IN THE COURT OF APPEAL OF NEW ZEALAND

CA522/2009
[2011] NZCA 246

BETWEEN	THE ABORTION SUPERVISORY COMMITTEE Appellant and Cross-respondent
AND	RIGHT TO LIFE NEW ZEALAND INC Respondent and Cross-appellant

Hearing: 5-6 October 2010

Court: Chambers, Arnold and Stevens JJ

Counsel: C R Gwyn and W L Aldred for the Abortion Supervisory Committee
P D McKenzie QC and I C Bassett for Right to Life New Zealand Inc

Judgment: 1 June 2011 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The costs order against the Abortion Supervisory Committee in the High Court is set aside. The Committee is entitled to costs in the High Court. In the absence of agreement, such costs are to be fixed by the High Court.

C The cross-appeal is dismissed.

D Right to Life New Zealand Inc must pay the Abortion Supervisory Committee costs for a complex appeal on a band B basis and usual disbursements. No separate costs award for the cross-appeal. We certify for second counsel.

REASONS

CHAMBERS AND STEVENS JJ
(Given by Stevens J)

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What must the Committee do?

[1] This case concerns the functions and powers of the Abortion Supervisory Committee (the Committee). Right to Life New Zealand Inc (RTL) has brought judicial review proceedings seeking declarations as to how and when the Committee must exercise its functions and powers. RTL alleges various breaches, principally concerning claimed omissions by the Committee to act on failures by medical professionals involved in the abortion process to comply with the law. At the heart of these complaints is the Committee's alleged failure adequately to perform its statutory function of keeping under review all the provisions of the abortion law, and, in particular, its unsatisfactory auditing of the activities of certifying consultants who authorise abortions. That includes not requiring certifying consultants to provide reports of cases considered to the Committee. RTL is concerned that abortions are available "on request" in New Zealand.

[2] These issues came before Miller J in the High Court. In summary, the Judge concluded that there was reason to doubt the lawfulness of many abortions authorised by certifying consultants and that it was likely that the law was being applied more liberally than Parliament intended. The Judge held that the Committee's belief that it was unable to review or scrutinise the decisions of certifying consultants was a misinterpretation of its statutory functions and powers. Rather, the Committee did have authority to review the operation and effect of the Contraception, Sterilisation and Abortion Act 1977 (the CSA Act) including the lawfulness of certifying consultants' decisions.[1] In a second judgment the High Court declined to make declarations against the Committee.[2] A third judgment awarded costs to RTL.[3]

[3] The Committee appeals against the judgments, including the costs decision, and raised three key grounds:

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1 *Right to Life New Zealand Inc v Abortion Supervisory Committee* [2008] 2 NZLR 825 (HC) at [5].

2 *Right to Life New Zealand Inc v Abortion Supervisory Committee* HC Wellington CIV-2005-485-999, 3 August 2009.

3 *Right to Life New Zealand Inc v Abortion Supervisory Committee* HC Wellington CIV-2005-485-999, 9 September 2009.

(a) the Court lacked jurisdiction to consider the question whether certifying consultants were obeying abortion law; and

(b) if there was jurisdiction, there was no evidential foundation to support the Judge's findings regarding the approval rate or lawfulness of abortions; and

(c) the Court erred in concluding that review by the Committee of certifying consultants' decisions to authorise or refuse abortions in individual cases was consistent with *Wall v Livingston*.[4]

[4] RTL has filed a cross-appeal against the findings of Miller J as to the requirements regarding counsellors and the notion of the right to life of unborn children. RTL also challenges the decision of Miller J in the second judgment not to make declarations against the Committee, submitting that there are strong reasons to support the making of declarations in this case.

[5] We consider that the outcome of the appeal turns on the proper interpretation of the CSA Act. To that task we will apply the normal principles of interpretation requiring the meaning of the statute to be ascertained from its text and in the light of its purpose.[5] The CSA Act was preceded by a Royal Commission of Inquiry[6] that reported its findings in March 1977.[7] Most of the recommendations were enacted by Parliament and counsel for both parties accepted that the report could be used as an aid to interpretation where the statutory language is ambiguous.[8]

[6] Before discussing the questions for interpretation, we propose to refer briefly to what the Royal Commission envisaged when recommending the establishment of a committee to oversee the implementation and operation of the abortion law. After considering briefly the content of the abortion law, we will examine the nature of the statutory body Parliament established and what functions and powers it gave the

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4 *Wall v Livingston* [1982] 1 NZLR 734 (CA).

5 Set out in s 5 of the Interpretation Act 1999.

6 The Royal Commission on Contraception, Sterilisation and Abortion established in 1975.

7 Royal Commission of Inquiry *Contraception, Sterilisation and Abortion in New Zealand: Report of the Royal Commission of Inquiry* (1977).

8 As they had done in the High Court: as recorded by Miller J at [10] of *Right to Life New Zealand Inc v Abortion Supervisory Committee* [2008] 2 NZLR 825 (HC)..

Committee. We then discuss how generally the Committee has gone about discharging such functions and powers. Reference will be made to the allegations pleaded against the Committee, before examining whether, in the light of our interpretation of key provisions of the CSA Act, RTL has established that the Committee has in fact breached the statutory obligations placed on it by Parliament.

The Royal Commission report

[7] The Royal Commission reported on the considerations of legal policy to which it recommended Parliament have regard when it implemented the legislation establishing the law in the area of abortion and the right of Parliament to intervene in what some say is a matter of a woman's choice. The Royal Commission therefore set out in some detail the basis of a legal code in Chapter 25 which, it was hoped, would "remove the doubts and uncertainties which at present exist in the law ...".[9] The report dealt with the recommendation to establish a committee, modelled on the one that reported annually to the Parliament of South Australia.[10] In the Summary, the Royal Commission said that Chapter 25 was "of considerable importance because it deals with the means by which the legal code should be implemented and the abortion decision made".[11] Thus, the recommendation involved:

> ... the setting up of a committee which is to have general oversight of the administration of the abortion law in this country. It has been our aim to ensure some uniformity of approach which has hitherto been lacking. The committee would help to attain this object. It would prescribe standards and give general supervision to the working of the abortion law.

[8] We will return later to the observations as to the role of the proposed committee and the general supervisory jurisdiction that was recommended. Significantly, the recommendation was later repeated in the body of Chapter 25 in the following terms:

> We recommend the establishment of such a committee [as in South Australia] in New Zealand and consider that it would be better suited to the general oversight of the administration of the abortion law than the Department of Health which is already heavily charged with health care in

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9 Summary of Report at 25.
10 At Chapter 25.
11 Summary of Report at 25.

> so many other areas. We envisage a committee of three members, two of whom should be experienced medical practitioners. In order to preserve some consistency of approach and outlook, the chairman of such a committee should hold office for a term of years, particularly at the outset.

The abortion law

[9] When the CSA Act was enacted in 1977, the term "abortion law" was a defined term. It meant every provision of ss 10 to 46 of the CSA Act and ss 182 to 187A of the Crimes Act 1961. In order to establish the context for the following discussion about the Committee, it is convenient to summarise the law that makes the killing of an unborn child a crime in certain circumstances. This aspect of the case was not contentious, so a short summary will suffice.

[10] Section 182 of the Crimes Act provides:

> **182 Killing unborn child**
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> (1) Every one is liable to imprisonment for a term not exceeding 14 years who causes the death of any child that has not become a human being in such a manner that he would have been guilty of murder if the child had become a human being.
>
> (2) No one is guilty of any crime who before or during the birth of any child causes its death by means employed in good faith for the preservation of the life of the mother.

[11] Section 183 of the Crimes Act provides that it is a crime unlawfully to use on a woman or girl any means, for example a drug or instrument, with intent to procure a miscarriage. Further, s 186 provides that it is a crime unlawfully to supply or procure the means of procuring an abortion. By s 182A of the Crimes Act miscarriage is defined to mean "the destruction or death of an embryo or foetus after implantation" or "the premature expulsion or removal of an embryo or foetus after implantation, other than for the purpose of inducing the birth of a foetus believed to be viable or removing a foetus that has died".

[12] The word "unlawfully" is defined for the purposes of ss 183 and 186 as follows:

187A Meaning of "unlawfully"

(1) For the purposes of sections 183 and 186 of this Act, any act specified in either of those sections is done unlawfully unless, in the case of a pregnancy of not more than 20 weeks' gestation, the person doing the act believes—

(a) That the continuance of the pregnancy would result in serious danger (not being danger normally attendant upon childbirth) to the life, or to the physical or mental health, of the woman or girl …; or

(aa) That there is a substantial risk that the child, if born, would be so physically or mentally abnormal as to be seriously handicapped; or

(b) That the pregnancy is the result of sexual intercourse between—

(i) A parent and child; or

(ii) A brother and sister, whether of the whole blood or of the half blood; or

(iii) A grandparent and grandchild; or

(c) That the pregnancy is the result of sexual intercourse that constitutes an offence against section 131(1) of this Act; or

(d) That the woman or girl is severely subnormal within the meaning of section 138(2) of this Act.

(2) The following matters, while not in themselves grounds for any act specified in section 183 or section 186 of this Act, may be taken into account in determining for the purposes of subsection (1)(a) of this section, whether the continuance of the pregnancy would result in serious danger to her life or to her physical or mental health:

(a) The age of the woman or girl concerned is near the beginning or the end of the usual child-bearing years:

(b) The fact (where such is the case) that there are reasonable grounds for believing that the pregnancy is the result of sexual violation.

(3) For the purposes of sections 183 and 186 of this Act, any act specified in either of those sections is done unlawfully unless, in the case of a pregnancy of more than 20 weeks' gestation, the person doing the act believes that the miscarriage is necessary to save the life of the woman or girl or to prevent serious permanent injury to her physical or mental health.

(4) Where a … medical practitioner, in pursuance of a certificate issued by 2 certifying consultants under section 33 of the Contraception, Sterilisation, and Abortion Act 1977, does any act specified in section 183 or section 186 of this Act, the doing of that act shall not be unlawful for the

> purposes of the section applicable unless it is proved that, at the time when he did that act, he did not believe it to be lawful in terms of subsection (1) or subsection (3) of this section, as the case may require.

[13] Importantly, under s 187A(4) a registered medical practitioner carrying out an abortion may do so lawfully provided that the medical practitioner is acting on the basis of a certificate issued by two certifying consultants under s 33 of the CSA Act. A certificate may be issued by the certifying consultants if, after considering the case, they are of the opinion that the case is one to which any of paragraphs (a) to (d) of s 187A(1) or (as the case may require in the case of a pregnancy of more than 20 weeks' gestation) s 187A(3) applies.[12] We note in passing that an abortion that meets these requirements is lawful not only under s 183 and s 186 of the Crimes Act, but also s 182.[13]

[14] The approach that we take to determining the issues in the appeal means that we do not need to elaborate further on the content of the abortion law. We would add, however, that the abortion law was intended by Parliament to reflect the rights of the mother as balanced against the statutorily undefined rights of the unborn child. As was stated by this Court in *Wall v Livingston*:[14]

> The Act itself reflects the very careful attempt made by Parliament to balance the deep philosophical and moral and social attitudes which surround this whole subject-matter.
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> ...
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> ... it is important not to lose sight of what must have been a deliberate Parliamentary decision; the avoidance of any attempt to spell out what were to be regarded as the legal rights of an unborn child; with the consequential absence of any statutory means by which rights (whatever their nature) could be enforced.

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12 Section 33(1).

13 In *R v Woolnough* [1977] 2 NZLR 508 (CA), this Court sought to reconcile the provisions of ss 182 and 183 of the Crimes Act. Richmond P opined at 516 that s 182 had no application to cases involving abortions carried out during the first trimester of pregnancy. This approach was followed by the Royal Commission in the recommendation at 279 that s 182 did not need to be amended, so long as s 159 (which defines when a child becomes a human being for the purposes of the Crimes Act) remained the law.

14 At 737.

The Committee

[15] The Committee is established by s 10 of the CSA Act. As recommended by the Royal Commission it consists of three members of whom two shall be medical practitioners. Members of the Committee are appointed by the Governor-General on the recommendation of the House of Representatives.[15] One member is to be appointed as Chairman. Significantly, any vacancies in membership are to be filled on the recommendation of the House of Representatives, if Parliament is in session. Where this is not the case, the Governor-General in Council may appoint a member to fill the vacancy, but the appointment must be confirmed by the House of Representatives.[16]

[16] The control by the House of Representatives over the appointment process illustrates the interest which has been mandated by Parliament over who is to hold membership (and the Chairmanship) on the Committee. No member of the Committee is required to hold legal qualifications. Nor does any member need to have expertise in medical discipline, although two of the three members must be medical practitioners.[17]

Functions and powers of the Committee

[17] The functions and powers of the Committee are set out in s 14 of the CSA Act as follows:

> **14 Functions and powers of Supervisory Committee**
>
> (1) The Supervisory Committee shall have the following functions:
>
> (a) To keep under review all the provisions of the abortion law, and the operation and effect of those provisions in practice:
>
> (b) To receive, consider, grant, and refuse applications for licences or for the renewal of licences under this Act, and to revoke any such licence:

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15 Section 12(2).

16 As required by s 12(3). It is noteworthy that similar provisions apply to the appointment process, even where a member is incapacitated by illness and the temporary appointment of a deputy is required (s13).

17 Section 10(2).

(c) To prescribe standards in respect of facilities to be provided in licensed institutions for the performance of abortions:

(d) To take all reasonable and practicable steps to ensure—

(i) That licensed institutions maintain adequate facilities for the performance of abortions; and

(ii) That all staff employed in licensed institutions in connection with the performance of abortions are competent:

(e) To take all reasonable and practicable steps to ensure that sufficient and adequate facilities are available throughout New Zealand for counselling women who may seek advice in relation to abortion:

(f) To recommend maximum fees that may be charged by any person in respect of the performance of an abortion in any licensed institution or class of licensed institutions, and maximum fees that may be charged by any licensed institution or class of licensed institutions for the performance of any services or the provision of any facilities in relation to any abortion:

(g) To obtain, monitor, analyse, collate, and disseminate information relating to the performance of abortions in New Zealand:

(h) To keep under review the procedure, prescribed by sections 32 and 33 of this Act, whereby it is to be determined in any case whether the performance of an abortion would be justified:

(i) To take all reasonable and practicable steps to ensure that the administration of the abortion law is consistent throughout New Zealand, and to ensure the effective operation of this Act and the procedures thereunder:

(j) from time to time to report to and advise the Minister of Health and any district health board established by or under the New Zealand Public Health and Disability Act 2000 on the establishment of clinics and centres, and the provision of related facilities and services, in respect of contraception and sterilisation:

(k) To report annually to Parliament on the operation of the abortion law.

(2) The Supervisory Committee shall have all such reasonable powers, rights, and authorities as may be necessary to enable it to carry out its functions.

[18] We discuss later in this judgment particular functions and powers identified in s 14 of the CSA Act, including those referred to in ss 14(1)(a), (e), (h), (i) and (k).

It will be convenient to discuss these provisions in the context of the pleaded breaches set out in the claim filed by RTL, to which we return.

[19] The Committee has power to appoint advisory and technical committees where it considers special knowledge or expertise is required to assist it in its work.[18] Additionally, the Committee and any advisory or technical committee appointed by it may co-opt specialist advice. The Committee may use such expertise to assist it in the exercise of its various functions.[19] Further, provision is made for services to be provided to the Committee from time to time through any department of State.[20] This includes secretarial and clerical services provided by the Ministry of Justice.

The licensing of institutions

[20] A central principle of the legislation is that no abortion is to be performed elsewhere than in an institution licensed for the purpose.[21] This necessitated the establishment, in the CSA Act, of a system of licensing of institutions, in respect of which the Committee has an essential role in the grant, renewal, refusal or cancellation of licences for hospitals and other types of institutions where abortions are performed. The discharge of this role by the Committee reflects the carrying out of the functions identified in ss 14(1)(b) to (f) of the CSA Act. As will be discussed, these functions concerning institutions differ from the task of the Committee in relation to certifying consultants. Certifying consultants are not the subject of a licensing regime, but rather the Committee is required to set up and maintain a list of appointed certifying consultants.[22]

[21] Because of its relevance to the views we have formed as to the structure and meaning of the CSA Act, we briefly describe some important features of the regime of licensing institutions that the Committee performs.

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18 Section 15.
19 Section 16.
20 In s 17.
21 Section 18.
22 Section 30(1).

[22] Licences for institutions may be either a full licence or a limited licence.[23] Applications for licences are directed to the Committee and must be in the prescribed form.[24] Under s 21 of the CSA Act, applications for either type of licence may only be granted if the Committee is satisfied that the criteria applicable to the two types of licence are met. These include the adequacy of surgical or other facilities and adequate and competent staff for the safe performance of abortions. In each case, there must be adequate counselling services available to women considering having an abortion in the institution. Importantly, where the Committee refuses to grant an application for a licence, it must on request provide a written statement of its reasons for refusing the application.[25] Once granted, licences are issued, on payment of the prescribed fee, in the prescribed form.[26] Licences are of a one year duration, unless cancelled sooner.[27]

[23] Section 24 makes provision for the non-renewal of licences. Where the Committee refuses to grant an application for the renewal of a licence it must, on request, give the applicant a written statement of its reasons for the refusal. The same provision applies in respect of the cancellation of licences. Parliament recognised the importance of any decision to cancel, refuse or not to renew a licence in providing for the Committee to receive and consider representations made to it and evidence put before it by the institution concerned.[28]

[24] The importance of decisions made by the Committee to refuse an application for the issue or renewal of a licence or the cancellation of a licence is reflected in the fact that for persons dissatisfied with a decision of the Committee there is, under s 26, a right of appeal to the High Court by way of case stated on a question of law. Advice of an alleged error of law is given by the appellant by the lodging of a notice with the Secretary of the Committee. Thereafter the appellant is required, within applicable time limits, to state a case setting out the facts and grounds relied upon and specifying the question of law on which the appeal is made. Finally, there is a

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23 Section 19. A full licence authorises the holder to perform abortions regardless of the length of time for which the pregnancy has been continuing. A limited licence authorises the performance of abortions only in the first 12 weeks of pregnancy (s 19(3)).

24 Section 20.

25 Section 21(5).

26 Section 22.

27 Section 23.

28 Section 25(2).

right of appeal against a decision of the High Court. If the appellant is dissatisfied with any final determination by the High Court in respect of the appeal, an appeal will lie to this Court by way of case stated.[29]

Appointment or approval of counselling services

[25] In addition to its functions involving licensing of institutions, the Committee is required under s 31 to appoint or approve suitably qualified persons to provide counselling services for those considering having an abortion. Further, it has a role in approving any agency for the provision of such counselling services.

[26] The criteria to which the Committee is to have regard in appointing persons or approving agencies for the provision of counselling services include the need for every counselling service to be directed by an experienced and professionally trained social worker.[30] Every counsellor is to be thoroughly familiar with all relevant social services and agencies, and should be able to advise patients, or refer them to appropriate agencies for advice on alternatives to abortion, such as adoption and solo parenthood. Additionally, suitably-trained lay counsellors may be used where there are insufficient professional social workers.

Committee to set up and maintain list of certifying consultants

[27] The Committee is required by s 30 of the CSA Act to set up and maintain a list of medical practitioners (termed certifying consultants) who may be called upon to consider cases referred to them by any other medical practitioner and determine whether to authorise an abortion in accordance with the requirements of s 33. Before drawing up the list, the Committee is required to determine the number of certifying consultants required to ensure that abortion cases are considered expeditiously. Under s 30(2) of the CSA Act the Committee must keep the number of certifying consultants under review and must make further appointments or revoke such number of appointments, as it considers necessary to meet any change in

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29 Section 27(1). Additionally, the Committee has power under s 28 to state a case for the High Court on "any question of law arising in any matter before the Supervisory Committee".

30 Section 31(2).

circumstances. Once the number of appointments to be made is determined, the Committee is required to consult with the New Zealand Medical Association and it may consult with any other professional or other body before determining whom to appoint.[31]

[28] There are requirements that must be met in making appointments to the list.[32] First, at least half of the total number of appointees must be practising obstetricians or gynaecologists. The list is then marked so as to indicate which of the appointees are so qualified. Second, there must be a sufficient number of appointees practising in each area of New Zealand to ensure that every woman seeking an abortion can have her case considered without involving her in considerable travel or other inconvenience.[33] Importantly, s 30(5) of the CSA Act deals with the desirability of appointing medical practitioners whose assessment of cases will not be coloured by their views about abortion generally. Section 30(5) provides:

> (5) In addition, in making such appointments, the Supervisory Committee shall have regard to the desirability of appointing medical practitioners whose assessment of cases coming before them will not be coloured by views in relation to abortion generally that are incompatible with the tenor of this Act. Without otherwise limiting the discretion of the Supervisory Committee in this regard, the following views shall be considered incompatible in that sense for the purposes of this subsection:
>
> (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.

[29] The appointment of a certifying consultant to the list is for a term of one year,[34] with the Committee having a power to reappoint on the expiry of the term. In relation to certifying consultants, the Committee retains the discretionary power at any time and at its discretion to revoke the appointment.[35] Unlike in the case of licensing of institutions, there is no statutory requirement for the Committee to give reasons in writing on request where a medical practitioner is not appointed to the list

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31 Section 30(3).
32 Section 30(4).
33 This provision is designed to ensure adequate geographic coverable of certifying consultants, a topic addressed by the Royal Commission in the Report at 290.
34 Section 30(6).
35 Section 30(7).

or where the appointment is revoked under s 30(7). Neither is there any provision for appeals in such cases.

The determination of an abortion case

[30] The CSA Act prohibits the performing of an abortion, unless and until it is authorised by two certifying consultants.[36] The procedure where a woman seeks an abortion is mandated by s 32 of the CSA Act. It envisages that the woman will first consult a medical practitioner who is referred to as "the woman's own doctor". The case is to be considered and dealt with under the provisions of s 32 and 33 of the CSA Act. The woman's own doctor may or may not be a certifying consultant. The procedure under s 32 is then:

> (2) If, after considering the case, the woman's own doctor considers that it may be one to which any of paragraphs (a) to (d) of subsection (1), or (as the case may require) subsection (3), of section 187A of the Crimes Act 1961 applies, he shall comply with whichever of the following provisions is applicable, namely:
>
> (a) Where he does not propose to perform the abortion himself, he shall refer the case to another … medical practitioner (in this section referred to as the operating surgeon) who may be willing to perform an abortion (in the event of it being authorised in accordance with this Act); or
>
> (b) Where he proposes to perform the abortion himself (in the event of it being authorised in accordance with this Act), he shall—
>
> (i) If he is himself a certifying consultant, refer the case to one other certifying consultant (who shall be a practising obstetrician or gynaecologist if the woman's own doctor is not) with a request that he, together with the woman's own doctor, determine, in accordance with section 33 of this Act, whether or not to authorise the performance of an abortion; or
>
> (ii) If he is not himself a certifying consultant, refer the case to 2 certifying consultants (of whom at least one shall be a practising obstetrician or gynaecologist) with a request that they determine, in accordance with section 33 of this Act, whether or not to authorise the performance of an abortion.

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[36] Section 29.

[31] Each certifying consultant must consider the case as soon as practicable.[37] Further, if the woman (referred to as the "patient") requires it, she must be interviewed, at which interview she is entitled to be accompanied by her own doctor, if the doctor agrees. The patient and her doctor are entitled to make representations and to adduce medical or other reports.[38] With her consent, the certifying consultant may consult any other person.[39] Where the woman's own doctor is a certifying consultant, he or she may certify an abortion in conjunction with another certifying consultant. Apart from identifying the varying situations that may arise in the course of determining a particular case, the provisions of s 32 illustrate the varying number of medical practitioners (including certifying consultants) and (potentially) other non-medical practitioners who may be involved in determining the case.

[32] The case is determined under s 33 of the CSA Act. If the certifying consultants agree that the case is one to which any of s 187A(1)(a)–(d) or s 187A(3) apply, they must forthwith issue a certificate in the prescribed form authorising an abortion. If they are of the contrary opinion, they must refuse to authorise the performance of an abortion. If an abortion is authorised, the prescribed form is forwarded to the holder of a licence in respect of the licensed institution in which the abortion is to be performed.[40] If the certifying consultants hold differing opinions, there is provision to refer the case to another certifying consultant for their opinion. We note that there is no right of review, either by the Committee or anyone else, of the decision of the certifying consultants. This is the case, even though the woman herself may wish to review a decision determining that that case for authorising the performance of an abortion had not been made out. We agree with the observations of Miller J when he said that:[41]

> The absence of any right of review of so important a decision tends to confirm that the CSA Act characterises the decision to authorise an abortion as one of medical judgment.

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37 Section 32(5).

38 Section 32(6).

39 Section 32(7).

40 Section 33(5). The prescribed form is Form 3A (or, where there is a disagreement between certifying consultants, Form 3B). Notes to the form refer to the fact that the grounds on which an abortion is justified are set out in s 187A of the Crimes Act. There is a requirement for the certifying consultants to state on which of those grounds they are authorising the performance of an abortion.

41 At [18].

[33] When the certifying consultants have made their decision whether to authorise or refuse to authorise the performance of an abortion, they must advise the woman of her right to seek counselling.[42] Finally, we note that certifying consultants are protected from personal liability, under s 40 of the CSA Act, in respect of any act done or omitted to be done in good faith in pursuance of the power conferred under the CSA Act. Similar protections apply to the members of the Committee.

Conscientious objection

[34] Although it is not directly relevant to the interpretation issues we must resolve, the CSA Act makes provision in s 46 for dealing with questions of conscientious objection. For example, no medical practitioner is under an obligation to perform an abortion if he or she objects to doing so on the grounds of conscience. The Medical Council of New Zealand has recently proposed to promulgate a statement entitled "Beliefs and Medical Practice". This statement relates to the responsibilities and actions required of medical practitioners in sensitive areas of practice where religious, cultural or ethical beliefs and values of patients and doctors may impact on matters of medical treatment and procedures. Abortion is one such area. The proposed statement was recently considered by the High Court.[43] The decision dealt with the options available to a medical practitioner who had a conscientious objection to abortion. MacKenzie J examined the provisions of the abortion law as well as the requirements of s 174 of the Health Practitioners Competence Assurance Act 2003 dealing with the duties arising when there is an objection on the grounds of conscience to providing a service, for example, related to abortion. There is a duty to inform the person requesting the service that the service may be obtained from another health practitioner.

[35] The Judge also recommended that the Medical Council make changes to the proposed statement. The case demonstrates, among other things, that when considering issues pertaining to abortion, the law involves consideration of not only the CSA Act but also legislation dealing with the obligations on, and standards required of, medical practitioners (for example, as set out in the Health Practitioners

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42 Section 35.

43 *Hallagan v Medical Council of NZ* HC Wellington CIV-2010-485-222, 2 December 2010.

Competence Assurance Act), as well as the rights of patients arising under the Health and Disability Commissioner Act and the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996.

Keeping of records and submitting reports

[36] The CSA Act imposes on certifying consultants an obligation to keep records and submit reports to the Committee. Section 36 of the CSA Act provides:

> **36 Certifying consultants to keep records and submit reports**
>
> (1) Every certifying consultant shall keep such records and submit to the Supervisory Committee such reports relating to cases considered by him and the performance of his functions in relation to such cases as the Supervisory Committee may from time to time require.
>
> (2) No such report shall give the name or address of any patient.

[37] The nature and scope of the information recorded by the certifying consultants and supplied to the Committee will be addressed when considering the evidence below. There is an obligation on every medical practitioner who performs an abortion to make a record of it and the reasons therefor.[44] Such record must be forwarded to the Committee within a month after performing the abortion. Again, the record is not to give the name or address of the patient.[45]

Reporting to Parliament

[38] Section 14(1)(k) of the CSA Act states that a function of the Committee is to "report annually to Parliament on the operation of the abortion law". Section 39 provides an additional requirement that the Committee, again annually, prepare and submit the Parliament "a report of its activities during the preceding 12 months". We consider that the word "activities" covers the broad spectrum of functions, topics and issues within the statutory jurisdiction of the Committee (in s 14 of the CSA

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[44] Section 45(1), such statutory obligation is expressed to be without limiting anything in s 36.
[45] Section 45(2).

Act), including the specific requirement to report generally on the operation of the abortion law.

The pleadings

[39] When the application for judicial review came to hearing before Miller J, RTL relied on the allegations pleaded in the third amended statement of claim.[46] The pleading is prolix and not particularly focussed. For present purposes it is convenient to refer to the succinct summary in the judgment of Miller J identifying the five grounds of review alleging that the Committee had failed:[47]

> (a) to interpret and apply the CSA Act according to its tenor, by failing: to take into account the rights of the unborn child, to exercise oversight of the manner in which certifying consultants do their work, to keep under review the prescribed procedures for determining whether an abortion is justified, to take all reasonable and practicable steps to ensure that the administration of the abortion law is consistent throughout New Zealand and effective, to revoke the appointment of any certifying consultant, and to have regard to the New Zealand Bill of Rights Act 1990;
>
> (b) to perform its statutory duty to review the procedure for the conduct of abortions and determine in any case whether the provisions and procedures set out in the CSA Act are being complied with;
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> (c) to inquire into the circumstances in which certifying consultants are authorising the performance of abortions on the mental health ground, having regard to the extent to which that ground is used;

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[46] This pleading followed the judgment of Wild J on a strikeout application (*Right to Life New Zealand Incorporated v Rothwell* HC Wellington CIV 2005-485-999, 11 October 2005); a judgment of Ronald Young J (*Right to Life New Zealand Inc v The Abortion Supervisory Committee* HC Wellington CIV 2005-485-999, 28 May 2007); a judgment of Simon France J (*Right to Life New Zealand Inc v The Abortion Supervisory Committee* HC Wellington CIV 2005-485-999, 3 October 2007), each of which related to evidential issues, and a pretrial judgment of Miller J (*Right to Life New Zealand Inc v The Abortion Supervisory Committee* HC Wellington CIV 2005-485-999, 31 March 2008).

[47] At [37].

(d) to seek proper information on mental health grounds from certifying consultants; and

(e) to perform its statutory duty or exercise statutory powers to take all reasonable and practicable steps to ensure that sufficient and adequate counselling facilities are available.

[40] Dealing in particular with the first of the pleaded claims, the actual content of the third amended statement of claim identifies the particular statutory provisions relied on and the evidence of alleged breach. RTL called in aid the Long Title of the CSA Act, ss 30(5) and 36, and the functions and powers contained in ss 14(1)(g), (h) and (i). In the prayer for relief, only these three subsections and s 36 were mentioned. Specific reliance on s 14(1)(a) of the CSA Act was mentioned in the draft orders submitted to Miller J post-judgment.

[41] The third amended statement of claim did not plead any particular factual example of a case involving a certifying consultant where it was alleged that the Committee failed properly to interpret the CSA Act according to its tenor. Rather, there were some general allegations that in its reports to Parliament in 1996, 2000, 2001 and 2003, the Committee had failed in various respects to interpret the CSA Act correctly.

[42] Such allegations were no doubt difficult to plead to in a number of respects. They drew from the Committee admissions as to the contents of the reports to Parliament, denials if they were characterised as allegations of fact and assertions that, insofar as they were allegations of law, the Committee was not required to plead to them. In relation to s 14(1)(a) of the CSA Act now relied upon by RTL, there was no pleaded factual basis for breach of the statutory obligation. Generally, the Committee responded that it relied on the decision of this Court in *Wall v Livingston* as the basis for its statements in the reports as to the nature and scope of its powers.

The issues for determination

[43] In addition to the pleadings, the parties filed in this Court an "Agreed Statement of Issues". From both sources, we have identified the questions that need to be determined on appeal, namely:

(a) Whether the law recognises an express right to life on the part of the unborn child. A related issue is whether the existence of a "State interest"/right to life in the protection of the life of the unborn child gives rise to either a requirement that the CSA Act be interpreted consistently with that interest or a procedural obligation of inquiry or investigation on the part of the Committee.

(b) Whether the common law "born alive" rule applies in New Zealand to exclude the right to life for the unborn child and whether the rule has been modified to the extent that the abortion law provides protection to the foetus in relation to abortion.

(c) Whether s 8 of the New Zealand Bill of Rights Act (NZBOR Act) extends to the unborn child and if so what are the legal consequences.

(d) Whether any conflict of interest exists in the provision of counselling services by licensed institutions, and whether in finding to the contrary the High Court accorded appropriate weight to the report of the Royal Commission. There are two related questions, namely:

(i) whether, in order for counselling services to be "adequate" within the meaning of ss 14(1)(e), 21(1)(e) and 31(1)(a) of the CSA Act, such counselling services are required to be independent of the licensed institutions in which abortions may be performed; and

(ii) whether s 31(1) of the CSA Act requires the Committee itself to appoint appropriate counsellors or counselling agencies.

(e) Whether the Committee's functions under ss 14(1)(a), (i) and (k) and s 36 of the CSA Act empower the Committee to review or scrutinise the decisions of certifying consultants and form its own view about the lawfulness of their decisions to the extent necessary to perform its functions. There is a related issue of whether the Court's conclusion that "after the fact" review by the Committee of certifying consultants' reasons for authorising or refusing abortions in individual cases is consistent with the decision of this Court in *Wall v Livingston*.

(f) Depending on the answer to (e), whether there is any evidential foundation for the finding made by Miller J that "the approval rate [for abortions] seems remarkably high, bearing in mind that under s 187A [of the Crimes Act 1961] the consultants must form the good faith opinion that continuance of the pregnancy would result in serious danger to the mother's health".

(g) Whether the Court has jurisdiction to consider the question "are certifying consultants obeying the abortion law?". There is a related question, depending on the issue of jurisdiction, whether there is any evidential foundation for the Judge's finding that "there is reason to doubt the lawfulness of many abortions authorised by certifying consultants".

[44] The parties also identified the issues of discretionary relief and costs as requiring determination, depending upon the outcome of the questions referred to in the previous paragraph.

The cross-appeal

[45] The cross-appeal raises agreed issues (a) to (d) above.

[46] The starting point for the cross-appeal by RTL is the conclusion of Miller J that:[48]

> ... the legislature has recognised, through the abortion law, that the unborn child has a claim on the conscience of the community, and not merely that of the mother. It has recognised that interest by prescribing that abortions may be authorised by the certifying consultants only where they believe, in good faith, that continuance of the pregnancy would result in serious danger to the mother's life or health.

[47] Mr McKenzie QC for RTL submitted that such conclusion did not go far enough in protecting the interests of the unborn child. These included a right to life arising in various ways as submitted by RTL under the agreed issues (a) to (c) set out at [43] above.

An express right to life for the unborn children?

[48] In addressing this issue, Miller J referred to the Long Title of the CSA Act that states, among other things, that it is an Act "to provide for the circumstances and procedure under which abortions may be authorised after having full regard to the rights of the unborn child". The Judge accepted that the Long Title indicated that Parliament meant to have regard to the rights of the unborn child.[49] This was a reasonable inference because it was only by constraining abortion that the procedures of the CSA Act and s 187A of the Crimes Act can be said to insist on regard being had to the rights of the unborn child. Miller J then posed the question: "Does the abortion law confer or recognise a right to life, and if so, what sort of right is it?"

[49] Miller J answered the question as follows:

> [70] This question leads immediately to the point that the CSA Act creates no express rights for the unborn child. Indeed, it does not mention the unborn child at all in its operative provisions. As the Court of Appeal held in *Wall v Livingston*, the legislature must have chosen to refrain from spelling out any legal rights in the unborn child. There is, as that Court also noted, a limited number of persons who may have any association with the certifying process.[50] They do not include anyone representing the unborn child. So

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48 At [5](b).
49 At [69].
50 At 740.

> there is no mechanism to enforce a right to life, whether such right be found in the abortion law or elsewhere. Indeed, the CSA Act does not require that any of the decision-makers involved (the mother, her own doctor, the consultants, or the doctor who performs the abortion) should have regard to the interests of the unborn child.

[50] The Judge then referred to the fact that s 182 of the Crimes Act was part of the abortion law as defined. He noted that under s 159 a child becomes a human being for the purposes of the Crimes Act when it has completely proceeded in a living state from the body of its mother. The Judge also referred to the decision of this Court in *R v Woolnough* before concluding that "the abortion law neither confers nor recognises an express right to life, s 182 and the Long Title of the CSA Act notwithstanding".

Submissions of the parties on express right to life

[51] RTL submits that the CSA Act recognises a "State interest" in protecting the right to life of the foetus. This right has the nature of a fundamental right in the sense of *R v Secretary of State, ex parte Daly*.[51] The legislation should therefore be interpreted consistently with this right to life. This would place on the Committee a procedural duty to inquire if it had reasonable ground to suspect that certifying consultants were not obeying the law.

[52] The Committee submits that there is no basis for contending that the foetus has a right to life of a fundamental nature. On the contrary, the born alive rule has been applied consistently, in that the foetus has no legally enforceable rights until born alive. Further, even if it did have such rights, that would not necessarily give rise to the legal consequences contended for by RTL. There would still be no basis upon which the Court could uphold RTL's contention that the Committee had a procedural obligation to inquire. Rather, any obligation of this kind would fall on the proper law enforcement and medical disciplinary authorities.

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[51] *R v Secretary of State, ex parte Daly* [2001] 2 AC 532 (HL) at 548.

Discussion

[53] We agree with the submissions on behalf of the appellant. We repeat the observations of this Court in *Wall v Livingston*:[52]

> The matter [of protection of the unborn child] is handled indirectly. It is done by surrounding the lawful termination of the pregnancy with the precautionary process of prior medical authorisation by two certifying consultants which must be obtained (except in certain situations of emergency) if an offence is to be avoided ...
>
> ...
>
> It is important not to lose sight of what must have been a deliberate Parliamentary decision: the avoidance of any attempt to spell out what were to be regarded as the legal rights in an unborn child; with the consequential absence of any statutory means by which rights (whatever their nature) could be enforced.

[54] We are satisfied that there is no basis either from the Long Title to the CSA Act or the abortion law to derive generally an express right to life in the unborn child. We reject this ground of appeal in RTL's cross-appeal for the same reasons as found favour with Miller J.

[55] For similar reasons we are satisfied that there is no warrant for interpreting the CSA Act consistently with a "State Interest"/right to life for the unborn child. The legislation, as understood from its text and according to its purpose, does not lead us to the interpretation contended for by RTL. Furthermore, we can find no basis in the CSA Act for an express right to life. Neither does that concept separately give rise to a procedural obligation of inquiry/investigation on the part of the Committee to inquire into whether certifying consultants are complying with the law in particular cases. Neither the Long Title, nor any of the specific provisions relied upon by RTL, support such a conclusion.

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[52] At 737.

Has the "born alive" rule been modified?

High Court decision

[56] In the High Court, Miller J examined this question as one of RTL's grounds supporting the review. The Judge concluded:[53]

> In general, New Zealand adheres to the common law "born alive" rule, which does not treat the unborn child as a person. Wrongs may be done to the unborn child before birth, but it has no remedy for them until born alive.[54] The rule is recognised by s 159 of the Crimes Act, which is not part of the abortion law as defined but must be read in this context with s 182, which is.

[57] The Judge's reasoning is succinctly stated in the following paragraphs:

> [82] Counsel accepted that the modern status of the born alive rule in New Zealand law was accurately summarised by McGrath J in *Harrild v Director of Proceedings*. McGrath J reviewed the authorities at common law, holding that they establish a settled position that at common law a fetus has no legal rights prior to birth. He noted that "… legal complexities and difficult moral judgments would arise if the Courts were to alter the common law to treat the fetus as a legal person." The rule according legal rights only at birth is founded on convenience rather than medical or moral principle. Whether the rule applies in a given statutory context, however, depends on the terms of the legislation. That explained decisions in which rights have been accorded the unborn child in particular contexts, such as guardianship.[55]
>
> [83] Mr Bassett accordingly argued that the abortion law modified the born alive rule by recognising the unborn child's right to life to the extent that it affords the unborn child protection from abortion. For reasons already given I prefer the view that the abortion law creates no legal rights in the unborn child, nor any mechanism by which rights found elsewhere may be enforced on its behalf. The abortion law exists to regulate and authorise abortions. Under it not only the life but also the health of the mother take precedence over the life of the unborn child. That is a compelling indication that the legal status of an unborn child differs profoundly from that of a born person. A legal right to life would be incongruous in such a law, for it would treat the unborn child as a separate legal person, possessing a status fundamentally incompatible with induced abortion. Far from modifying the born alive rule, the abortion law rests on it.

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53 At [81].

54 Citing *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA).

55 Citing *Re an Unborn Child* [2003] 1 NZLR 115 (HC); compare *Re Ulutau* (1988) 4 FRNZ 512 (HC) (where an order was made in respect of the child with effect from live birth) and see Joanna Manning "Health Care Law Part 1: Common Law Developments" [2004] New Zealand Law Review 181 at 188.

Discussion

[58] For RTL, Mr Bassett again submitted that the "born alive" rule had been modified by the abortion law. He referred to the common law origins of the rule and advanced a number of policy reasons why the born alive rule should not be determinative in the context of fundamental human rights.

[59] We do not consider that this is an appropriate occasion on which to embark on a detailed discussion of the born alive rule. The law on this topic was settled by the judgment of this Court in *Harrild v Director of Proceedings*. For present purposes, we simply reject the submissions advanced by RTL under this ground of the cross-appeal. In so doing, we are content to endorse the reasons given by Miller J in the High Court outlined above.

Does s 8 of the NZBOR Act apply to the unborn child?

[60] Section 8 of the NZBOR Act deals with the right not to be deprived of life in the following terms:

> **Right not to be deprived of life**
>
> No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

High Court decision

[61] Miller J noted that the question whether s 8 applies to the unborn child had not yet been decided.[56] He then summarised the arguments advanced by RTL that the section should apply on the basis that the unborn child may be "deprived of life" and is human. Hence, in this context of a statute dealing with human rights, the term "no one" should refer to all humans. Miller J referred to the submission by RTL that, given s 8 extends to the unborn child, the abortion law must be interpreted in accordance with s 6 of NZBOR Act, namely, that wherever an enactment can be

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[56] At [89].

given a meaning that is consistent with the rights and freedoms contained in the NZBOR Act, that meaning should be preferred to any other.

[62] Next, Miller J summarised the authorities from other jurisdictions relied on by RTL.[57] He noted that some such jurisdictions recognise a constitutional right to abortion. He referred to authorities from the United States of America,[58] Canada,[59] the European Court of Human Rights[60] and South Africa.[61] The Judge then stated:

> [98] Three points may be derived, cautiously, from this brief sketch of the law of other jurisdictions. The first is that there is nothing in the New Zealand Bill of Rights Act upon which a right to abortion, as found in the North American instruments, might be based. The right to an abortion in those jurisdictions is based upon the proposition that if forced upon a woman, the physical and psychological effects of pregnancy, childbirth and child-rearing would violate her constitutional guarantees of liberty and security of the person. The New Zealand Bill of Rights Act records no equivalent right. Presumably a right to an abortion might be asserted under the Act if continuance of a pregnancy were to imperil life or amount to cruel, degrading or disproportionate treatment, but I am not presently concerned with that possibility.
>
> [99] Second, the meaning to be attached to the term 'no one' may be derived from the provisions of the New Zealand Bill of Rights Act. Very few of the rights mentioned in the Act could possibly be exercised by or on behalf of an unborn child. It could be subjected to wrongs in the form of torture or cruel treatment, or medical or scientific experimentation. But its rights would be inseparable from those of the mother. And the right to be free of unwanted medical treatment could not sensibly be asserted on behalf of the unborn child independently of the mother. Who, if not the mother, would speak for it, and if their interests were in conflict how would those interests be reconciled?
>
> [100] Third, the absence of any definition of 'no one' and 'person' is significant, for a definition that extended to the unborn child should have been expected had the legislature meant to extend rights to it. The New Zealand Bill of Rights Act was preceded by a White Paper, which referred to the first instance judgment in *Borowski v Attorney General of Canada*, stating that the Court had held that the corresponding provision of the Canadian Charter does not does not give rights to a fetus. The issue was the

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57 At [91] to [97].

58 Dealing with the Fourteenth Amendment to the Constitution, such as *Roe v Wade* 401 US 113 (1973).

59 Dealing with s 7 of the Canadian Charter of Rights and Freedoms such as *R v Morgentaler* [1988] 1 SCR 30, *Borowski v Attorney-General of Canada* [1984] 1 WWR 15 (SKQB) and *Tremblay v Daigle* [1989] 2 SCR 530.

60 Dealing with the European Convention on Human Rights such as *Vo v France* (2005) 40 EHRR 12 (Grand Chamber, ECHR).

61 Dealing with the Right to Life provision of the Constitution of South Africa discussed in *Christian Lawyers Association of South Africa v Minister of Health* 1988 (4) SA 1113.

subject of many submissions to the Justice and Law Reform Select Committee as it inquired into the White Paper. That Committee reported:

> The result in New Zealand if our courts adopted the same view in relation to [s 8] is that the present abortion laws would not be affected by the bill of rights. In our view, that is the correct approach. Given the need for consensus on the bill of rights we consider that the bill must remain neutral on contentious issues such as abortion and the retention or abolition of capital punishment.

(Footnotes omitted.)

[63] The Judge accordingly found that it was "most unlikely" that in such circumstances the legislature would have failed to address the position of the unborn child explicitly, had it intended to extend to it the right to life. Miller J held:

> [102] I conclude that s 8 of the New Zealand Bill of Rights Act does not extend to the unborn child. It follows that s 6 of that Act does not apply to interpretation of the abortion law.

Discussion

[64] Mr Bassett presented further submissions both in writing and orally in support of this part of the cross-appeal. We do not find it necessary to decide the point. For present purposes, we simply observe that the "cautious" commentary and the conclusions of Miller J have much to commend them.

United Nations Convention on the Rights of the Child

[65] RTL also relies on the provisions of Article 6 of the United Nations Convention on the Rights of the Child. This Article provides:

> 1. States Parties recognise that every child has the inherent right to life.
>
> 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

[66] New Zealand is a signatory to this Convention. Miller J considered this Article and held:[62]

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62 At [103].

> A "child" is defined as including every human being under the age of 18 years,[63] but the Convention sets no lower limit to that definition. The Convention's preamble,[64] however, requires state parties to bear in mind the 1959 Declaration of the Rights of the Child, which provided that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth".[65] Mr Bassett naturally emphasised those words. But the wording of the Convention and its preamble leaves each state to establish for itself the appropriate level of protection accorded to the unborn child. New Zealand has retained the CSA Act following ratification of the Convention, indicating that the legislature considered that the CSA Act provided an appropriate level of protection.

[67] Despite the careful and comprehensive submission to the contrary, we see no reason to differ from the views so expressed by Miller J. In the event, there was no need for us to reach a final determination on the point.

Provision of counselling services by licensed institutions

[68] We have referred earlier to the role of the Committee in appointing or approving counselling services.[66] The provisions of s 31(2) of the CSA Act set out the factors to which the Committee must have regard when making such appointments. In this context, the provisions of s 21(1)(e) are important. The Committee, when considering an application from an institution for a full licence, shall grant a licence to that institution only if it is satisfied that "adequate counselling services are available to women considering having an abortion in the institution, and are offered to such women whether or not they ultimately have an abortion". A similar requirement applies where the Committee is considering an application for a limited licence in respect of an institution.[67]

[69] There are two aspects of the counselling issue to be addressed. The first is whether counselling services must be independent of the licensed institutions in

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63 United Nations Convention on the Rights of the Child (signed by New Zealand 1 October 1990, entered into force 2 September 1990), art 1.

64 Paragraph 9.

65 *United Nations Declaration of the Rights of the Child* GA Res 1386, UN GOAR 3rd Comm, 14th sess, 841st plen mtg at preamble, para 3 (1959).

66 At [25] and [26] above. Section 31(1) requires the Committee to appoint "suitably qualified persons to provide counselling services ...".

67 Section 21(2)(e).

which abortions be performed. The second is whether the Committee itself must appoint the counsellors or agencies.

Is independence necessary?

[70] In the High Court, RTL submitted that the Committee had failed to appoint or approve counselling services under s 31 of the CSA Act, but rather had left it to licensed institutions to provide counselling facilities and services. Further, to the extent that the forms prescribed by the Abortion Regulations 1978 contemplate counselling within licensed institutions, they are ultra vires. On this independence point, Miller J concluded:[68]

> The CSA Act nowhere prescribes that counsellors must be independent of licensed institutions. Mr McKenzie's argument rested on the supposition that counselling could not be carried out effectively if counsellors were affected by conflicts of interest, and the Royal Commission's proposals. As to the first point, it is not at all obvious that counsellors employed by District Health Boards have any incentive to encourage women to have abortions in Board facilities. I am not prepared to infer that a conflict of interest exists. Nor is there any reason to suppose that professional standards are incapable of managing any latent conflicts. The Code of Health and Disability Services Consumers' Rights applies to counsellors, and breaches of it are policed by the Health and Disability Commissioner.[69] The Committee's standards also require that all counsellors be full members of a recognised professional association. The evidence indicates that almost all counsellors belong to one of two associations,[70] each with ethical codes and complaints procedures. That being so, there is no reason to suppose that counselling facilities provided in institutions that carry out abortions are inadequate for purposes of the CSA Act.
>
> [142] As to the second point, it is true that the Royal Commission recommended that counsellors should be independent of licensed institutions.[71] If the legislature had intended to adopt that recommendation, however, it would have done so in s 21(1). That subsection prohibits the grant of a licence to an institution unless adequate counselling services are available to women considering having an abortion. It does not assume that the facilities will be associated with the institution; it contemplates rather that institutions should not be licensed unless women in that area also have access to counselling facilities. But neither does it insist that counselling services should be independent of the institutions. Such agnosticism may be attributable to a concern that women throughout New Zealand should have prompt access to appropriate facilities for abortions and counselling. As a

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68 At [141].

69 Under the Health and Disability Commissioner Act 1994.

70 New Zealand Association of Counsellors (NZAC) and Aotearoa New Zealand Association of Social Workers (ANZASW).

71 Royal Commission Report at 288.

> practical matter, it may not have been possible to provide adequate facilities independent of District Health Boards (or hospital boards, as they then were).
>
> [143] I conclude that the legislation does not require that counsellors be independent of licensed institutions. It follows that the applicant's challenge to the Abortion Regulations must also fail.

[71] RTL seeks to challenge these conclusions based on the interpretation of the relevant provisions of the CSA Act. Again, reliance was placed on the statements in the report of the Royal Commission.[72] Particular emphasis was placed on the use of the words "sufficient or adequate" in conjunction with counselling facilities in s 14(1)(e).

[72] We are not persuaded by the submissions on behalf of RTL. Nowhere in the CSA Act does Parliament require that counsellors or counselling facilities be independent of licensed institutions. Had that been intended by Parliament, the legislation would have said so. We agree with the conclusions of Miller J on this point. Accordingly, this aspect of the cross-appeal must fail.

Failure of the Committee to appoint counsellors or counselling agencies

[73] RTL also contends that the Committee has itself failed to make the appointments of counsellors or counselling agencies. The gist of the concern by RTL arose from correspondence in March 2004 from the Committee stating that the Committee had never used the powers conferred on it by s 31(1) of the CSA Act to "directly" appoint counsellors or approve any agency for the provision of counselling services. The Committee had no direct knowledge of the terms of the employment contract that existed between counsellors and District Health Boards. The involvement of the Committee was rather by way of "practical input" involving the setting of standards of practice for counsellors and providing ongoing voluntary training by the Counselling Advisory Committee set up by the Committee under s 15.

[74] On this point, Miller J concluded:

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[72] At 288.

> [147] When the legislation is considered as a whole, it is apparent that the Committee is to appoint counsellors or counselling agencies to the extent necessary to ensure that there are sufficient and adequate facilities throughout New Zealand. Only if they are not sufficient or adequate must it appoint counsellors or agencies itself. So, for example, when licensing an institution the Committee must begin by assessing the counselling facilities available to women having abortions there. If they are both sufficient and adequate, no further action is required. If they are not, the Committee shall appoint counsellors or counselling services itself.
>
> [148] Accordingly, the Committee's failure to address the appointment of counsellors or agencies itself is not necessarily contrary to the legislation. It would be so only if the Committee had failed to satisfy itself that there are sufficient and adequate facilities throughout New Zealand. Nor is it inappropriate for the Committee to assess counselling services when granting institutional licences. By doing so it ensures that there are sufficient facilities available.

[75] We have considered the submissions presented by RTL in support of this ground of the cross-appeal. We are not persuaded that the conclusions of Miller J are in error. RTL cannot therefore succeed on this ground.

Are certifying consultants obeying the abortion law?

[76] This question encompasses the three issues on appeal identified at (e) to (g) of [43] above, which are best considered together. Each arises as part of the appeal by the Committee and is directed towards challenging the conclusions of Miller J on the scope of the functions and powers of the Committee.

High Court decision

[77] It is convenient first to set out the relevant parts of the judgment that the Committee challenges. They are as follows:

> [5] ...
>
> (c) There is reason to doubt the lawfulness of many abortions authorised by certifying consultants. Indeed, the Committee itself has stated that the law is being used more liberally than Parliament intended.
>
> (d) The Committee has misinterpreted its functions and powers under the abortion law, reasoning incorrectly that *Wall v Livingston* means it may not review or scrutinise the decisions of certifying consultants. I find that it may do so, using its power to require

> consultants to keep records and report on cases they have considered, for the purpose of performing its statutory functions. Those functions include keeping under review all the provisions of the abortion law, as defined, and their operation and effect in practice, reporting to Parliament on the operation of the abortion law, keeping the procedure for authorising abortions under review, ensuring the administration of the abortion law is consistent throughout New Zealand, and appointing and removing consultants. The Committee may form its own opinion about the lawfulness of consultants' decisions to the extent necessary to perform these functions.

[78] Despite the above conclusions, Miller J refused mandatory relief.[73] He did so on the basis, among other things, that the Committee's stance involved a misunderstanding of its functions and, having been put on notice of apparent non-compliance, it would form a view under s 14(1)(a) of the CSA Act and would record its conclusions in its annual report to Parliament. The Judge also found in the declaratory relief judgment that such relief should be declined. He held that:[74]

> ... the Committee is supervised by Parliament, which can hold it to account if it does not administer the law honestly and is the proper body to assess where the public interest lies in this field. Construction of legislation is the province of the Court, and the Court's analysis of the legislation may complement Parliamentary oversight, but to go further by making declarations is to risk assuming a function that Parliament has reserved for itself. In particular, the question whether consultants are complying with the abortion law falls to be answered by the Committee, in the first instance, and by Parliament as the body to which the Committee reports.

[79] The Judge's conclusions regarding the Committee's functions concerning certifying consultants' compliance with s 187A of the Crimes Act were based on an analysis of several of the functions and powers set out in s 14 of the CSA Act. He considered, for example, that s 14(1)(a) is expressed "in the widest terms" and that the subsections contemplates that the Committee "will keep under review certifying consultants' compliance with s 187A".[75] With respect to s 14(1)(h), the Judge accepted that the subsection is confined to the procedure prescribed under ss 32 and 33.[76] Dealing with s 14(1)(i), the Judge referred to the use of the defined term "abortion law" as extending to the administration of the application of the exemptions in s 187A of the Crimes Act. He held that the natural meaning of

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73 At [13].
74 At [154].
75 At [113].
76 At [114].

"administration" in s 14(1)(i) was apt to include enforcement of the provisions of the abortion law.[77]

[80] The Judge noted that obligations on certifying consultants to keep records and submit reports to the Committee arise from s 36 of the CSA Act. Miller J's conclusions as to the nature and scope of such obligations are as follows:

> [119] Section 36 requires that a consultant must keep such records and submit such reports "relating to cases considered by him and the performance of his functions in relation to such cases" as the Committee may from time to time require. That must include records and reports concerning their medical judgements about the s 187A criteria, to the extent that the Committee's s14 functions extend so far. I have concluded that ss 14(1)(a) and (k) do require that it review the operation of the abortion law, including s 187A, while s 14(1)(i) requires that it take steps to ensure that consultants administer the abortion law, including s 187A, consistently throughout New Zealand. Each of these functions might require that it demand reports about consultants' decisions, including where necessary decisions in particular cases. I observe that this approach is consistent with the recommendations of the Royal Commission, that full records should be kept and regular reports submitted to the Committee on all requests for abortion, all requests granted, and any relevant personal details. For reasons mentioned below, it is also consistent with the Committee's function of appointing and removing consultants, which is not referred to in s 14.
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> ...
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> [125] I do not accept that the makeup of the Committee points to a narrower construction of s 36 or that its resources are relevantly constrained. On the contrary, it is not a lay tribunal and medical specialists may be appointed to it, it is empowered to appoint advisory and technical committees and co-opt specialist advice, Government departments may arrange work or services for it, and the Ministry of Justice must supply secretarial and clerical services.[78] Nor would reviewing consultants' performance invariably involve second-guessing medical judgements. That would depend on the circumstances that led the Committee to inquire. It might be necessary to inquire into the detail of one or more diagnoses if the issue was whether a consultant had acted in bad faith, for example. But the Committee has previously reported that the law is not being administered as Parliament intended, evidently reaching that conclusion without a comprehensive investigation of the work of all consultants. And because the CSA Act treats decisions to authorise or refuse abortions as medical in nature, there must be room for the exercise of judgement about both diagnosis and degree of risk. A review might be confined to ensuring that decisions were properly documented, that they rested on recognised diagnoses, and that they were not plainly unreasonable.

[81] In summary, Miller J's conclusions on this part of the case were:

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77 At [116].

78 Sections 15–17.

> [135] I have recorded my conclusions in para [5] above. By way of elaboration, I reach no final conclusion on the question whether certifying consultants are complying with the abortion law. It is for the Committee to assess these matters. I accept that the Committee is on notice that certifying consultants collectively are apparently employing the mental health ground in much more liberal fashion than the legislature intended, and it also seems that there may be inconsistencies in their application of the law.
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> [136] The applicant has failed to show that the procedures in ss 32–33 of the CSA Act extend to compliance with the substantive criteria in s 187A, and there is no substance to the criticism that the Committee has failed to keep the procedures themselves under review. As noted above, in 1996 it invited the legislature to change the procedures. ...

The nature of the Committee's functions

[82] The agreed issues (e) to (g) outlined at [43] raise for determination the question whether ss 14(1)(a), (i) and (k), together with the requirements of s 36, empower the Committee to review or scrutinise the decisions of certifying consultants and form its own view about the lawfulness of their decisions. Miller J reached an affirmative conclusion to this question.[79]

Appellant's submissions

[83] Ms Gwyn, for the Committee, challenges the breadth of the Judge's ruling. She submits that the requirement in s 14(1)(a) to "keep under review" must be interpreted as review at a general level, rather than scrutiny of individual decisions in particular cases. Ms Gwyn submits that, as with other statutes that use similar wording of keeping under review particular laws all impose obligations to keep the law under review as opposed to individual decisions made under the law.[80]

[84] Ms Gwyn also submits that the Judge's conclusion is inconsistent with the tenor of the Act read as a whole and the judgment of this Court in *Wall v Livingston*. In that context she submits that the Judge's decision raises insurmountable practical difficulties. The conclusions that certifying consultants are not required to give reasons for their decisions (other than referring to the statutory ground) and the fact

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79 At [119].

80 Counsel cited s 5(1) of the Law Commission Act 1985, s 10(1)(b) of the Securities Act 1978, s 8(1)(a) of the Takeovers Act 1993 and s 13(1)(e) of the Children's Commissioner Act 2003.

that the Committee cannot insist that certifying consultants identify the specific diagnosis and its severity, must apply equally in respect of reports specifically sought by the Committee under s 36, as to the certificates required in respect of each decision, namely, the information in forms 3A and 3B of the Abortion Regulations. She emphasises that the Committee does not have access to the women in respect of whom the certifying consultants have made decisions because certifying consultants are required by s 36(2) to anonymise their reports.

[85] With respect to s 14(1)(i), Ms Gwyn submits that the focus is on consistency of approach throughout New Zealand, again with a power of general overview, rather than requiring the Committee to review or examine individual decisions. Further, the requirement to ensure the effective operation of the Act and the procedures thereunder takes its flavour from the requirement to ensure consistency. Additionally, she submits these words are general and do not mandate examination of decisions involving medical judgment by certifying consultants.

[86] Ms Gwyn submits that s 36 of the Act is framed as an obligation on certifying consultants, to keep such records and submit to the Committee such reports as the Committee may from time to time require. Ms Gwyn emphasises that s 36 does not specify in advance the kinds of reports that certifying consultants may be required to produce for the Committee. That is left to the Committee for determination as to what is required from time to time. But s 36(2) expressly provides that the patient's name and address must not be disclosed to the Committee.

[87] As to the necessity for the Committee to obtain a report in an individual case, Ms Gwyn submits there is no indication in the CSA Act as to what might trigger this requirement. She posits the situation where a woman had had multiple abortions or where the certifying consultants involved in the case had authorised "too many abortions".[81] She contends that this would require the Committee to make a value judgment as to the proper proportion of authorisations per consultant or the proper proportion of abortions that might be justified on the mental health ground. But here

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[81] She cited Miller J's findings at [56] that there had been high numbers of abortions authorised by certain consultants.

the Committee has no direction or mandate under the CSA Act, nor the expertise to make such judgments.

[88] Finally, Ms Gwyn submits that the suggestion that the Committee could remove certain certifying consultants based on its review of individual cases is fraught with difficulty.[82] This is because of the absence of express statutory authority to interview a patient or at the very least review her full clinical file. Thus the Committee would be unable to form its own view about whether the abortion was lawfully authorised and, if not, whether the certifying consultants assumed failure to apply correctly the test in s 187A of the Crimes Act was such as to justify the termination of his or her appointment. Ms Gwyn submits that the only statutory context in which administrative bodies are expressly charged with the function of reviewing clinical decision making is in the medical disciplinary area under the Health Practitioners Competence Assurance Act and the Health and Disability Commissioner Act. Under these statutes, the Health Practitioners Disciplinary Tribunal and the Health and Disability Commissioner have broad powers to obtain clinical records, investigate complaints and examine witnesses.

Submissions of RTL

[89] Mr McKenzie supports the Judge's conclusions as a correct analysis of the Committee's power to review the decisions of certifying consultants in individual cases. In particular, he argues that the Judge correctly interpreted and applied the Committee's functions under ss 14(1)(a), (i) and (k), as well as s 36. Further, he contends that the Judge correctly applied the statements of principle in *Wall v Livingston*, which are properly limited to review prior to an abortion being carried out and do not apply to after-the-fact review.

[90] Mr McKenzie accepts the proposition in *Wall v Livingston* that there is an absence of any direction in the CSA Act or the Regulations requiring any reasons to be given by the certifying consultants for the authorisation, other than reference to

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[82] A finding which she contends is implicit in [119] of Miller J's judgment.

the statutory exceptions within s 187A of the Crimes Act.[83] He also accepts that no reasons need to be given in the certificate in the prescribed form authorising an abortion. But he contends that certifying consultants have a quite separate obligation under s 36 to record and submit to the Committee such reports relating to cases considered by them and the performance of the certifying consultant's function as the Committee may from time to time require. He argues that there is nothing in s 36 to suggest that, in responding to the Committee's request for a report, no reasons are to be given. To the contrary, certifying consultants are expressly required to provide reports on cases considered by them. He submits that such reports would lack substance and there would be little utility in terms of s 36 if the Committee could not request particulars including the diagnosis used in individual cases.

[91] Mr McKenzie cites in support s 45 of the CSA Act, which requires a record to be made by every medical practitioner who performs an abortion or other medical procedure that could lead to an unnatural miscarriage and the reasons therefor. A copy of such record is to be forwarded to the Committee within a month after performing the abortion or procedure. Like s 36(2), no record shall give the name and address of any patient. Mr McKenzie draws a distinction between the matters to be contained in the certificate and the records to be kept and made under ss 36 and 45. He submits that under s 36 at least, the Committee may require certifying consultants to keep a detailed record of the diagnoses and their severity.

[92] Such obligations, Mr McKenzie contends, do not mean that the Committee has any input into decisions made by the certifying consultants in any individual case. Rather, the Committee is empowered to require consultants to keep a record of the decision and the diagnosis that the Committee may require after the event. Accordingly, this would mean that the Committee can influence the approach of the certifying consultants as to the way in which they carry out their functions in future cases. Mr McKenzie endorses the observation of Miller J that:[84]

> One would expect [the consultants] to respond to informed criticism and to recognise a risk that serious non-compliance will result in disciplinary

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83 At 739. Mr McKenzie refers to s 33(1) as the likely basis for that observation.

84 At [121].

> action. However, they remain free to exercise their clinical judgment in any particular case.

[93] Mr McKenzie cites as an example the way in which the Committee used the opinion of Professor Simpson, a consulting psychiatrist (who provided the Committee with opinions on the diagnosis of "reactive depression") to influence the way in which consultants approach their decision making functions in relation to the use of recognised diagnosis when citing depression as a ground for an abortion. Thus, he contends that if a consultant, contrary to the Committee's guidance, used the outdated diagnosis "reactive depression", the Committee could question the use of that diagnosis and direct the use of the recommended diagnostic nomenclature.

[94] In summary, Mr McKenzie supports after-the-fact review and submits that, coupled with the Committee's power to remove consultants under s 30(7) of the CSA Act, it should mean that there may be some circumstances where information made available to the Committee under s 36 leads it to inquire further into the detail of one or more diagnoses. Such avenue of inquiry could be relevant to whether a consultant may have acted in bad faith or whether the medical or clinical performance was such as to lead to removal from the list of certifying consultants under s 30(7) of the CSA Act.

The scope of Wall v Livingston

[95] To deal with these submissions, we first examine the approach of this Court in *Wall v Livingston*. There, the facts involved an application for judicial review by a doctor of the decision of two certifying consultants who had authorised an abortion for a teenage girl. The doctor was a paediatrician who had treated the girl for a heart complaint but played no part in the consideration of any aspect leading to the decision to authorise the abortion. The doctor formed the view that there were no grounds under the CSA Act to justify the carrying out of the abortion. Both the High Court and this Court found that the doctor lacked standing to challenge the decision by way of judicial review. It was not a case where bad faith had been established.

[96] In terms of the statutory scheme, this Court decided that a comprehensive analysis was not required. It noted that the starting point for analysis is the series of exceptions in s 187A of the Crimes Act which prevent the termination of a pregnancy being branded as unlawful. But typically the exceptions will operate only if prior authority has been given for performance of the abortion by two independent medical consultants appointed under the Act.[85] The purpose of s 30(5) dealing with appointment of consultants, was to "emphasise the rigid attitudes that must be avoided" and hence the purpose is to ensure that the Committee produces a panel of certifying consultants "able and qualified to make the determinations in a clinically detached way against medical expertise and experience".[86]

[97] With reference to the functions of the Committee, the Court observed that the Committee has:[87]

> ... a responsibility for the *general oversight* of the work of certifying consultants throughout New Zealand and the way in which the purposes of the Act are working out in practice. But what is important and of significance in this case is that the [Committee] is given no control or authority or oversight in respect of the individual decisions of consultants. That deliberate absence of any review process inside the Act itself is probably founded upon three considerations. First, special attention has been given in the Act to the preservation of anonymity of the woman patient. Secondly, the whole process of authorisation appears designed to place fairly and squarely upon the medical profession as represented in any particular case by the certifying consultants a responsibility to make decisions which will depend so very much upon a medical assessment pure and simple. And thirdly, there are the adverse medical implications which could arise from the passage of time should such a determination be easily open to review. Thus it can be said that the Act itself has put aside the dangers and anxieties and frustrations together with moral as well as medical argumentation that might develop by permitting the substitution of one set of medical opinions for others as the result of some generally available process of review or appeal.
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> (Emphasis added.)]

[98] We agree with those principles. Although the case itself concerned a challenge to the assessment of the two certifying consultants in a particular factual context, we are satisfied that the observations made by this Court about the

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85 At 738.
86 Ibid.
87 Ibid.

"authorising machinery" of the CSA Act are of general application.[88] The same may be said about the repeated references to the critical medical decision-making being "clinically detached", "a medical assessment pure and simple" and "a completely detached medical judgment". It follows that we disagree with the view expressed by Miller J that the case was concerned solely with decisions to authorise abortions in particular cases.[89] We consider that the observations made by this Court have relevance when it comes to analysing the functions and powers of the Committee. This approach is underscored by the statement in *Wall v Livingston* that the Committee:[90]

> ... is kept quite isolated from any individual case that might be dealt with by such consultants. It would be inconsistent with the whole scheme and purpose of the Act if it were possible to introduce into such a matter anybody other than the woman herself and those very few persons who have been given the statutory responsibilities for screening her request for an abortion.

[99] This Court also observed that the CSA Act reflected the clear intention that "the question as to whether or not an abortion should be authorised is to be left entirely to the certifying consultants, bad faith alone excepted".[91] We agree and will further discuss *Wall v Livingston* when we outline our conclusions.

Our evaluation

[100] We are satisfied that none of the functions or powers of the Committee, as set out in ss 14(1)(a)(i) or (k), s 36 or any of the statutory provisions relied on by RTL, either singly or in combination, empower the Committee to review or scrutinise the decisions of certifying consultants in relation to either the authorisation or refusal of an abortion in individual cases. It follows that it is not open to the Committee to form its own opinion about the lawfulness, including the clinical correctness, of the decisions of the certifying consultants in particular cases. We agree with the submission of Ms Gwyn that this conclusion is consistent with the tenor of the Act

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88 At 738.

89 At [66]. Later, at [123], Miller J drew a distinction between an application to review a decision before an abortion was carried out and review "after-the-fact", which he said the Court was not dealing with. He added: "Had it been asked to consider that question, it is unlikely that it would have spoken so unequivocally".

90 At 740.

91 Ibid.

read as a whole and the judgment of this Court in *Wall v Livingston*. We respectfully disagree with the view of Miller J and the dissenting judgment of Arnold J to the opposite effect.[92]

[101] Like this Court in *Wall v Livingston*, we consider that the Act characterises the decision of certifying consultants as a "medical assessment pure and simple". The legislation has been careful to immunise the Committee from involvement in decisions made by health professionals on medical and clinical grounds in particular cases. Moreover, certifying consultants are not required to give reasons for their decisions, beyond identifying the applicable statutory exception in s 187A of the Crimes Act. The Committee cannot require certifying consultants to specify in the authorising certificates the specific diagnosis and its severity.

[102] We agree with Ms Gwyn's submission that a power of after-the-fact review would cause real practical difficulties. It would be illogical if the statute, while mandating that certifying consultants are not required to give reasons for their decisions (other than by reference to the applicable statutory ground) was to be interpreted, through an expansive reading of s 36, to require certifying consultants to stipulate the specific diagnoses and severity, together with other medical and clinical details, as part of the records to be kept and submitted to the Committee. Not only would the approach be internally inconsistent within the CSA Act, but it would mean that a provision dealing with the formalities of record keeping was the statutory driver of functions and powers of the Committee. We do not see that as being the legislative intention, particularly when the Committee's functions and powers are expressly addressed in s 14.

[103] But there are other reasons for rejecting this approach. First, the nature and scope of the records to be kept and maintained pertaining to individual cases are likely to be established in the first instance by the professional obligations of the medical practitioner concerned. Such obligations would fall to be administered and enforced by the Health and Disability Commissioner[93] and various other medical

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92 As explained by Miller J at [5], [113] to [116], [119] to [121], and [135] to [136].

93 Health and Disability Commissioner Act 1994, s 14(1)(e).

authorities[94] in the exercise of their respective statutory functions. Second, the disclosure of records kept has the potential to impact on the privacy of both the patient and the relevant medical practitioner or provider. Again, such issues would normally be considered or dealt with by the Heath and Disability Commissioner under the statutory procedures which ensure the privacy of all involved and afford fairness and natural justice rights to medical personnel about whom complaints are made.[95] Third, the disclosure of the records kept pursuant to s 36 may only tell part of the story. It may be critical for other relevant information to be obtained from the patient or other persons who have been supporting her. Fourth, the disclosure of such information may well give rise to disciplinary issues that are properly the province of the Health and Disability Commissioner or other medical authorities.[96] We consider that the Committee would not be properly equipped to deal with such matters.

[104] In this context, the structure of the Act is highly relevant. Not only does the Committee not have express statutory power to investigate the actions of medical practitioners and certifying consultants in particular cases, but the Committee's statutory functions are silent on issues of establishing professional and ethical obligations, investigating alleged breaches of such obligations, enforcing standards and the administrative and procedural framework to deal with these matters. We are satisfied that Parliament intended that these areas would continue to be the province of the Medical Council and the Health and Disciplinary Commissioner. Moreover, any alleged breach of the criminal law would fall to be dealt with by the police, with appropriate protections being provided to those involved through criminal processes and procedures.

[105] In contrast to this absence of statutory provisions, when it comes to licensing of institutions, the CSA Act has a relatively detailed machinery for dealing with applications, the giving of reasons and providing for possible legal challenges.[97] Such institutions, of course, fall outside the medical discipline regime. Unless the

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94 Such as a Professional Conduct Committee or the Health Practitioners Disciplinary Tribunal under Part 4 of the Health Practitioners Competence Assurance Act 2003.

95 Complaints to the Commissioner and discipline matters are dealt with in Part 4 of the Health Practitioners Competence Assurance Act.

96 Such as those mentioned in fn 94 above.

97 As discussed at [20]–[24] above.

Committee is responsible for those institutions, there is no other body that will supervise them. This is to be contrasted with the Committee's role with respect to certifying consultants, where there is a disciplinary regime in place to deal with any wrongful conduct on their part.

[106] We consider that the obligations in s 36 of the CSA Act are primarily on certifying consultants to keep records required by the Committee. It will be for the Committee to assess from time to time what records it requires for its purposes and functions and the nature of the records that it requires certifying consultants to submit. Thus s 36 ought not to be used indirectly to empower the Committee to review or scrutinise the decisions of certifying consultants.

[107] We do not regard s 45 of the CSA Act, relied on by RTL, as providing any support for the contrary view. Section 45 provides a statutory obligation on medical practitioners, in addition to those obligations in s 36, to make a record relating to the performance of an abortion or other related medical or surgical procedure and to record the reasons therefore. Thereafter there is a requirement to send such a record to the Committee.

[108] Finally, we are satisfied that the provisions of ss 14(1)(a)(i) and (k), together with s 36, must be interpreted consistently with the views of this Court as expressed in *Wall v Livingston*. We see the power of review in s 14(1)(a) as a operating at a general level as envisaged by the Royal Commission. Thus the Committee may not intervene in the individual decisions of certifying consultants, absent bad faith. We do not see the power of the Committee to revoke the appointment of a certifying consultant as requiring a different approach.[98] That power is available to the Committee to be exercised where, in a clear case, bad faith is demonstrated or where for some other reason an early or urgent revocation is required before the expiry of any annual appointment period.[99] A practical example would be the need for immediate revocation pending the outcome of disciplinary, or possibly criminal proceedings involving a certifying consultant.

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98 Section 30(7).
99 Section 30(6).

[109] It follows from the above that the related issue concerning the finding of Miller J that after-the-fact review is not inconsistent with *Wall v Livingston* is incorrect. We do not repeat our conclusions set out in the previous section discussing that case.

How has the Committee discharged its functions?

[110] There is no doubt that in the 32 years since the passage of the CSA Act, the Committee has taken seriously its obligation to report annually to Parliament as required by ss 14(1)(k) and 39.

[111] Early reports typically provided a short comment on each aspect of the abortion process that the Committee is required to review, followed by detailed statistics as to the abortions performed in New Zealand and overseas. As early as 1979 the Committee noted that the abortion law was being interpreted in a "very liberal" way in some parts of the country,[100] particularly with regard to the increasingly-used mental health ground for abortion. It made a further observation as to the state of the law in 1986 that "[d]espite criticism of being a liberally interpreted law, the [CSA Act] has resulted in New Zealand recording almost the lowest abortion rate of developed countries from which reliable statistics are available."[101] By 1999, the Committee observed that "the abortion law has not fulfilled the expectations of the legislators because it has been interpreted more liberally than expected and has not resulted in fewer abortions".[102] It has repeated such observations in subsequent reports.

[112] The Committee has, since the beginning, made observations and recommendations across a wide range of topics, from technical suggestions to improve the forms used by certifying consultants, to expressing disappointment at the low participation rate of the medical profession, to the need for greater contraception education and funding to reduce the abortion rate. From the outset, the

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100 GCPA Wallace, BW Grieve and H Thomson *Supplementary Report of the Abortion Supervisory Committee* (Wellington, 1979) at 8, repeated in 1986.

101 HJ White, SC Hawes and D Heginbotham *Report of the Abortion Supervisory Committee for the year ended 31 March 1986* (Wellington, 1986) at 5.

102 CS Forster, MM Lamb and J Whittaker *Report of the Abortion Supervisory Committee for 1999* (Wellington, 1999) at 5.

Committee has consistently identified to Parliament the number of unwanted pregnancies as a concern, even when New Zealand's abortion rate was well below that of comparable countries, and made recommendations as to reducing the need for abortion.

[113] In 1994, Parliament was critical of the sketchy nature of the Committee's reports. This concern was promptly addressed and reports have become more comprehensive since that date.

[114] In 1996 Parliament engaged meaningfully with the Committee's reports for the first time when the Committee appeared before the Justice and Law Reform Select Committee, which in turn reported to Parliament on the abortion law.[103] In its 1996 annual report, the Committee observed:[104]

> The [Select Committee] Report has drawn to the Parliament's attention its lack of response to the Committee's recommendations made over the last 18 years. During the inquiry the Committee was subject to intense scrutiny. Considerable effort and research was put into providing the inquiry with relevant information and opinion. The Committee expects that the new MMP Parliament to act on the Committee's recommendations and not allow the report to be put aside for political convenience.
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> …
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> The Committee believes that if New Zealanders wish to have openness and honesty in contemporary New Zealand society then it is important that our legislation reflects the reality of what is happening.
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> …

[115] The 1996 annual report also recorded the Committee's understanding that the task of certifying consultants involved medical judgment and that the Committee had no authority or oversight over individual decisions.[105] It also noted that the Select Committee had acknowledged that the Committee members "can do no more or less

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103 *Inquiry into the Abortion Supervisory Committee: Report of the Justice and Law Reform Committee* (1996).

104 CS Forster, CPT Hutchison and MM Lamb *Report of the Abortion Supervisory Committee for the year ended 30 June 1996* (Wellington, 1996) at 6.

105 At 7.

than the Act requires them to do" and that "it is Members of Parliament who have it within their powers to effect a change to the abortion law".[106]

[116] Significantly, the 1996 annual report made a number of recommendations for reform of the abortion law.[107] Amongst recommendations were a law change to allow socio-economic factors as a consideration when determining whether the grounds for an abortion were met, the implementation of a long-term strategy to reduce unwanted pregnancies, the introduction of sex education for young adults, a review of the CSA Act, and that all medical practitioners be allowed to certify abortions. As a result, Parliament made modest changes to the law, mostly concerning the procedure under ss 32 and 33 of the CSA Act.

[117] In 1997, the Committee reported on the need to address New Zealanders' failure to take personal responsibility for their sexual behaviour and reiterated its longstanding recommendation that Parliament develop and fund a long-term strategy to reduce unwanted pregnancies.[108] In 1998, its report detailed recommendations for a review of the abortion law and observed that the Minister of Health had stated that the law did not square with practice and that New Zealand had abortion on demand, but that it was a politically sensitive issue.[109] In 1999, the Committee reported on its "considered opinion" that abortion was a matter for the woman and her doctor and the law should be changed to reflect this. It recorded its disappointment that Parliament had not acted on the Select Committee report, nor on any of the legislative reforms recommended by the Committee over the last 11 years. It also recorded the refusal of the Minister of Health to meet with the Committee and its belief that his "don't rock the boat" attitude was damaging to New Zealand women.[110]

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106 At 7, citing *Inquiry into the Abortion Supervisory Committee* at 11.

107 At 13.

108 CS Forster, CPT Hutchison and MM Lamb *Report of the Abortion Supervisory Committee for 1997* (Wellington, 1997) at 5–6.

109 CS Forster, MM Lamb and J Whittaker *Report of the Abortion Supervisory Committee for 1998* (Wellington, 1998) at 7–8.

110 At 5.

[118] In 2000, the Committee again recommended reform and made its observations in strong language:[111]

> The Act is outdated in its language and content. Its procedures are too complex and are not being followed as the law intended. Its provisions for providing legal, safe abortions are not being consistently applied throughout the country. The Act is demeaning to women in requiring a medical procedure to be considered under the Crimes Act. It is also misleading that 98.2 percent of abortions have to be granted under the mental health provisions.

[119] The Committee has made similar observations and recommendations in its reports to Parliament every year since.

[120] It is fair to observe that the Committee has reported to Parliament assiduously over many years and has repeatedly given its honest opinion as to the state of the law. The perceived dichotomy between the legal requirements and the practice of certifying consultants could not have been made plainer. The Committee's clear, comprehensive recommendations for reform have fallen on deaf ears. Given the Select Committee's acknowledgment that the Committee had no power to review individual decisions and that it was for Parliament to change the law, an impasse has been reached. The question that remains is whether the Committee could or should have done more to discharge its function in s 14(1)(a) "to keep under review all the provisions of the abortion law, and the operation and effect of those provisions in practice".

What information does the Committee receive and does it conduct audits of such information?

[121] RTL alleges that the Committee has failed to collect, act on or audit information in order to discharge its statutory functions properly. This allegation was not pleaded but arose in the course of argument before us in relation to the discussion on the Committee's performance of its functions under ss 14(1)(a), 14(1)(h) and 14(1)(i). We also consider the scope of the pleadings in more detail

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[111] CS Forster, MM Lamb and J Whittaker *Report of the Abortion Supervisory Committee for 2000* (Wellington, 2000) at 5.

when discussing the draft judgment of Arnold J below. Nevertheless, in this section we deal with the information that the Committee receives and how it uses it.

[122] In discharge of its function under ss 14(1)(b) and 14(1)(d) with regard to institutions where abortions have been performed, the Committee aims to visit, and generally does visit, each institution over a two-year cycle. It maintains a register of licensed institutions and the services they offer, relevant medical employees and any problems experienced, and requires institutions to complete a questionnaire when applying for or renewing an annual licence. It declines applications for renewal where the institution does not meet the statutory criteria set out in s 21 and has done so five times since 2001, including based on information in the questionnaire.

[123] It appoints two counselling advisors who provide support and training to counsellors, monitor the quality and availability of counselling in institutions, assess the adequacy of counselling services in a particular area, and report their findings back to the Committee (s 14(1)(e)).

[124] With regard to the appointment and monitoring of certifying consultants, the Committee receives applications from medical practitioners who wish to be added to the list (which the Committee is required to maintain under s 30(1)) and sends them an application form, the appointment criteria and the relevant legislation and forms. It consults the New Zealand Medical Association as to a candidate's suitability before making a decision as to appointment (s 30(3)) and now requires a copy of the candidate's practising certificate. It takes steps to ensure that certifying consultants are providing diagnoses in accordance with current medical opinion, for example it wrote to certifying consultants in 1996 with concerns that consultants continued to use the outdated diagnosis "reactive depression" when certifying an abortion under the mental health ground. It wrote again to consultants in 2006 on a similar basis. Since 2005, it has taken steps to ensure consultants certifying a very low number of abortions are sufficiently familiar with the proper procedure.

[125] Certifying consultants are required to complete a certificate authorising an abortion containing the patient's personal details, which is given to the institution

where the abortion is carried out.[112] They must also complete a report without identifying details and return it to the Committee every time they authorise or decline to authorise an abortion.[113] They must give the patient's socio-demographic information, her pregnancy history (including previous live births and abortions) and state whether they have interviewed or examined the patient. They must state the ground under s 187A upon which the abortion is authorised and may give reasons. They may also give reasons if the abortion is not authorised. The surgeon who performs the abortion must complete a similar form on behalf of the institution where the abortion is carried out, including giving the patient's "domicile code" (that is what part of the country she normally resides in).[114] The Committee checks that the forms have been filed in correctly and completely and returns them for correction if they are not. It then compiles the data received, including statistics as to abortions certified as against abortions actually carried out.

[126] The Committee receives detailed reports from the Health and Disability Commissioner as to complaints made about medical professionals and counsellors involved in the abortion process, of which there have been three since the establishment of the Commissioner's office. Each was investigated thoroughly with particular regard to the rights of the complainant and medical personnel involved, under the procedure set out in the Health and Disability Commissioner Act. On at least one occasion there was an audit in response to one such complaint by a woman who had had an abortion and alleged that she had not been given sufficient information before doing so. The Committee carried out the audit in October 1999 to determine the likelihood of a woman having an abortion without ever having been interviewed by any of the certifying consultants. The result was that it was "unlikely" that such would ever happen.

[127] The Committee also refers abortions involving breach of the Crimes Act to the police. For example, it recorded in its 2004 annual report to Parliament that it had been notified of four illegal abortions, some involving medical practitioners, and had referred these to police.

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112 This is form 3A or 3B, prescribed by the Abortion Regulations 1978 pursuant to ss 33(1) and 33(5) of the CSA Act.

113 This is not required by the CSA Act or the Regulations and is of the Committee's own initiative.

114 This appears to be required by s 45 of the CSA Act.

[128] There may have been other audits but, as we have noted above, the Committee's failure to collect, collate and audit information was not pleaded, and the Committee was not put on notice of the need to give evidence of any such audits before the High Court.

[129] Because the issue of alleged failure to collect and act on information and carry out audits was not pleaded, we do not propose to make factual findings on the point. To do so would be unfair to the Committee, which has not had a chance to give evidence as to any audits it carries out. Such evidence as there was in the affidavits regarding audits was fortuitous and not directed towards any particular allegations. By way of general guidance to the Committee only, we consider that the combined effect of ss 14(1)(a), 14(1)(h) and 14(1)(i), together with s 36, could be used by the Committee to gather information where it considers that appropriate, to analyse it and to carry out appropriate audits. It may not, of course, review the clinical or medical judgment of medical practitioners in individual cases.

The evidential findings

[130] Because the grounds of the Committee's appeal include challenges to certain findings and observations of Miller J, we will deal with these points. Issues (f) and (g) in [43] above related to certain factual findings made by Miller J. We have approached our task on appeal in a somewhat different way to that undertaken in the High Court. We have treated the central issue in the case as one of statutory interpretation. In view of our conclusions as to the nature of the Committee's functions and powers, and the scope of *Wall v Livingston*, we therefore propose to draw some brief conclusions on the challenged passages.

The approval rate for abortions

[131] Miller J made an observation that the statistics and the Committee's comments over the years (since 1994) "give rise to powerful misgivings about the

lawfulness of many abortions".[115] In so stating, he was echoing the comments of this Court in *Bayer v Police* when it said:[116]

> We have no doubt that the supervisory committee's statistics about abortions performed on mental health grounds and its critical comments [in its 1988 report the committee had spoken of terminating potentially normal pregnancies on pseudo-legal grounds] could give rise to misgivings about the lawfulness of many abortions carried out in New Zealand.

[132] Having considered some statistics from other jurisdictions, Miller J commented as follows:[117]

> The approval rate seems remarkably high, bearing in mind that under s 187A the consultants must form the good faith opinion that continuance of the pregnancy would result in serious danger to the mother's health.

[133] It has not been necessary for us to consider the evidence on this aspect of the case. We merely record that Ms Gwyn submits that Miller J's statements were expressed in sufficiently definite terms as to have serious potential repercussions for certifying consultants and the administration of the abortion law.

[134] Given our conclusions on the nature and scope of the Committee's functions and powers, we consider that factual findings or observations of the type made by Miller J were inappropriate. No such findings should have been made.

Reason to doubt the lawfulness of many abortions

[135] The appellant also challenges the finding of Miller J that: "There is reason to doubt the lawfulness of many abortions authorised by certifying consultants".[118] Nevertheless, later in the judgment, Miller J stated that he had reached "no final conclusion on the question whether certifying consultants are complying with the abortion law".[119] Ms Gwyn expressed concern about such findings both in terms of jurisdiction and as to the accuracy of the factual basis for them.

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115 At [56].
116 *Bayer v Police* [1994] 2 NZLR 48 (CA) at 52.
117 At [56].
118 At [5](d).
119 At [135].

[136] With respect to the findings that cast doubt on the lawfulness of the decisions of the certifying consultants, given the conclusions we have reached on the main ground of appeal, such findings ought not to have been made. We consider that the appropriate channels of investigation would involve either a complaint by a patient or potentially by the Committee itself, in which case the Health and Disability Commissioner would become involved. Alternatively there might be a complaint to the police, in which case the police would investigate the matter.

[137] Accordingly, we are satisfied that the findings as to lawfulness of the decision making of the certifying consultants or judicial comment about New Zealand having abortion "on request" ought not to have been made in the circumstances of this case. We conclude that they are of no lawful effect.

Observations on judgment of Arnold J

[138] We have considered the draft judgment written by Arnold J. The judgment refers to s 14 as contemplating that it is a function of the Committee to review the way in which certifying consultants perform their role under the CSA Act. The content of ss 14(1)(a), 14(1)(h) and 14(2) are advanced as supporting the proposition.[120]

[139] We observe that none of the functions in s 14 state that it is a function of the Committee "to review the way in which certifying consultants perform their role". Had the Royal Commission so recommended, or had Parliament so required, it would have been a simple drafting exercise to so provide. Parliament did not do so. Further, s 14(1)(a) is in the most general of terms. We do not see the use of the words "in practice" used after the words "the operation and effect of those provisions" [meaning the abortion law] as changing or enhancing the primary function of the Committee to keep under general review all the provisions of the abortion law. With respect to s 14(1)(h) the requirement is to keep under review the procedure prescribed in ss 32 and 33, not more.

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[120] Section 14(2) is a typical all reasonable powers provision enabling the Committee "to carry out its functions".

[140] Next, the judgment discusses s 30(5) of the CSA Act dealing with appointments by the Committee of medical practitioners. We agree that the Committee, in making such appointments, must have regard to the desirability of appointing medical practitioners whose assessment of cases will not be coloured by views about abortion generally that are "incompatible with the tenor" of the CSA Act. The two extreme positions are appropriately referenced in ss 30(5)(a) and (b). But this subsection is contained within s 30 which deals with the Committee being required "to set up and maintain a list of certifying consultants". Significantly the section does not contain a power enabling the Committee to review the way in which certifying consultants perform their role under the CSA Act. The focus of s 30 is the list of medical practitioners and is one place in the Act where consultation with the New Zealand Medical Council and other relevant professional bodies is called for.

[141] In this context, we note that there was no pleading of any relevant breach by the Committee in respect of its role or powers under s 30. We agree with the views of this Court in *Wall v Livingston* as to the scope of s 30.[121]

[142] The judgment later refers to the question of how the Committee is to perform its role. Arnold J comments that it is "difficult to answer this question in the abstract, in the absence of particular factual situations". We agree. This observation raises the nature of the pleadings by RTL in its third amended statement of claim. We have earlier referred briefly to the nature of such pleading. We consider it important in the present context to describe the pleading in more detail. We consider that the nature of the pleading has created difficulties in dealing with the issues raised on appeal. As a general comment, the third amended statement of claim is rather prolix and lacks focus or specificity. It pleads many legal propositions and then some of the allegations have legal and factual propositions mixed together. The case on appeal did not contain the second amended statement of claim. We mention it only because it is that document to which the Committee responded in its statement of defence to second amended statement of claim. Most of the allegations of legal matters are appropriately responded to by a plea that the respondent is not required to plead to allegations of law. Generally there is denial of any relevant factual allegations.

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[121] Referred to at [96] above.

[143] The real problem is that the alleged failure by the Committee to exercise certain functions and powers were only generally pleaded, largely by reference to reports of the Committee to Parliament. As we have noted, the Court, in a judicial review context, is being asked to review recommendations and observations in these reports to Parliament made under s 14(1)(k) of the CSA Act. There is a real question as to whether such recommendations and observations are properly characterised as decisions that are reviewable.

[144] There is no need to recite in any detail the factual background pleaded in the third amended statement of claim. However, Part B contains what are described as "grounds for relief". Again, the individual allegations do not require repetition. Rather we list below the headings under the claimed grounds for relief. They are as follows:

- failure to properly interpret the Act according to its tenor;

- failure to perform the Committee's statutory duty to review the procedure for the conduct of abortions and determine in any case whether the provision and procedures set out in the Act are being complied with;

- failure to inquire into the circumstances in which certifying consultants are authorising the performance of abortions on the mental health ground having regard to the extent to which that ground is used;

- failure to seek proper information on mental health ground from certifying consultants.

[145] Part C of the third amended statement of claim refers to the relief claimed and relevantly pleads:

> **C. Relief Claimed**
>
> **WHEREFORE** the applicant claims:
>
> A. A declaration that the Committee in carrying out its statutory functions and powers and exercising its statutory discretions in s 14(1)(g)(h) and (i) is empowered to:

(i) Inquire into and report on whether certifying consultants are carrying out the procedure prescribed by ss 32 and 33 of the Act in circumstances where the Committee has expressed concern as to the extent to which abortions are authorised under the mental health ground;

(ii) Require certifying consultants, when reporting to the Committee under s 36 of the Act, to define their diagnosis in relation to the mental health ground and state the serious danger they consider the woman or girl faces;

…

E. A mandatory order in the nature of mandamus directing the Committee to carry out its statutory functions and exercise its statutory powers and discretions in accordance with the law, and in particular:

(i) Institute a procedure for inquiring into and reporting on whether certifying consultants are carrying out the procedure prescribed by s 32 and s 33 of the Act in accordance with the Act;

(ii) Institute and require the observance of a procedure for requiring certifying consultants, when reporting to the Committee under s 36 of the Act, to define their diagnosis in relation to the mental health ground and state the serious danger they consider the woman faces;

…

[146] It is to be observed that, in relation to the second ground of relief set out in the second bullet point at [144] above, RTL did not plead any particular case where the provisions and procedures of the CSA Act were not being complied with. Neither was there any pleading that the Committee had failed or refused, in any particular area of its functions and powers, to carry out an investigation or audit. Moreover, in respect of the third ground (see third bullet point at [144] above), no particular case was pleaded in which a certifying consultant had improperly authorised the performance of an abortion on the mental health ground. In particular the third amended statement of claim did not contain a specific allegation that the Committee failed to carry out an investigation or develop an effective method of auditing the conduct of certifying consultants. It is in this context that our observations on how the Committee has discharged its functions, set out at [110] to [120] above, were made.

[147] The judgment of Arnold J refers in summary to the fact that the RTL pleadings "raised an issue whether the CSA Act was being complied with". We consider that the way in which this issue was raised in such a generalised and non-specific manner that has created real difficulties both in the High Court and in relation to the determination of the appeal.

[148] Finally, we reiterate that the Committee's key reporting obligation is to report annually to Parliament on the operation of the abortion law.[122] If a party is to seek to review the administrative action of the Committee by way of judicial review it is required to identify the relevant statutory power, the decision to be challenged, the relevant surrounding factual circumstances giving rise to the breach and the basis upon which the breach is sought to be reviewed. In the third amended statement of claim no proper allegation of a reviewable decision or an alleged breach of statutory power was pleaded. We therefore agree with Arnold J to the extent that it is very difficult for the Court to answer questions in the abstract as to how the Committee is to perform its statutory functions and powers under the CSA Act. The Court, on an application for judicial review, is unable to fulfil the function of a generalised commission of inquiry. Miller J, in our respectful view, fell into error when he effectively adopted that stance. Undertaking a general review did not become appropriate simply because in the end he decided not to grant RTL any relief. In our view, that refusal to grant relief simply reinforces the inappropriateness of an inquiry leading to no concrete finding. Arnold J, again in our respectful view, has now fallen into the same error.

[149] Our concern is not merely technical. This judicial act of undertaking a generalised inquiry quite outside the pleadings is grossly unfair on the Committee and the certifying consultants. They have been tarred with condoning illegality in the one case and committing it in the other with none of the safeguards to which they would be entitled under the criminal law or the appropriate disciplinary regime. Neither were the certifying consultants represented in the proceeding brought by RTL.

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[122] Section 14(1)(k).

Result

[150] The Committee has succeeded on all of the grounds of its appeal as summarised in the agreed issues at [43]. RTL has failed to make out any grounds of its cross-appeal.

[151] The appeal is allowed. The cross-appeal is dismissed. We set aside the costs order in favour of RTL made in the High Court. The Committee is entitled to costs in the High Court. In the absence of agreement between the parties, such costs are to be fixed in the High Court.

[152] The respondent must pay the costs of the appellant in this Court. In terms of such costs, we consider that the appeal should be categorised as a complex one. Because the issues in the appeal and the cross-appeal were so intertwined, we have decided to make one costs order only. However, we consider that, as there were a myriad of detailed issues arising on the cross-appeal, we should award costs to the Committee on a band B basis.

[153] Accordingly, RTL must pay the Committee costs for a complex appeal on a band B basis and usual disbursements. There is no separate costs award for the cross-appeal. We certify for second counsel.

ARNOLD J

[154] I have read the majority's judgment in draft. I agree with the majority's conclusions and reasoning in relation to the issues identified at [43](a)–(d) above. However, I disagree with their reasoning and conclusions in relation to the issues identified at [43](e)–(g). Accordingly I write separately.

[155] In summary, I consider that as part of its general functions, the Abortion Supervisory Committee (the Committee) must keep the work of consulting physicians under the Contraception, Sterilisation and Abortion Act 1977 (the CSA Act) under review. In that context, it may be required to consider whether

consulting physicians are performing their proper statutory role and to form a view about that in order to report to Parliament. A conclusion by the Committee that some consulting physicians are not performing their proper role under the CSA Act may suggest that some abortions have been performed unlawfully. But the possibility of a generalised view of that type being formed does not mean that the Committee must reach specific conclusions about the legality of specific abortions in the sense precluded by this Court's decision in *Wall v Livingston*,[123] nor does it mean that the Committee can have no significant role in reviewing the work of consulting physicians or reporting to Parliament about it.

[156] It is, I think, important to identify at the outset the conclusions of Miller J in the High Court that gave rise to the issues identified at [43](e)–(g). The Judge summarised his relevant conclusions as follows:[124]

> (c) There is reason to doubt the lawfulness of many abortions authorised by certifying consultants. Indeed, the Committee itself has stated that the law is being used more liberally than Parliament intended.
>
> (d) The Committee has misinterpreted its functions and powers under the abortion law, reasoning incorrectly that *Wall v Livingston* means it may not review or scrutinise the decisions of certifying consultants. I find that it may do so, using its power to require consultants to keep records and report on cases they have considered, for the purpose of performing its statutory functions. Those functions include keeping under review all the provisions of the abortion law, as defined, and their operation and effect in practice, reporting to Parliament on the operation of the abortion law, keeping the procedure for authorising abortions under review, ensuring the administration of the abortion law is consistent throughout New Zealand, and appointing and removing consultants. The Committee may form its own opinion about the lawfulness of consultants' decisions to the extent necessary to perform these functions.

[157] The Judge explained the qualified language in point (c) towards the end of his judgment, as follows:[125]

> By way of elaboration, I reach no final conclusion on the question whether certifying consultants are complying with the abortion law. It is for the Committee to assess these matters. I accept that the Committee is on notice

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123 *Wall v Livingston* [1982] 1 NZLR 734 (CA).
124 At [5].
125 At [135].

> that certifying consultants collectively are apparently employing the mental health ground in much more liberal fashion than the legislature intended, and it also seems that there may be inconsistencies in their application of the law.

[158] The Judge left the question whether he should make any declarations for further argument. In a subsequent judgment, Miller J refused to make any declarations.[126]

[159] Against this background, I propose to address the issues under two heads: the Committee's role in relation to certifying consultants and Miller J's observations about non-compliance with the CSA Act.

The Committee's role in relation to certifying consultants

[160] I will discuss the question of the Committee's role in relation to certifying consultants under three headings, namely:

(a) the general supervisory role of the Committee under the CSA Act;

(b) the Committee's statutory role in relation to certifying consultants;

(c) the effect of *Wall v Livingston*.

The Committee's general supervisory role under the Act

[161] As this Court noted in *Wall v Livingston*, the CSA Act "reflects the very careful attempt made by Parliament to balance the deep philosophical and moral and social attitudes which surround this whole subject matter".[127] It was enacted following the report of the Royal Commission in Contraception, Sterilisation and Abortion in 1977. Miller J summarised the effect of the Royal Commission's report as follows:[128]

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126 *Right to Life New Zealand Inc v Abortion Supervisory Committee* HC Wellington CIV-2005-485-999, 3 August 2009.

127 At 737

128 At [1].

> [The Royal Commission] reported ... that it is wrong, except for good reasons, to terminate unborn life. Whether the unborn child is regarded as a full or incipient human being, the decision to abort it "extinguishes the potentiality of life" and so must be regarded as "a most serious step". The status of the unborn child should not be left to the mother and her doctor to determine, and to allow the mother an abortion on request "would be to deny to the unborn child any status whatever". Such an approach would permit abortion "for reasons of social convenience", which is morally wrong. Rather, the unborn child has a status that merits protection in law. That protection "should yield in the face of compelling competing interests", in the form of serious danger to the mother's life or physical or mental health.

[162] As the majority note,[129] the Royal Commission recommended the establishment of a committee to give "general oversight of the administration of the abortion law". The Royal Commission saw one of the benefits of such as committee as being to assist in ensuring greater uniformity of approach across the country.

[163] Parliament accepted the Royal Commission's recommendations and established the Committee. Its statutory functions are set out in s 14 of the CSA Act. Several have potential relevance in the present context:

(a) The Committee is required to "keep under review all the provisions of the abortion law, and *the operation and effect of those provisions in practice*" (emphasis added).[130] The term "abortion law" is defined to mean ss 10 to 46 of the CSA Act and ss 182 to 187A of the Crimes Act 1961.[131] In this context, the term "keep under review" suggests that the Committee must itself examine or consider the matters identified. It is difficult to see how the Committee could meet its review obligation, particularly as it relates to practice, without having regard to the way that certifying consultants in fact perform their functions under the CSA Act.

(b) The Committee is required to "keep under review the procedure, prescribed by sections 32 and 33 of [the CSA Act], whereby it is to be determined in any case whether the performance of an abortion would

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129 At [7] above.
130 Section 14(1)(a).
131 Section 2.

be justified".[132] Section 32 sets out in some detail the procedure to be followed where a woman seeks an abortion and s 33 deals with how applications are to be determined. Miller J drew a distinction between the substantive criteria to be applied when an abortion determination is made and the process to be followed in applying them and held that s 14(1)(h) deals with the latter but not the former.[133] While I see the linguistic basis for this distinction, it is not one that I find compelling in this statutory context. Abortion decisions must be made consistently with s 33. Section 33 requires certifying consultants to apply the relevant legal criteria. It seems to me somewhat artificial that the review function under s 14(1)(h) should be confined to the process of decision making and ignore the substance. But it may not matter. Whether construed on the wider or narrower basis, it is difficult to see how the Committee could perform this function without examining how certifying consultants go about their statutory role.

(c) The Committee is required to "take all reasonable and practicable steps to ensure that the administration of the abortion law is consistent throughout New Zealand, and to ensure the effective operation of [the CSA Act] and the procedures thereunder".[134] This also suggests that the Committee must have regard to the way in which certifying consultants perform their statutory role. This is necessary to enable the Committee both to make a consistency assessment and to reach a view about the *effective* operation of the CSA Act and its procedures.

(d) The Committee is required to report annually to Parliament "on the operation of the abortion law".[135] This obligation reflects the important and continuing role that Parliament saw for itself under the CSA Act, as is further illustrated by the fact that appointments to the Committee are made by the Governor-General "on the

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132 Section 14(1)(h).
133 At [114].
134 Section 14(1)(i).
135 Section 14(1)(k).

> recommendation of the House of Representatives".[136] In principle, it seems unlikely that Parliament would have limited the scope of the reporting obligation by excluding from it the Committee's views on the question whether certifying consultants were performing their roles consistently with the CSA Act.

There are two further points. First, s 14(2) provides that the Committee has "such reasonable powers, rights and authorities as may be necessary to enable it to carry out its functions". Second, s 10(2) requires that two of the Committee's three members be medical practitioners. Under s 16, the Committee has the power to co-opt specialist advice.

[164] On the face of it, then, s 14 seems to contemplate that it is a function of the Committee to review the way in which certifying consultants perform their role under the CSA Act. This is not, perhaps, surprising, given that the decisions of certifying consultants are at the heart of the operation of the statutory scheme. But s 14 is only part of the picture and it may be that other aspects of the CSA Act indicate that the scope of the Committee's functions was intended to be confined. Accordingly I turn to other relevant aspects of the CSA Act.

The Committee's statutory role in relation to certifying consultants

[165] Under s 30(1) of the CSA, the Committee is required to establish and maintain a list of certifying consultants. After the Committee has determined the number of appointments to be made,[137] the Committee must consult with the New Zealand Medical Council, and may consult with any other body, before determining whom to appoint.[138] Appointments are for a period of one year, but appointees may be re-appointed.[139] The Committee has a discretion to revoke an appointment at any time.[140]

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136 Section 12(1). If Parliament is not in session the appointment is made by the Governor-General in Council but must be confirmed by the House – s 12(3).
137 Section 30(2).
138 Section 30(3).
139 Section 30(6).
140 Section 30(7).

[166] Importantly for present purposes, s 30(5) provides:

> In addition, in making such appointments, the Supervisory Committee shall have regard to the desirability of appointing medical practitioners whose assessment of cases before them will not be coloured by views in relation to abortion generally that are incompatible with the tenor of this Act. Without otherwise limiting the discretion of the Supervisory Committee in this regard, the following views shall be considered incompatible in that sense for the purposes of this subsection:
>
> (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.

(For ease of reference, I will refer to medical practitioners who meet this standard as "neutral".)

[167] This Court described the purpose of s 30(5) in *Wall v Livingston* in the following terms:[141]

> The clear purpose of s 30(5) is to ensure that the supervisory committee will be likely to produce a panel of certifying consultants able and qualified to make determinations in a clinically detached way against medical expertise and experience. It is a provision designed to avoid determinations that may be influenced by bias or predetermination based on some strong subjective attitude in one direction or the other concerning the sensitive question of abortion. *It is not surprising therefore to find that in necessary circumstances a consultant may be removed by the committee.*
>
> (Emphasis added.)

[168] I make two points about s 30(5):

(a) First, it tells us something about the "tenor" of the CSA Act. The CSA Act was not intended to authorise abortion "on demand" or to leave the decision whether an abortion should be performed solely to a woman and her doctor. Equally, however, it was not intended to prohibit abortion or to limit its availability to very extreme situations. Parliament made a careful attempt to achieve an appropriate balance

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[141] At 738.

between these extremes, as is reflected in particular in s 187A of the Crimes Act.[142]

(b) Second, the wording of the Committee's obligation is significant. It is mandatory ("shall have regard to"), but the standard is "desirability". The subsection could have been worded in an absolute fashion, prohibiting the Committee from appointing as a certifying consultant any medical practitioner whose views were incompatible with the tenor of the CSA Act. Had the subsection been so worded, the Committee would undoubtedly have been required to go through a process to satisfy itself that medical practitioners whom it was considering appointing as certifying consultants were neutral. Does the fact that the lesser standard of "desirability" was adopted affect the Committee's responsibilities in this regard? Clearly it does, at least to some extent. The use of "desirability" indicates that the appointment of neutral medical practitioners as certifying consultants was something that it was *hoped* could be achieved rather than being required. The use of the language of objective rather than requirement may reflect that:

- within the two extremes (for example, between abortion on demand and no abortion) there is likely to be a range of views, some of which may differ in reasonably subtle ways;

- for that and other reasons, drawing conclusions about the views of particular medical practitioners may be difficult;

- given Parliament's wish to achieve geographic spread,[143] some flexibility in this respect was required.

On the other hand, the use of the language of objective rather than requirement does not mean that the Committee has no obligation to

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142 Quoted at [12] of the majority judgment.
143 Section 30(4)(b).

> turn its mind to the views of medical practitioners about abortion when considering their appointment as certifying consultants. The statutory objective is the appointment of neutral medical practitioners. The Committee must take meaningful steps towards the achievement of that objective when making appointment decisions.

[169] Also relevant in this context are the Committee's power to revoke appointments of certifying consultants and the certifying consultants' reporting obligations. I deal with each in turn.

[170] As I have said certifying consultants are appointed for one year but may be reappointed.[144] The Committee may, at its discretion, revoke a certifying consultant's appointment.[145] It seems that revocation may occur even though there is no suggestion that the particular certifying consultant is in some way unqualified or has failed to meet his or her obligations. This appears to follow from s 30(2), which provides:

> Before drawing up the list [of certifying consultants], the Supervisory Committee shall determine the minimum number of certifying consultants required to ensure, so far as possible, that every woman seeking an abortion has her case considered expeditiously, and shall make that number of appointments in accordance with this section. Thereafter, the Committee shall keep that number under review, and shall from time to time make such further appointments, *or revoke such number of appointments*, as it considers necessary to meet any change in the circumstances.
>
> (Emphasis added.)

[171] This suggests that the power of revocation may be used simply to adjust the number of certifying consultants in particular areas of the country, to reflect changing circumstances, although it seems more likely that the Committee would deal with that type of situation by declining to re-appoint.

[172] The power to revoke is also available to deal with performance issues. On its face, the power to revoke is unqualified. It may become clear to the Committee that a particular medical practitioner's appointment as a certifying consultant is no longer appropriate. In such circumstances, given the vital role of consultants in the

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144 Section 30(6).
145 Section 30(7).

statutory process, it is readily understandable that Parliament would have wished the Committee to have the power to terminate the appointment immediately rather than waiting until the period of appointment expired. In my view, one situation where the Committee could properly revoke an appointment is where it becomes apparent to the Committee in some way that a certifying consultant is allowing his or her decisions about abortions to be influenced by an extreme view about abortion generally, whether liberal or conservative. The italicised sentence in the extract from *Wall v Livingston* at [167] above indicates this. It contemplates the use of revocation to achieve the desired neutrality.

[173] That proposition may well be uncontroversial, given that the Committee may acquire information about a certifying consultant's performance in ways other than as part of a general review of certifying consultants' work. The real controversy concerns the power or responsibility of the Committee to review the work of certifying consultants. It is here that the certifying consultants' reporting obligations become important. Two provisions are relevant:

(a) Section 36 provides that certifying consultants must keep such records and submit to the Committee such reports relating to cases they consider *and the performance of their functions in relation to such cases* as the Committee requires.

(b) Section 45 provides that every medical practitioner who performs an abortion must make a record of it and the reasons for it and must forward a copy of that record to the Committee.

In each case, there is an explicit prohibition on including the name or address of the woman involved.

[174] Further, under s 43 the Governor-General may make regulations prescribing (among other things) the forms that may be used for the purposes of the CSA Act. The Abortion Regulations 1978 prescribe the forms to be completed by certifying consultants in terms of s 33 of the CSA Act. (Sections 33(1) and (4) provide for the issuance of certificates in the prescribed form.) Where the certifying consultants

agree that an abortion is justified, they must complete a form (described as a certificate) stating the ground or grounds on which, in their opinion, it is justified. Note 2 to this form reads:

> The grounds on which an abortion is justified are set out in section 187A of the Crimes Act ... The certifying consultants must state on which of those grounds they are authorising the performance of an abortion.

The completed certificate must then be forwarded to the licensed institution which is to carry out the abortion.[146]

[175] However, there are no regulations prescribing the form of records that medical practitioners performing abortions must keep under s 45 or the records or reports that certifying consultants must make under s 36. Nor is there any explicit limitation in the CSA Act as to the nature of such records and reports, other than the prohibition on giving a patient's name or address.

[176] Despite this, the majority concludes that the Committee has no power to require certifying consultants to report to it on the basis of the specific diagnosis which justified particular abortions or to review or scrutinise their decisions in individual cases. The majority reach this view on the basis of:

(a) internal consistency within the CSA Act;[147]

(b) the professional obligations of medical practitioners, the privacy interests of patients, the fact that records may be incomplete and the existence of other mechanisms to address what may well be matters of professional discipline;[148]

(c) the lack of what the majority consider to be the powers necessary to enable the Committee to investigate individual cases.[149]

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146 Section 33(5).
147 At [102] above.
148 At [103] above.
149 At [104] above.

[177] I disagree with this analysis, for the following reasons. First, in my view, the certificates prescribed in the Regulations in relation to s 33 perform a different function to the records and reports of certifying consultants dealt with in s 36. The certificates provided under s 33 are the culmination of the process for considering whether particular abortions will be approved. They provide authority for personnel at the licensed institution to carry out the abortion.[150] That being so, it is understandable that they should be framed simply in terms of the requirements of s 187A of the Crimes Act. In a formal sense, that is all that the licensed institution needs to justify its performance of an abortion. However, I see no logical reason why the content of a certificate under s 33 should place any limit on the nature of the reports that the Committee may require under s 36. That is, I do not see any issue of internal inconsistency. Moreover, as I see it, the prohibition on the giving of a patient's name and address shows that Parliament contemplated that reports under s 36 could properly contain details of individual cases.

[178] Second, Parliament has decided that abortion is not a matter to be left simply to the affected woman and her doctor. Rather, it has taken as more circumscribed approach, specifying criteria for abortions, establishing processes for the consideration of applications and for the performance of abortions and constituting a supervisory committee to administer those processes and keep them under review. In other words, Parliament has chosen to interfere with the privacy interests of women seeking abortions and with their professional relationships with their medical advisers. I do not mean to suggest that as a consequence privacy interests and professional obligations have no relevance to the issues before the Court – clearly they do, as Parliament has recognised with the patient name and address prohibition. Rather, my point is that simply because a particular reporting requirement may engage a privacy or professional interest does not, of itself, indicate that it is beyond the scope of the CSA Act. This is particularly so where, as here, Parliament has already provided a degree of privacy protection in relation to reporting.

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150 Under s 37(1)(b) of the CSA Act it is an offence for anyone to perform an abortion other than pursuant to a certificate issued under s 33. Section 187A(4) of the Crimes Act provides protection for a medical practitioner performing an abortion pursuant to a s 33 certificate.

[179] Third, I do not agree that there is a procedural lacuna in the CSA Act which indicates that it was not intended that the Committee have the power to review the work of certifying consultants. The majority are, of course, right to say that there are other mechanisms for dealing with complaints or disciplinary matters involving medical practitioners.[151] But the Committee is not concerned with such issues. Nor does it have to determine whether particular abortions were carried out lawfully or unlawfully. Its role in this context is simply to make revocation/re-appointment decisions and to evaluate the operation of the CSA Act for the purpose of reporting to Parliament. Given the requirement in s 30(5) to have regard to the desirability of appointing neutral medical practitioners as certifying consultants, the Committee is, in my view, entitled to review the work of certifying consultants in an effort to assess whether or not they are approaching their task in a neutral fashion. Equally, the Committee must concern itself with the consistency of the administration of the abortion law. Given the central role of certifying consultants in the statutory scheme, it seems to me implausible that Parliament would have intended to preclude the Committee from keeping under review the way in which they preformed their role.

[180] The question of how the Committee is to perform that role arises. It is, in my view, difficult to answer this question in the abstract, in the absence of particular factual situations. Accordingly I make two brief comments.

[181] First, the Committee obviously faces some constraints in performing its review function. In my view, as part of the reporting obligation the Committee may require certifying consultants to report to it on the basis for their decisions, including the underlying diagnoses. That is, it may seek more information than is provided in the s 33 certificate. However, the identification prohibition indicates that the Committee may not, for example, interview the women involved. But I do not see the existence of such constraints as indicating that the Committee has no review role.

[182] Second, as I have said, in undertaking such review processes the Committee is not attempting to determine the legality of particular abortions or whether particular consultants have committed criminal or disciplinary offences. Rather, it is

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151 See [103] above.

attempting to assess whether consultants are making decisions consistently with the tenor of the CSA Act, that is, neutrally, and whether their decision-making is broadly consistent across the country. In this sense, the Committee's perspective is a systemic one. To understand how the system is operating in practice for the purpose of reporting to Parliament, the Committee must, in my view, be prepared to utilise its powers to consider the basis of individual decision-making by certifying consultants. The Committee may find this a difficult assessment to make in many instances. But if, for example, approval rate statistics throw up significant discrepancies between certifying consultants, the Committee may well be able to conduct some form of audit to assess the position, provided that issues of patient name and address are satisfactorily addressed. In other words, the likelihood that the Committee's task will be difficult in some instances does not mean it was never intended to undertake it in any circumstances. The Committee's role is one of general oversight. It cannot examine every decision made by every certifying consultant. The limits of its resources and expertise (even supplemented by specialist assistance) [152] must be taken into account

[183] In summary, then, I consider that the more detailed provisions of the CSA Act support the view which I tentatively expressed after consideration of s 14: that it is part of the Committee's statutory role to keep the work of certifying consultants under review. I turn now to the decision of this Court in *Wall v Livingston*.

The effect of Wall v Livingston

[184] *Wall v Livingston* dealt with an attempt by a paediatrician to intervene to prevent an abortion that had yet to occur. Accordingly, it does not have direct relevance to the present case. Despite this, the Court made some important observations about the CSA Act.

[185] Following the passage quoted at [167] above in relation to s 30(5), the Court said:[153]

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[152] Section 16.
[153] At 738–739.

> The supervisory committee has a responsibility for the general oversight of the work of certifying consultants throughout New Zealand and the way in which the purposes of the Act are working out in practice. But what is important and of significance in this case is that the supervisory committee is given no control or authority or oversight in respect of the individual decisions of consultants. That deliberate absence of any review process inside the Act itself is probably founded upon three considerations. First, special attention has been given in the Act to the preservation of anonymity of the woman patient. Secondly, the whole process of authorisation appears designed to place fairly and squarely upon the medical profession as represented in any particular case by the certifying consultants a responsibility to make decisions which will depend so very much upon a medical assessment purse and simple. And thirdly, there are the adverse medical implications which could arise from the passage of time should such a determination be easily open to review. Thus it can be said that the Act itself has put aside the dangers and anxieties and frustrations together with moral as well as medical argumentation that might develop by permitting the substitution of one set of medical opinions for others as the result of some generally available process of review or appeal.

[186] The Court said that the Act reflected the "clear intention of Parliament that the question as to whether or not an abortion should be authorised is to be left entirely to the certifying consultants, bad faith alone excepted: see s 40 of the [CSA] Act".[154] The Court left open the possibility of judicial review of the certifying consultants' decisions but identified two factors which would severely limit its scope. In the course of that discussion, the Court said:[155]

> And most significantly, as we have earlier mentioned, the exercise of that medical judgment in individual cases is not subject to review by the supervisory committee, the specialist body established under the Act to exercise oversight of the legislation.

[187] Like Miller J, I do not see these statements as being inconsistent with the type of Committee oversight which is at issue in the present case. As the Court said, there is no general right of appeal or review in respect of individual decisions of certifying consultants, either at the suit of the affected woman or anyone else. The Committee cannot intervene in individual decisions. If judicial review is available, it is available only in the most constrained of circumstances. (As I understand it, the respondent did not challenge any of this.)

[188] But the opening sentence of the extract quoted at [185] above indicates that the Court in *Wall v Livingston* accepted that the Committee had responsibility for the

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154 At 740.
155 At 741.

general oversight of the work of certifying consultants throughout the country and the way in which the purposes of the CSA Act were working out in practice. Moreover, the Court's acknowledgement of the importance of the Committee's power to revoke a certifying consultant's appointment in the context of its discussion of s 30(5) and the need to avoid bias or predetermination by consultants suggests that the Court considered that the Committee's general oversight function encompassed reviewing the decisions of certifying consultants to assess whether they were performing their proper statutory role. That is, were making decisions based simply on medical criteria, uninfluenced by personal predispositions one way or another. As the Court emphasised, the intention of the CSA Act is that abortion decisions be made on the basis solely of the relevant medical considerations.

Miller J's observations about non-compliance with the CSA Act

[189] The majority state that they have "considerable reservations about [Miller J's] findings that cast doubt on the lawfulness of decisions of certifying consultants" and say the Judge ought not to have made such findings. They consider the appropriate channel of investigation would involve a complainant by the patient or the Committee, in which case the Health and Disability Commissioner would become involved. In the alternative there might be a complaint to the police.[156] As a consequence, the majority conclude, the Judge's observations are "of no lawful effect".[157]

[190] The Judge did not make a finding of non-compliance, much less grant a declaration to that effect. He deliberately expressed his view in a qualified fashion, as noted at [157] above. When he discussed this issue in the course of giving judgment, the Judge admitted to "powerful misgivings about the lawfulness of many abortions".[158]

[191] The Judge's view was based on four factors:

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156 At [136] above.
157 At [137] above.
158 At [56].

(a) the observations of this Court in *Bayer v Police*;[159]

(b) the fact that the Committee had itself in several reports to Parliament expressed reservations about whether the law was being followed appropriately by certifying consultants;

(c) an analysis of abortion statistics;

(d) the reported comments of a former Chair of the Committee.

The factors referred to in (b) – (d) were relied on in the respondent's pleading.

[192] Dealing first with *Bayer v Police*, in that case the appellants were members of an anti-abortion group who had been convicted of trespass when they sought to block access to a clinic that was due to perform some abortions and refused to leave despite the occupier's warning that they should. The question was whether they had a defence to the charge on the basis that they believed that their actions were necessary to prevent the performance of unlawful abortions at the clinic on the relevant days.

[193] In the course of it judgment the Court described the appellants' argument as follows:[160]

> There was no direct evidence about the operations to be carried out in the clinic on the days covered by the charges ... The appellants relied on inference to support their claim that unlawful abortions were due to take place. That inference was primarily drawn from the statistics in successive reports of the Abortion Supervisory Committee established by s 10 of the C S & A Act. Among its functions are those of keeping under review the provisions of the abortion law and of reporting annually on its operations to Parliament. In the year ended 31 March 1989 1703 abortions took place at the clinic, an average of seven per working day. Over 98 per cent of all abortions in New Zealand were authorised on the grounds of serious danger to mental health. This reflects s 187A(1)(a) of the Crimes Act 1961 which declares that acts done to procure abortions in the case of pregnancy of not more than 20 weeks are lawful if the person doing the act believes–

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159 *Bayer v Police* [1994] 2 NZLR 48 (CA).
160 At 51–52.

> (a) That the continuance of the pregnancy would result in serious danger (not being danger normally attendant upon childbirth) to the life, or to the physical or mental health, of the woman or girl ... .
>
> Other grounds include substantial risk of a seriously handicapped child being born, or if the pregnancy is the result of incest or sexual violation, or the mother is seriously subnormal.
>
> The appellants had called evidence to the effect that few (if any) abortions could be justified on the ground of serious danger to mental health, but there was evidence to the contrary from medical witnesses called by the prosecution. Evidence by the licensee of the clinic, Dr McKenzie, raised doubts about his understanding of s 187A(1)(a): in cross-examination he appeared to be of the view that to deny a woman a legal right to abortion could be deleterious to mental health. That does not, of course, accord with the criterion in that subsection and an abortion based only on that ground could be unlawful. But possibly he may have meant that, after being refused an abortion to which she felt entitled, a woman might find continuance of a pregnancy a stress so great as to seriously endanger her mental health. This could not be a general rule; it would depend on the facts of the particular case. The appellants also referred to the criticism in the Supervisory Committee Report for 1988, which spoke of the "the present unwieldly system of authorising the termination of potentially normal pregnancies on pseudo-legal grounds". These matters were relied on to support a submission that, on statistical probabilities verging on certainty, some at least of the abortions to be carried out at the clinic on the days in question would be unlawful.
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> The appellants did not suggest there had been non-compliance with the procedures under ss 32 and 33 of the C S & A Act for authorisation of abortions at the clinic by two certifying consultants. Nor could they point to evidence that in any particular case scheduled for the day in question, a proper clinical judgment had not been made about the application of the criteria for lawful abortion contained in s 187A of the Crimes Act.
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> *We have no doubt that the supervisory committee's statistics about abortions performed on mental health grounds and its critical comments referred to above could give rise to misgivings about the lawfulness of many abortions carried out in New Zealand.* But such misgivings or suspicions are not enough on which to base a defence under s 3(2) of the Trespass Act. It was not established that an unlawful abortion was to be performed at the clinic on the days in question.
>
> (Emphasis added.)

[194] The Court did not, of course, endorse the view that abortions were being carried out unlawfully. It simply accepted that the material referred to could give rise to misgivings about the lawfulness of many abortions carried out in New Zealand. Miller J's observations in the present case that there was "reason to doubt" and to have "powerful misgivings about" the legality of many abortions in New Zealand go a little further than the Court in *Bayer v Police*, but not much. Miller J

had, of course, the benefit of greater statistical material and, more significantly, a number of additional pertinent observations by the Committee.

[195] As to the latter:

(a) In its 1996 report the Committee noted that there was a public perception that some consultants take the socio-economic circumstances of their patients into account when considering the grounds for abortion under s 187A and suggested that the legislation be amended to reflect "the reality of what is happening". The Committee recommended that socio-economic factors should be taken into account in this context.

(b) In its 1999 report, the Committee said:

> New Zealand has had legal abortion for more than 20 years and if the increase in the rate of abortion is an indication, then abortion is generally accepted by Parliament and the New Zealand public, even though for some groups it remains a highly emotive and divisive issue. During these 20 years the abortion law has not fulfilled the expectations of the legislators because it has been interpreted more liberally than expected and has not resulted in fewer abortions.

The Committee went on to say that its 1998 Report "illustrated the contradictory views that exist between what the law prescribes and what is practised in New Zealand".

(c) In its 2000 report the Committee recommended that the Government carry out a comprehensive review of the CSA Act. It said:

> The Act is outdated in its language and content. Its procedures are too complex and are not being followed as the law intended. Its provisions for providing legal, safe abortions are not being consistently applied throughout the country. The Act is demeaning to women in requiring a medical procedure to be considered under the Crimes Act. It is also misleading that 98.2 percent of abortions have to be granted under mental health provisions.

(d) In its 2001 Report the Committee said that it had noted in its 2000 Report that "the law is being liberally interpreted and is not working as was originally intended".

(e) In its 2005 Report the Committee said:

> Anti-abortion groups assert that the current interpretation of the [CSA Act] is too liberal. Further they say that this was not the intention of those who wrote the law, and cite the Report of the Royal Commission that preceded the drafting of the Act. The Supervisory Committee must hold that the law was written with precision, and enacted by careful lawmakers. But the wording has come to have a de facto liberal interpretation. Case law does not refute the understanding. The Supervisory Committee has therefore no choice but to accept that this is the intent.

[196] Ms Gwyn submitted that, where the Committee suggested that certifying consultants were applying the law more liberally than intended, its observations should be given little or no weight. I accept that the Committee's observations were made in the context of relatively brief reports covering matters other than simply certifying consultants. Moreover, they were made during a period when the Committee was apparently pressing for the law to be liberalised (which may not be the stance of the Committee as presently comprised). Despite this, the Committee does seem to have considered that there was a difference between what the CSA Act prescribes and what happens in practice, including in relation to the work of certifying consultants. As Miller J noted,[161] the Committee considered that the decision in *Wall v Livingston* meant that it had no oversight role in respect of the decisions of certifying consultants. Like him, I consider that view to be erroneous.

[197] Next, there are the statistics. In its pleading, the respondent relied on the significant increase in the number of abortions and in the crude abortion rate over the last 25 or so years. It also pointed to the fact that, in recent years, over 98 per cent of abortions have been authorised on the grounds of serious danger to mental health, as well as identifying other statistical material. It alleged that despite this data, the Committee had failed to exercise its powers to review the work of certifying consultants. Miller J discussed the statistical data at [44]–[49] and [54]–[57] of his

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[161] At [41].

judgment, noting that counsel for the Committee had accepted that they were sufficient to put the Committee on enquiry. The statistics are not, of course, conclusive. But the Judge did not treat them as conclusive. Like him,[162] and the Court in *Bayer v Police*, I consider that the statistical data raises the question whether the CSA Act is being applied as intended, and gives ground for concern that it is not. No firmer conclusion can be, or has been, drawn.

[198] Finally, there are the reported remarks of the former Chair of the Committee. These are set out at [53] of Miller J's judgment. She expressed the view that there is essentially abortion on demand in New Zealand. Miller J commented that the Committee's reports tended to confirm her view,[163] but made no greater use of her comments than that.

[199] There is one final point. In concluding that Miller J ought not to have expressed the views he did, the majority say that medical disciplinary or police investigative procedures were the appropriate channels for investigation of issues of non-compliance. It will be apparent from what I have already said that I do not agree. Those processes are directed at different issues. The Committee is simply seeking to review the work of certifying consultants in order to make re-appointment or revocation decisions (the latter may, of course, engage natural justice considerations) and to report to Parliament on the operation of the CSA Act. If the Committee considers that the CSA Act is not, or may not be, working in practice as Parliament intended for some reason (including because certifying consultants are not performing their tasks consistently with the Act), it is entitled, indeed obliged, to say so. This may raise the possibility that some who have responsibilities under the Act (including certifying consultants) are not meeting them to such an extent that issues of professional discipline or criminal liability may arise. In those situations, the Committee would presumably refer matters to the appropriate authorities, as it has in the past.

[200] To summarise, then, the respondent's pleadings raised as an issue whether the CSA Act was being complied with. Evidence was presented on that topic. The

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[162] At [123].
[163] At [56].

Judge expressed views on it that were qualified. He did not make definitive findings or grant a declaration. In my view, the Judge had a proper basis for the qualified views he expressed.

[201] In the result then, I would dismiss both the appeal and the cross-appeal insofar as it relates to the right to life issues. In the circumstances I express no view on the question whether Miller J should have granted declarations.

Postscript

[202] The majority has made some observations on my judgment. It is not necessary that I respond to all their comments but three are sufficiently important to require a response.

[203] First, the majority say that the Court:[164]

> ... is being asked to review recommendations and observations in [the Committee's] reports to Parliament made under s 14(1)(k) of the CSA Act. There is a real question as to whether such recommendations and observations are properly characterised as decisions that are reviewable.

[204] I agree that the respondent's pleadings have deficiencies. However, it seems to me clear that the respondent alleged that under the CSA Act the Committee, being a body which performs public functions, was in breach of its duty within the meaning of r 30.2 of the High Court Rules or that the Committee had failed to exercise its statutory powers consistently with the CSA Act. So, the respondent sought both an extraordinary remedy and relief under the Judicature Amendment Act 1972.

[205] The respondent sought relief on various bases, one being that the Committee had misconstrued the CSA Act by adopting the position that it has no power to review the decisions of certifying consultants in the context of performing its statutory functions. In an effort to justify its claim that the Committee has not been performing its duty or exercising its statutory powers in accordance with the CSA Act, the respondent relied on, among other things, statements from the Committee's

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[164] At [143] above.

reports which it claimed went to that point. The Court was not asked to judicially review the recommendations and observations in the Committee's reports themselves. Rather, the Court was referred to them so that it could understand what the Committee's view of its powers was, a view which the Committee confirmed, through counsel, in the argument before us. As I understand it, this analysis is consistent with the view that Wild J took when dealing with the Committee's application to strike the respondent's proceedings out.[165]

[206] Accordingly, despite the deficiencies in the pleadings, the essence of the respondent's claim seems to me to be a conventional enough judicial review claim. In principle, it is no different to the claim in *Electoral Commission v Tate*.[166] In that case, the statutory body involved asserted that it had a statutory power to require political parties to provide particular information, a view which one political party contested. In the present case, the statutory body, the Committee, asserts that it does not have a particular statutory function or power, which the respondent contests. It follows from this that I do not accept that the hearing before Miller J was "a generalised inquiry quite outside the pleadings".[167]

[207] This leads on to the second point. The majority say that the respondent did not plead any particular case in support of its claim. But it is unrealistic to suggest that it should, given that the CSA Act attempts to preserve the privacy of individual women. If a statutory body adopts the view that it is not within the scope of its functions or powers to undertake a particular task which a person with an appropriate interest alleges goes to the heart of the body's statutory functions, I do not see why reference to specific cases or instances is required as long as it is clear that there is a meaningful dispute between the parties.

[208] In this context I should make it clear that my observation that it is difficult to answer the question how the Committee was to perform its review role in the abstract[168] was simply intended to indicate that there may be a variety of ways in which the Committee could perform its review function. Which it chose to adopt

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165 *Right to Life New Zealand Inc v Rothwell* [2006] 1 NZLR 531 (HC).
166 *Electoral Commission v Tate* [1999] 3 NZLR 174 (CA).
167 At [149] above.
168 See [180] above.

would depend on the particular circumstances. Ultimately, the Committee must choose which mechanism is consistent with its statutory powers and which it considers will enable it to fulfil its statutory functions and report to Parliament.

[209] Finally, I should address the majority's point about the inappropriateness and unfairness of the Court expressing a view about the operation of the CSA Act that might suggest that some certifying consultants are not following the legislation correctly.

[210] One of the reasons that the majority gives for concluding that the CSA Act does not allow the Committee to review the decisions of certifying consultants after the event is that the CSA Act does not provide an appropriate context. In relation to individual cases, the proper context is found in criminal, disciplinary and similar processes.

[211] The question of interface with the criminal law arises in other statutory settings. For example, in *Electoral Commission v Tate*, the Electoral Commission, purporting to act under the Electoral Act 1993, required political parties to report their electoral spending by breaking down their overall expenditure into categories. The ACT party refused to do this, providing only an overall expenditure figure. The Electoral Committee issued proceedings for a declaration on the point, citing the secretary of ACT as the defendant. The secretary applied to strike out the proceedings, in part on the basis that, if there had been non-compliance, she would be guilty of an offence under the Electoral Act and a prosecution was the proper method for resolving the point.

[212] Greig J rejected that argument.[169] The Judge referred to various authorities which supported the view that a court's power to grant a declaration was not excluded because the matter in respect of which the declaration was sought fell for decision in criminal proceedings. The Judge noted that the Electoral Commission's proceedings sought simply a declaration as to the meaning of the legislation, in circumstances where no criminal prosecution was on foot or in contemplation. A criminal proceeding would have raised a number of additional issues, for example

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169 *Electoral Commission v Tate* HC Wellington CP134/97, 12 November 1997.

knowledge or reasonable excuse. ACT chose not to appear when the matter came on for a full hearing in the High Court so an amicus curiae was appointed. The High Court refused to make a declaration,[170] but this Court disagreed and granted one.[171]

[213] As I see it, a similar analysis applies in this case. The Committee is not being asked to make findings about the legality or otherwise of individual abortions and is not required to consider the range of matters that might arise in a disciplinary proceeding or a criminal prosecution. Rather, its perspective is a systemic one. It must report to Parliament on the operation of the abortion law, including, in my view, the performance by certifying consultants of their statutory role. That role is at the heart of the scheme of the abortion law. It is, in my view, implausible to suggest that this role can only be examined incidentally, in the context of criminal or disciplinary proceedings. Such proceedings focus on individual instances and will not address in any effective way the systemic issues that are properly the concern of the Committee.

[214] This leads on to the position of the Court. In fulfilling its reporting function, the Committee has said on a number of occasions that it considers that the law is being applied more liberally than Parliament intended, clearly with the work of certifying consultants in mind. This Court observed in *Bayer v Police* that the statistics could give rise to misgivings about the lawfulness of many abortions,[172] and Miller J records that Ms Gwyn accepted that the abortion statistics put the Committee on enquiry. On the basis of this material, Miller J said that there was reason to doubt the lawfulness of many abortions in New Zealand. He went no further. In particular, he made no finding that certifying consultants have acted unlawfully. With respect to the majority, it seems to me to be an exaggeration to say that certifying consultants have, in these circumstances, been tarred with committing illegality with none of the safeguards that criminal and disciplinary processes involve.

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170 *Electoral Commission v Tate* HC Wellington CP134/97, 5 June 1998.
171 *Electoral Commission v Tate* (CA) at [65].
172 *Bayer v Police* [1994] 2 NZLR 48 (CA) at 52.