(c) and (d), replace “by way of a miscarriage or still-birth” with “by way of a miscarriage, still-birth or abortion”;
- ii) In s 69(4), remove “other than as a result of abortion services provided in accordance with the Contraception, Sterilisation, and Abortion Act 1977”; and
- iii) In s 69(4), add “abortion means an abortion within the meaning of section 2 of the Contraception, Sterilisation, and Abortion Act 1977”.

91 Statistics New Zealand Tauranga Aotearoa ERP, above n 80; and Statistics New Zealand Tauranga Aotearoa *Abortion statistics*, above n 80, at table 7.

92 Ausaga Epho Fa’asalele Tanuvasa “The Place of Contraception and Abortion in the Lives of Samoan Women” (PhD Thesis, Victoria University of Wellington, 1999) at 8, 38–39, 90–91, 106 and 399–404.

93 Auckland Women’s Health Council “Abortion in Pacific Cultures” (2018) Auckland Women’s Health Council <www.womenshealthcouncil.org.nz>.

94 Tanuvasa, above n 92, at 180.

95 At 180.

The amended provision, in line with the approach taken in the existing Act, should not require an employee to identify whether their pregnancy has ended by way of miscarriage, stillbirth or abortion. The authors also suggest that no distinction should be drawn between the various reasons a person might have had an abortion. This would ensure that the provision upholds people's right to privacy and freedom from discrimination in relation to their reproductive decisions. Any such amendments should be considered in light of Te Tiriti and other relevant cultural considerations.

VII CONCLUSION

The Holidays (Bereavement Leave for Miscarriage) Amendment Act 2021 has taken an important step towards recognising the grief that people experience following a miscarriage or stillbirth. However, by excluding bereavement leave for people following an abortion, it fails to provide equality before the law to people suffering bereavement and perpetuates the social stigma and shame surrounding abortion in Aotearoa New Zealand. The Act has now passed — it is time to acknowledge and support all reproductive decisions.

The legislation should be further scrutinised from a Māori understanding of abortion and Te Tiriti obligations to ensure that Māori rights are being upheld and Māori are not being disproportionately impacted. Te Tiriti obligations such as tino rangatiratanga for Māori when making reproductive decisions should be supported. Māori should be able to take leave to heal and grieve all loss of life and receive culturally safe care.