IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2005-485-999

IN THE MATTER OF	Part I of the Judicature Amendment Act 1972 and Rule 623 of the High Court Rules
AND	
IN THE MATTER OF	The Contraception, Sterilisation and Abortion Act 1977
BETWEEN	RIGHT TO LIFE NEW ZEALAND INC Applicant
AND	THE ABORTION SUPERVISORY COMMITTEE Respondent

Hearing: 7 and 8 April 2008

Counsel: P McKenzie QC and I C Bassett for Applicant
C Gwyn and W Aldred for Respondent

Judgment: 9 June 2008

JUDGMENT OF MILLER J

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Introduction

[1] A Royal Commission on Contraception, Sterilisation and Abortion reported in 1977 that it is wrong, except for good reasons, to terminate unborn life. Whether the unborn child is regarded as a full or an 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.

[2] The Royal Commission's recommendations were adopted in the Contraception, Sterilisation and Abortion Act 1977, which I will call the **CSA Act**, and in amendments to the Crimes Act 1961. The relevant provisions of these statutes are collectively defined as **the abortion law**. The abortion law provides that two certifying consultants may authorise an abortion where they believe that continuance of the pregnancy would result in "serious danger" to the life or physical or mental health of the woman, not being danger normally attendant upon childbirth. The CSA Act also established the respondent, the Abortion Supervisory Committee, which exercises oversight of the legislation and its operation.

[3] New Zealand now experiences an abortion rate comparable to those of Canada and the USA, where women enjoy a constitutional right to abortion. In 2006 there were 17,934 abortions; that is a rate of 231 abortions per 1,000 births, stillbirths and abortions. The medical practitioners who serve as certifying consultants authorise about 99% of formal requests for abortions. Almost all of their decisions cite serious danger to the mother's mental health.

[4] The applicant, a charitable society dedicated to protecting the rights of unborn children, says that New Zealand has abortion on request. It attributes that state of affairs in large part to what it says is the refusal of the Abortion Supervisory Committee to confront the work assigned to it under the abortion law. That work is said to include supervising the work of certifying consultants, by investigating their decisions as necessary and removing those who fail to apply the law as Parliament intended. The Committee responds that the appellant would have it interfere with the medical judgement of the consultants, contrary to the longstanding decision of the Court of Appeal in *Wall v Livingston*,[1] which settled the correct interpretation of the abortion law and the Committee's place within it.

[5] I conclude that:

a) The abortion law neither confers nor recognises a legal right to life for the unborn child; that is so because the abortion law imposes no duty on the mother, or any other actor in the abortion process, to protect the

[1] [1982] 1 NZLR 734

life of the unborn child and does not recognise a child as a person until it is born alive. Nor does s8 of the New Zealand Bill of Rights Act 1990, which recognises a right to life, apply to the unborn child.

b) However, 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.

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.

e) Under the abortion law, Parliament oversees the Committee's work. For that reason, among others, mandatory relief is refused. I reserve

for further argument the question whether declarations ought to be made.

The abortion law

[6] I begin by surveying the abortion law and outlining the assigned functions of the Supervisory Committee and certifying consultants.

The Royal Commission on Contraception, Sterilisation and Abortion

[7] The law has long provided that it is a crime to procure an abortion unlawfully. Provisions to that effect can be traced to an English statute, the Offences Against the Person Act 1861. However, it had long been left to the Courts to determine when an abortion was unlawful. Reference may be made to *R v Bourne*,[2] *R v Davidson*,[3] *R v Anderson*,[4] and *R v Woolnough*.[5]

[8] By 1977 the position had been reached in New Zealand that an abortion might be carried out lawfully where the physician believed in good faith that it was necessary to preserve the life or physical or mental health of the mother from some serious danger. The majority of the Court of Appeal approved a jury direction to that effect in the case of James Woolnough, a doctor associated with the Auckland Medical Aid Trust who had twice stood trial on 12 counts of procuring abortions. The decision established that an abortion might be carried out not only to preserve the life of the mother but also to preserve her health. Richmond P reviewed the legislative history and the common law, concluding that the law was uncertain and observing that the legislature had not attempted to provide any guidance.[6] Woodhouse J also noted that the meaning of the word 'unlawfully' had been left to "judicial legislation" although the subject of abortion was a divisive and sensitive one within the community.[7] Wild CJ dissented, holding that it was for the legislature

[2] [1939] 1 KB 687
[3] [1969] VR 667
[4] [1951] NZLR 439
[5] [1977] 2 NZLR 508 (CA)
[6] at p515
[7] at p519-20

to extend the law to permit abortions for preserving health rather than life alone. He observed presciently that in light of advances in psychiatry the mental health of the mother was likely to loom larger in justifications for abortion.[8]

[9] When the Royal Commission was established in 1975, abortion was a prominent and controversial topic of public discourse. Demand was being met in part by the Auckland Medical Aid Trust and by Australian clinics in which legal abortions were available to those who could afford to travel. Some women risked their health by procuring illegal abortions. Sections of the community were resolutely opposed to abortion. The Commission was instructed to inquire into the state of the law and whether it met the needs of society having regard to social and moral issues attending abortion, including the rights of the pregnant woman and the status of the unborn child. It was to identify any changes to the law that it thought appropriate.

[10] The Royal Commission reported on 5 March 1977 after extensive public hearings, research, and consultation. It recommended legislation, and the Government of the day produced a Bill that was said on its introduction to be a faithful attempt to set out the Commission's recommendations in legislative form.[9] The Bill was passed on a conscience vote. Both counsel accepted that I might consider the Report by way of background and, because the abortion law was designed to implement the Commission's recommendations, as an aid to interpretation where the statutory language is ambiguous.[10]

Killing of unborn child a crime in certain circumstances

[11] The Crimes Act provides that it is an offence to kill an unborn child, while providing that no one is guilty of any crime who causes the death of a child before or during birth in good faith for the preservation of the mother's life:

> **182 Killing unborn child**

[8] at p524
[9] (19 August 1977) 412 New Zealand Parliamentary Debates 2358
[10] Burrows J., *Statute Law in New Zealand* (3rd ed., 2003) at 184

> (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.

Circumstances in which an abortion may be authorised

[12] Abortion is generally proscribed under the Crimes Act, s183 of which still provides that it is a crime to unlawfully use on a woman or girl any means, such as a drug or instrument, with intent to procure miscarriage. Section 186 provides that it is a crime to supply or procure the means of procuring an abortion. Miscarriage means "the destruction or death of an embryo or fetus after implantation" or "the premature expulsion or removal or an embryo or fetus after implantation, otherwise than for the purpose of inducing the birth of a fetus believed to be viable or removing a fetus that has died".[11]

[13] Following the Royal Commission's recommendations, the adverb "unlawfully" is now defined in section 187A:

> **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

[11] s182A

(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.

[14] It will be seen that under ss(4) a registered medical practitioner who carries out an abortion may do so lawfully if he or she acts under a certificate issued by two certifying consultants under s33 of the CSA Act. The certifying consultants may issue a certificate after considering the case and forming the opinion that the case is one to which any of paragraphs (a) to (d) of ss(1), or (as the case may require) ss(3), of s187A of the Crimes Act applies. For reasons explained later in this judgment, such an abortion is lawful not only under ss183 and 186 but also s182.[12]

Certifying consultants

[12] paragraph [71] below

[15] The CSA Act provides that no abortion shall be performed unless and until it is authorised by two certifying consultants.[13] The Committee must maintain a list of medical practitioners (termed certifying consultants) who may be called upon to consider cases referred to them by any medical practitioner and determine whether to authorise an abortion. At least one of the two certifying consultants must be a practising obstetrician or gynaecologist.

[16] Section 32 envisages that a female or "patient" will consult a doctor seeking an abortion. That doctor may be a certifying consultant, and for purposes of the section is described as "the woman's own doctor". If asked to do so by her or on her behalf, the woman's own doctor shall arrange for the case to be dealt with under the Act's procedures. They begin with the doctor referring her to consultants if, after considering the case, the doctor considers that it may be one where there are grounds for an abortion under s187A. Each consultant must consider the case as soon as practicable after it is referred "and shall, if requested to do so by the patient, interview her". The consultant may also insist on an interview. The patient may be accompanied by her own doctor if the doctor agrees. She and her doctor may make representations and adduce medical or other reports. With her consent, the certifying consultant may consult any other person. A certifying consultant who is the woman's own doctor may certify an abortion in conjunction with another certifying consultant.

[17] If the consultants agree that the case is one to which any of s187A(1)(a) to (d) or s187A(3) apply, they "shall" forthwith issue a certificate in the prescribed form authorising an abortion and forward it to the holder of the licence for the licensed institution in which it is to be performed. If they are of the contrary opinion, they shall refuse to authorise an abortion. Accordingly, the principal obligation of a certifying consultant under the Act is that of forming an opinion whether one of the statutory grounds for an abortion exists. Where the request for an abortion turns on the mental health of a woman or girl whose pregnancy is of not more than 20 weeks gestation, for example, the consultant must be of the opinion that continuance of the pregnancy would result in serious danger (not being danger normally attendant on childbirth) to her mental health. The bracketed words were employed because the

[13] s29

Royal Commission recognised that pregnancy and childbirth normally carry risks to life and health that exceed those associated with abortion.

[18] There is provision for referral to a third consultant if the two disagree. But there is no right of review, whether by the Supervisory Committee or anyone else, of the consultants' decision. That is so although the woman herself might want to review a decision to deny her an abortion. 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 judgement. The principal criteria, serious danger to the life or health of the woman or girl, are clearly medical in nature, as is the risk that the child would be seriously handicapped. No distinction is drawn between those criteria and those (pregnancy results from incest or the woman or girl is severely subnormal) that are not medical, or not exclusively medical, in nature.

[19] The certifying consultants must tell the woman of her right to seek counselling when they decide to allow or refuse an abortion.[14]

[20] Certifying consultants are protected from personal liability for any act done or omitted in good faith in pursuance of their powers under the CSA Act.[15] (The same provision extends to members of the Committee.) They must also forward information to the Committee as required; I discuss those provisions below.

The Abortion Supervisory Committee

[21] The CSA Act establishes the Committee, which consists of three members of whom two must be medical practitioners. The Governor-General appoints them on the recommendation of the House of Representatives. Functions and powers of the Committee are set out in s14, which I must set out in full:

> **14 Functions and powers of Supervisory Committee**
>
> (1) The Supervisory Committee shall have the following functions:

[14] s35
[15] s40

(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:

(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.

[22] The "abortion law" is defined as ss10-46 of the CSA Act and ss182-187A of the Crimes Act, which is why I have used that term in this judgment.

[23] Succeeding provisions of the CSA Act provide that the Committee may appoint advisory and technical committees and co-opt specialist advice.[16] The Committee also licenses institutions to carry out abortions. Section 21 provides, inter alia, that the Committee shall grant such a licence in respect of an 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.

[24] The Committee may cancel a licence where it is satisfied that the institution no longer meets the requirements of s21(1) or that the holder of the licence has failed to take reasonable and practicable steps to ensure that the provisions of the abortion law were complied with in the institution.[17]

[25] The Committee must 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 must appoint that number. At least half of them must be practising obstetricians or gynaecologists. Section 30(5) provides:

> **30 Supervisory Committee to set up and maintain list of certifying consultants**
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> (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.

[16] ss 15 and 16
[17] s25

[26] Consultants are appointed for a term of one year, and may be reappointed. The Committee may remove a consultant at any time at its discretion under s30(7).

[27] The Committee must also appoint suitably qualified persons to provide counselling services for persons considering having an abortion or approve agencies for the provision of such counselling services. Counsellors should be able to advise patients on alternatives to abortion, such as adoption and solo parenthood, or refer them to appropriate agencies for such advice.

[28] The Committee may require reports from certifying consultants relating to cases that they have considered and the performance of their functions in relation to such cases. Consultants must keep records and submit reports relating to cases that they have considered and the performance of their functions.[18] Every medical practitioner who performs an abortion must record it and the reasons for it, and forward the record to the Committee.[19]

Legislative oversight

[29] The legislature reserved to itself an oversight role under the CSA Act. Members of the Committee are appointed on its recommendation.[20] It receives the annual reports of the Committee on the operation of the law, and contemplated that it would respond to any Committee recommendations for amendments to the law, including the procedures in ss32 and 33. By way of illustration, the Justice and Law Reform Select Committee reviewed the law in 1996, considering various recommendations of the Committee. The Committee was also criticised in 1994 for the poor quality and content of its annual reports; it responded by endeavouring to improve them.

Offences

[18] s36
[19] s45
[20] s12

[30] The Crimes Act and the CSA Act each establish offences concerning abortion. Those under the Crimes Act are serious offences. It is a crime to administer any drug or use any instrument upon a woman with the intent to procure her miscarriage,[21] or to supply the means for abortion, believing they are intended to be unlawfully used to procure miscarriage.[22] These crimes attract maximum penalties of 14 and seven years' imprisonment respectively. A doctor who performs an abortion without, at the time, believing it to be lawful under s187A commits the crime of unlawfully procuring an abortion[23] even if he or she does so in pursuance of the necessary certificate.[24]

[31] Under the CSA Act, it is an offence to perform an abortion elsewhere than in a licensed institution or without first obtaining the requisite certificates.[25] The maximum penalty for these offences is imprisonment for a term not exceeding 6 months or a fine not exceeding $1,000. Liability can be avoided if the defendant can show an honest belief that the necessary certificate had been issued.[26] Liability under the CSA Act may also be avoided if it is shown that the act was done in good faith in pursuance of the powers conferred by the Act,[27] or if the medical practitioner believed the abortion was immediately necessary to save the life of the patient or to prevent serious permanent injury to her physical or mental health.[28]

[32] All of these offences are addressed to those who perform an unlawful[29] abortion or assist in doing so. The woman may not be charged as a party to unlawfully procuring her own miscarriage under s183 of the Crimes Act.[30]

[33] However, a woman who procures her own miscarriage does commit an offence under the CSA Act.[31] That provision was formerly found in s185 of the Crimes Act, under which the maximum penalty was seven years' imprisonment.

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[21] s183
[22] s186
[23] s183
[24] s187A(4)
[25] s37
[26] s37(3)
[27] s40
[28] s37(2)
[29] For all offences, the meaning to be given to "unlawful" is that provided by s187A of the Crimes Act
[30] s183(2)
[31] s44

After "anxious consideration" the Royal Commission recommended that the offence should remain but it considered that the maximum penalty was "savage".[32] The Crimes Act provision was re-enacted in the CSA Act, under which the maximum penalty is a $200 fine. It appears that the Commission was motivated by several concerns: Courts would not impose the maximum penalty or anything like it; it would be difficult to obtain evidence against an abortionist if the woman was at risk herself; if the unborn child has some status, that ought not be affected by the identity of the person procuring the abortion; and the woman should not be exempt in circumstances where others face severe penalties for assisting her.

The Abortion Regulations 1978

[34] Regulations have been made under the CSA Act. They provide that applications for licences and certificates authorising abortions shall be in the prescribed forms. Form 1 provides for the applicant to set out details of facilities for abortions in the institution, and adds:

> 3. That the following counselling services will be available to women considering having an abortion in the institution …

[35] Form 3A provides that the certifying consultants authorise the performance of an abortion, and provides for them to specify that in their opinion an abortion is justified on specified grounds. Notes to the form record that the grounds are set out in s187A of the Crimes Act and specify that the consultants must state on which of those grounds they are authorising the abortion.

The application for review

[36] The third amended statement of claim was filed following the judgment of Wild J on a strikeout application[33] and judgments of Ronald Young[34] and Simon

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[32] Royal Commission Report, p280

[33] *Right to Life New Zealand Incorporated v Rothwell, Reid and Lamb and Anor* HC WN CIV 2005-485-999 11 October 2005

[34] *Right to Life New Zealand Inc v The Abortion Supervisory Committee* HC WN CIV 2005-485-999 28 May 2007

France JJ[35] on challenges to admissibility of affidavits filed for the applicant. Reference may be made to these judgments and a recent one of my own[36] for the history of the litigation.

[37] The claim now pleads five grounds of review, alleging that the Committee has failed:

(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;

(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;

(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;

(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.

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[35] *Right to Life New Zealand Inc v The Abortion Supervisory Committee* HC WN CIV 2005-485-999 3 October 2007

[36] *Right to Life New Zealand Inc v The Abortion Supervisory Committee* HC WN CIV 2005-485-999 31 March 2008

[38] In support of the first two of these grounds, it is said that the Committee wrongly interprets the CSA Act as conferring no power to alter the liberal interpretation being given to the law by certifying consultants, believing that it has no power to investigate their work and ensure that the Act functions as intended. Specifically, the Committee has misunderstood the judgment of the Court of Appeal in *Wall v Livingston*, believing that its conclusions about certifying consultants apply equally to the Committee's functions and that the Committee has no duty to ensure that s187A is complied with. The Committee has failed to interpret the CSA Act in accordance with the rights of the unborn child, including the right to be born and the right under s8 of the New Zealand Bill of Rights Act not to be deprived of life.

[39] In support of the third ground, the claim pleads that as many as 98.2% of abortions are performed under the mental health ground, and that the Committee itself has severe doubts about the lawfulness of many of them.

[40] The claim pleads that the Committee has frequently been asked to carry out its statutory duties or exercise its powers and discretions, but has consistently failed to do so. It seeks a variety of declarations relating to the Committee's powers and the provision of counselling services, and mandatory orders directing the Committee to carry out those functions.

[41] The respondent generally denies these allegations. Its case, as developed in argument, is that it accuses the applicant of misconstruing the legislation, which confers no rights on the unborn child. It characterises the claim as a challenge to *Wall v Livingston*, saying the applicant seeks to have it supervise the decisions of certifying consultants. The Committee has no power to review or oversee the clinical decision-making process, and no function of ensuring that consultants apply s187A correctly. It denies that New Zealand has abortion on request, saying there is no evidence to that effect, and it asserts that it has discharged the general oversight functions that the CSA Act prescribes for it by, for example, inquiring generally into the use of the mental health ground. It says that the Court should deny relief as being moot and unnecessary having regard to the degree of any non-compliance, and that the claim is improperly motivated; although it admits the applicant's views are

genuinely and deeply held, the claim is said to be a "Trojan Horse" for a challenge to the legislation itself.

[42] The respondent did not contend before me that its powers and functions are not susceptible in principle to judicial review, although Ms Gwyn did argue that relief ought to be refused because of their discretionary nature.[37]

[43] Common issues underlie most of the grounds of review. I will examine those issues as follows: are certifying consultants obeying the abortion law; to what extent am I bound or assisted by *Wall v Livingston*; has the unborn child a right to life whether under the abortion law, the New Zealand Bill of Rights Act or international conventions; the Committee's functions concerning compliance by certifying consultants with the substantive criteria in s187A; and the Committee's functions concerning counselling services. For reasons that appear subsequently, I find the applicant's emphasis on the unborn child's right to life misplaced, for this case turns on the language of the abortion law rather than the manifestly ambiguous character of any underlying rights. I respond to its submissions, however, because I accept that there is ambiguity in the CSA Act at certain points and s6 of the New Zealand Bill of Rights Act, which concerns interpretation of laws, would apply at those points if the unborn child enjoyed a right to life under s8 of that Act.

Are certifying consultants obeying the abortion law?

[44] The most recent annual report of the Committee that was available to the Court is for the 2006 year. It records in table form the numbers of abortions in each calendar year since 1980 and the abortion rate, expressed in various ways. The table is notable for the absolute number, the trend, and the crude abortion ratio shown in the last column.

[37] cf *Right to Life New Zealand Inc v Rothwell* [2006] 1 NZLR 531 at [62]

INDUCED ABORTION STATISTICS (1980 – 2006)

December Year	Induced Abortions(1)	Crude Abortion Rate(2)	General Abortion Rate(3)	Crude Abortion Ratio(4)(5)
1980	5,945	1.9	8.5	105
1985	7,130	2.2	9.3	120
1990	11,173	3.3	14.0	156
1991	11,613	3.3	14.0	162
1992	11,595	3.3	13.9	163
1993	12,893	3.3	14.3	168
1994	12,835	3.5	15.3	182
1995	13,652	3.7	16.1	191
1996	14,805	4.0	17.3	204
1997	15,208	4.0	17.6	208
1998	15,029	3.9	17.4	207
1999	15,501	4.0	18.0	213
2000	16,103	4.2	18.7	220
2001	16,410	4.2	19.1	226
2002R	17,380	4.4	19.9	242
2003R	18,511	4.6	20.8	247
2004R	18,211	4.5	20.2	237
2005R	17,531	4.2	19.3	232
2006	17,934	4.3	19.6	231

(1) Induced abortions registered in New Zealand. (Obtained from the Abortion Supervisory Committee.)
(2) Per 1,000 mean estimated population.
(3) Per 1,000 mean estimated number of women aged 15-44 years.
(4) Per 1,000 live births, stillbirths and abortions.
(5) The crude abortion rate for 1998 is based on the total number of birth notifications received by the Department of Internal Affairs. The abortion ratio for all other years is based on the number of births registered.
(R) Revised

Note: Abortion rates from 1991 onwards are based on the mean estimated resident population. Before 1991, abortion rates are based on the mean estimated de facto population.

Source: Unless stated all statistical tables are sourced from Statistics New Zealand.

[45] The grounds relied on by certifying consultants are also recorded:

ABORTION BY GROUNDS OF AUTHORISATION (2006)

Grounds	Total	%
Risk to Life	1	0.0
Risk to Physical Health	10	0.1
Risk to Mental Health	17,732	98.9
Risk to Life and Physical Health	1	0.0
Risk to Life and Mental Health	2	0.0
Mental and Physical Health Risk	61	0.3
Other Physical/Mental/Health Comb	1	0.0
Foetal Abnormality and Physical Risk	1	0.0
Foetal Abnormality and Mental Risk	77	0.4
Foetal Abnormality, Physical and Mental Risk	2	0.0
Foetal Abnormality, Risk to Life & Physical Health	1	0.0
Serious Foetal Abnormality	40	0.2
Criminal Offence and Risk to Mental Health	5	0.0
TOTALS	**17,934**	**100.0**

[46] There is significant variation among certifying consultants, in that some appear to approve every request while others decline a small but significant number.

These details are not included in the annual reports. It appears that in 2003 one consultant approved 1666 abortions and declined none. In 2005 the Committee provided the following statistics in response to a request for the number of approvals and refusals by the 20 highest fee earning consultants:

	1 JULY 2003 – 30 JUNE 2004		
	JUSTIFIED	NOT JUSTIFIED	TOTAL
1.	1647	3	1644
2.	1207	2	1209
3.	1202	4	1206
4.	1171	4	1175
5.	1105	20	1125
6.	971	1	972
7.	988	1	989
8.	923	7	924
9.	915	7	922
10.	864	30	894
11.	870	6	876
12	840	0	840
13	819	19	838
14	799	20	819
15	709	5	714
16	610	6	616
17	651	3	654
18	656	0	656
19	607	2	609
20	596	2	598

[47] The Committee has also provided statistics for the Christchurch region indicating that few requests are refused. In 2005, for example, 4992 abortions were sought under the CSA Act's procedures in that region and 27 of them were declined. That is an approval rate of more than 99%.

[48] Significant numbers of women have had multiple abortions. In 2006, more than 6300 women had previously undergone one or more and of those 1400 had previously undergone two.

[49] The Committee also records the crude abortion rate relative to that of other low fertility nations:

ABORTION RATES, NEW ZEALAND AND OTHER LOW FERTILITY COUNTRIES

Country	Year	Crude Abortion Rate (1)	General Abortion Rate (2)
New Zealand (3)	1990	3.3	14.0
	1995	3.7	16.1
	2000	4.2	18.7
	2001	4.2	19.1
	2002R	4.4	19.9
	2003R	4.6	20.8
	2004R	4.5	20.2
	2005R	4.2	19.3
	2006	4.3	19.6
Australia (4)	2004	4.1	19.3
Canada (5)	2003	3.3	14.7
Denmark	2005	2.8	14.3
England and Wales (6)	2005	3.5	17.8
Finland	2003	2.1	10.7
France (7)	2003	-	16.4
Germany	2004	-	7.7
Japan (7)	2001	2.7	13.8
Netherlands (6)	2005	-	8.6
Norway	2005	3.0	15.2
Scotland (6)	2005	2.5	11.9
Sweden	2005	3.9	20.2
United States	2003	4.4P	20.8P

(1) Per 1,000 estimated mean population
(2) Per 1,000 estimated mean number of women aged 15-44 years
(3) Rates from 1991 onwards are based on induced abortions registered in New Zealand and the mean estimated residen population. Before 1991, rates are based on induced abortions registered in New Zealand and the mean estimated de facto population
(4) Abortions are estimated based on Medicare and hospital morbidity statistics
(5) Per 1,000 women aged 14-44. Excludes abortions performed on non-Canadian residents. Due to changes in data collection methods in Ontario, caution should be taken when comparing data from 1999 onwards with earlier years.
(6) Residents only (in the case of the Netherlands, includes abortions to foreign women residing in the Netherlands)
(7) Abortion reporting is incomplete and the rates are at least 20 percent higher than those given above
(P) Provisional
(R) Revised
- Figures not available

[50] The Committee has frequently suggested that certifying consultants are not complying with s187A or are applying it more liberally than Parliament intended, and that the Committee can do nothing about it. In its 2005 report the Committee addressed criticisms by groups opposed to abortion. It referred to the Royal Commission's report and stated that although the law was written with precision:

> … the wording has come to have a de facto liberal interpretation. Case law does not refute this understanding. The Supervisory Committee therefore has no choice but to accept that this is the intent.

[51] In its 2000 report the Committee stated that the CSA Act's procedures "are not being followed as the law intended". The provisions for legal, safe abortions "are not being consistently applied throughout the country." The Act is demeaning in requiring that a medical procedure be considered under the Crimes Act, and

> It is also misleading that 98.2 percent of abortions have to be granted under mental health provisions.

[52] In 2001 the Committee referred to its 2000 observation that the law is not working as originally intended and added that the Committee does not have the power to alter the situation. And in 1996 it referred to criticism of the consultants' reliance on the diagnosis of "reactive depression" by stating that it is a recognised diagnosis and adding that the Committee has no power to question an individual diagnosis. In its 1999 report the Committee also opined that the abortion law had not fulfilled the expectations of the legislators because it was being interpreted more liberally than expected. In 1997 it explained that women seek abortion for many reasons; poverty, inadequate resources for housing or feeding a family, drug or alcohol dependency, violent or abusive relationships, low self esteem, reluctance to take the pill, and lack of knowledge.

[53] Lastly, a previous Chair of the Committee, Dr Christine Forster, was quoted in a *Sunday Star-Times* article of 5 November 2000 as follows:

> "We do essentially have abortion on demand or request, however you like to put it. Our view is that over the years of listening to people, it's time perhaps to be more honest about it.
>
> "Certainly in the main centres, in Auckland, Wellington and Christchurch, if a woman wants an abortion I think she'll get one," said Forster.
>
> The committee wanted to see abortion removed from the Crimes Act. It would then be a matter for a woman and her GP, not subject to any restrictions in legislation and treated like any other medical procedure, said Forster. …
>
> Abortions have been rising under the law, reaching a high of 15,501 last year. The vast majority, 98%, are approved on the grounds that proceeding with the pregnancy would result in serious danger to the mental health of a woman.
>
> Forster said she did not believe all those women were in serious danger.
>
> "I think it is a serious time in their life, going through this decision and I wouldn't underestimate it, but I think in a way it's demeaning to be claiming that this is something that is a serious mental health problem.
>
> "I think people are fitting the grounds to the women," said Forster.

[54] I readily accept Ms Gwyn's submission that the statistics must be interpreted with care. Those who seek abortions are most unlikely to form a representative

sample of all pregnant women. On the contrary, health risks may well be more prevalent among them. For example, some women who seek an abortion, perhaps lacking the resources or family support to raise a child, may risk major depressive disorder if the pregnancy continues (I use that terminology because there is evidence that major depressive disorder is a recognised condition that might constitute a serious danger to a woman's health if the risk is sufficiently severe.) The statistics do not record the number of women who elected not to proceed, perhaps after counselling, before the consultants reached a decision. I also accept that some of the Committee's comments about the unsatisfactory state of the law's administration were made when it recommended that the law be liberalised. Such recommendations are encompassed by its statutory functions.

[55] In *Bayer v Police* [1994] 2 NZLR 48, the Court of Appeal considered an earlier set of statistics when evaluating a defence that the defendants, who had entered an abortion clinic, had acted in defence of life and so were not guilty of trespass. The Court stated:

> 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.[38]

[56] In my opinion, the statistics and the Committee's comments over the years since the Court of Appeal made that observation do give rise to powerful misgivings about the lawfulness of many abortions. They tend to confirm Dr Forster's view that New Zealand essentially has abortion on request. The number is substantial when expressed as a ratio of total births, stillbirths, and abortions, and the crude abortion rate is comparable to that of Canada and the USA, in which women enjoy a constitutional right to abortion. Some consultants approve every request, and around 98% of abortions are authorised on the mental health ground. The approval rate seems remarkably high, bearing in mind that under s187A the consultants must form the good faith opinion that continuance of the pregnancy would result in serious danger to the mother's health. The law precludes abortion on request and abortion as a matter between the woman and her own doctor. It is not available on request in

[38] at p52

cases of rape, although that can be taken into account under s187A. And while judgements about danger to health must be based on modern medical knowledge and standards, it is noteworthy that the Royal Commission observed that some women suffer from anxiety, insomnia and emotional outbursts in the first trimester of pregnancy and concluded that it would be wrong to terminate a pregnancy because of psychological stress that was of relatively short duration or of relatively mild anxiety.[39]

[57] Ms Gwyn emphasised that the composition of the Committee has changed. The present members have not expressed the opinion that certifying consultants are manipulating the statutory grounds to provide abortion on request. But previous Committees doubtless reflected carefully before reporting their views to Parliament. They thought the law was not being administered in the conservative manner that Parliament intended. The crude abortion rate has not changed significantly since then, and with the exception of the 2004 and 2005 years the numbers have continued to climb. It is inescapable, as Ms Gwyn properly acknowledged, that the statistics put the Committee on inquiry. Indeed, it has responded by providing consultants with opinions by Associate Professor Simpson, the clinical director of the Auckland Regional Forensic Psychiatry Service, to the effect that the diagnosis of "reactive depression" is now outdated, that consultants should be encouraged to use the terms "major depressive disorder" and "adjustment disorder with depressed mood", and that diagnoses should also state that the severity of the patient's condition is such that it is a serious danger to her health. It advised consultants that it considered use of these terms mandatory in the forms used to certify abortions. It maintains, however, that it can go no further.

[58] This is an appropriate point to record that Parliament appears untroubled by the state of the abortion law. The Committee's occasional calls for reform have gone unheeded. After reviewing the law in 1996, the Justice and Law Reform Select Committee recommended modest changes, including streamlining the procedure in ss32 and 33. The Government did not take up the recommendations, noting that in Parliament there had been little apparent support for "a fundamental reappraisal of the balance struck in 1977". The Committee has occasionally expressed frustration

[39] Royal Commission Report p270

at what it has characterised as the indifference of Members of Parliament to the statistics and opinions presented in its annual reports.[40]

The lessons of *Wall v Livingston*[41]

[59] Dr Wall, a paediatrician, sought judicial review of the decision of two consultants who had authorised an abortion. He had treated the girl concerned for a heart condition but had nothing to do with the decision to authorise the abortion, which he sought to prevent. He differed from the two consultants on what the Court of Appeal characterised as a matter of medical judgement, apparently believing that they had issued their certificate without sufficient time for interview or consultation and that their conclusions were wrong. Although the Courts were prepared to assume that his opinions were honestly held, he earned disapproval for alleging bad faith without sufficient evidential foundation. In the High Court, Speight J declined judicial review, reasoning that Dr Wall lacked standing.

[60] The Court of Appeal observed that the CSA Act followed the report of the Royal Commission and reflected a very careful attempt by the legislature to balance the "deep philosophical and moral and social attitudes which surround this whole subject-matter".[42]

[61] Speight J had remarked that the legislation considers the rights of the mother and balances them against the rights of the unborn child "which in the course of nature must mean the right to be born". The Court of Appeal must have entertained reservations about that remark, for it suggested courteously that by mentioning the rights of the unborn child in that way Speight J was drawing attention to the important fact that nowhere in the CSA Act but in the long title is there any mention of the phrase "the unborn child" or of its rights. Nor is anybody assigned responsibility for protecting such rights. Rather, the matter is handled indirectly, by surrounding the lawful termination of a pregnancy with a precautionary process involving medical authorisation by two certified consultants. The Court emphasised

[40] ASC Report to Parliament for year ended 30 June 1999
[41] [1982] 1 NZLR 734
[42] at p737

that "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."[43]

[62] The Court emphasised that the legislation places a great social responsibility on the medical judgement of two independent consultant doctors, and treats the decision as "a medical assessment pure and simple". Section 30(5) is intended to ensure that the Committee will be likely to produce a panel of consultants "able and qualified to make determinations in a clinically detached way against medical expertise and experience."[44]

[63] After outlining the mechanism for authorising an abortion, the Court discussed the Committee's role, holding:

> 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 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.[45]

[64] The Court agreed with Speight J that Dr Wall lacked standing. No legal statutory right in the unborn child could be spelled out of the Act which would in itself enable a direct claim of standing; that being so, neither Dr Wall nor anybody else could possibly claim to represent the interests of the unborn child. Insofar as Dr Wall's limited previous association with the girl was concerned, the Court noted that even the Committee is kept quite isolated from any individual case. The

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[43] *ibid*
[44] p738
[45] *ibid*

decision is a medical one, and the decision is to be left entirely to the certifying consultants, "bad faith alone excepted".

[65] The Court declined to express a final view about the availability of judicial review. But two constraining factors must inevitably and "very severely" limit its operation. The first was standing; the CSA Act is a code governing the procedure to be followed before abortions are carried out, and provides an elaborate screening mechanism dependent almost entirely on medical judgement. No individual who was not one of the statutory participants could ever be regarded as having a sufficient interest to institute proceedings for judicial review. Second, the scope of judicial review must be limited where the subject of the review would be the exercise of medical judgement by professionals in discharge of a professional responsibility under a statutory authority. The Court attached significance to the fact that the exercise of the medical judgement of the certifying consultants in individual cases is not subject to review by the Committee, "the specialist body established under the Act to exercise oversight of the legislation".[46] Nor are they required to give reasons for their decisions, beyond identifying the applicable statutory exception in the Crimes Act.

[66] *Wall v Livingston* established emphatically that judicial review of the decisions of certifying consultants is available only in exceptional circumstances. But that case was concerned with decisions to authorise abortions in particular cases; these the Act characterises as both medical in nature and somewhat urgent, and accordingly assigns to the certifying consultants with no provision for review. This application brings the functions of the Committee into sharper focus. The applicant says that although the Committee cannot intervene in particular decisions before abortions are carried out, it can and should review those decisions after the fact where necessary to ensure that the criteria in s187A are being applied consistently and in the manner that the legislature had in mind.

Does the unborn child enjoy a legal right to life?

[46] p741

[67] The long title to the CSA Act states, inter alia, that it is an Act "to provide for the circumstances and procedures under which abortions may be authorised after having full regard to the rights of the unborn child".

[68] Mr Bassett understandably emphasised the long title to argue that the unborn child enjoys legal rights and hence possesses a legal status of its own. The abortion law itself recognises that the unborn child enjoys a legal right to life except where the law places the health of the mother first. This, he argued, justifies judicial review of "the highest intensity". Further, the CSA Act must be interpreted in a manner consistent with the New Zealand Bill of Rights Act, s8 of which provides that 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. He distinguished US and Canadian cases holding that the unborn child is not a person under the constitutional law of those jurisdictions. He also invited me to find that the abortion law displaced the 'born alive' rule.

Does the abortion law itself recognise the unborn child's right to life?

[69] The long title is an indication in an Act for purposes of the Interpretation Act 1999 and so may be taken into account in interpreting its language.[47] It is a guide to the legislature's purpose. I respectfully agree with Wild J that the long title to the CSA Act indicates that through the legislation Parliament itself meant to have regard to rights of the unborn child.[48] In context, it is a reasonable inference that the legislature had in mind a "right" to life, since it is only by constraining abortion that the CSA Act's procedures and s187A can be said to insist on regard being had to rights of the unborn child. Does the abortion law confer or recognise a right to life, and if so what sort of right is it?

[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

[47] Burrows *Statute Law in New Zealand* (3rd ed., 2003) at p165

unborn child. There is, as that Court also noted, a limited number of persons who may have any association with the certifying process.[49] They do not include anyone representing the unborn child. So 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.

[71] Section 182 of the Crimes Act, which I have set out above, is part of the abortion law as defined. It refers to the unborn child in the section heading, an indication to which the Court may pay attention when interpreting the section.[50] It protects the unborn child by providing that it is a crime to cause the death of any child that has not become a human being. Under s159 a child becomes a human being for purposes of the Crimes Act when it has completely proceeded in a living state from the body of its mother.[51]

[72] Although s182 recognises that an unborn child may be killed, it does not establish that the abortion law recognises a legal right to life. It has formed part of the criminal law of New Zealand since 1867 and was created to address the killing of a child during birth, so bridging a gap between abortion and homicide.[52] Before it was first enacted as cl 203 Criminal Code Bill 1883,[53] killing a child in the process of birth did not entail procuring a miscarriage so was not an offence under (now) s183. Nor was it murder, for the child had not proceeded in a living state from the body of its mother. However, the drafting left the scope of s182 and its relationship with the abortion provisions in an uncertain state, because the section covers death caused before birth but does not establish a timeframe within which death must occur.[54] In *Woolnough* the Court of Appeal accordingly found it necessary to reconcile ss182 and 183. Richmond J discerned a legislative intention that s182 should not apply in the first trimester of pregnancy:

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[48] *Right to Life New Zealand Inc v Rothwell* [2006] 1 NZLR 531 at [49]
[49] p740
[50] s5(3) Interpretation Act 1999
[51] s159
[52] *Woolnough* at p516
[53] Sections 200 and 201 of the code were in the same terms, except as to penalty, as ss182 and 183 of the Crimes Act 1961

> …the language of s 182(2) contemplates that the entire section is concerned only with the situation where the death of a "child" is caused "before or during [its] birth". In ordinary language I do not think that this is an appropriate description of the destruction of an embryo or fetus brought about at a very early stage of pregnancy as the result of an induced miscarriage. In the present case the court is concerned only with abortions carried out during the first trimester of pregnancy and all I need say is that in my opinion s 182 has no application to such cases.[55]

[73] The Royal Commission followed that approach, recommending that s182 need not be amended so long as s159 remained the law.[56] The legislature appears to have signalled its acceptance that s182 is compatible with ss183-187A and the CSA Act by defining the abortion law to include it and by preserving s159.

[74] Accordingly, the abortion law neither confers nor recognises an express right to life, s182 and the long title to the CSA Act notwithstanding.

[75] A legal right is narrowly defined as having the following five characteristics:[57]

a) It is vested in a person who may be distinguished as the owner of the right, the subject of it, the person entitled, or the person of inherence.

b) It avails against a person, upon whom lies the correlative duty. He may be distinguished as the person bound, or as the subject of the duty, or as the person of incidence.

c) It obliges the person bound to an act or omission in favour of the person entitled. This may be termed the content of the right.

d) The act or omission relates to some thing (in the widest sense of the word), which may be termed the object or subject matter of the right.

e) Every legal right has a title, that is to say, certain facts or events by reason of which the right has become vested in the owner.

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[54] Skegg & Paterson *Medical Law in New Zealand* (2006) at p498
[55] *Woolnough* at p516
[56] Royal Commission Report p279

[76] In the strict sense, then, a legal right must be vested in one person and avail against another, binding the second person to an act or omission in favour of the first. This proposition might meet the objection that right is a concept of flexible meaning. The law also recognises a broader category of rights, as where it confers a power or liberty or immunity on someone. For example, it might be said loosely that medical practitioners have the right to perform abortions, although it is more accurate to say that s187A(4) confers an immunity on them in certain circumstances. The term 'right' is also sometimes used to describe a liberty that carries with it no correlative duty on others, although its use in such contexts has been aptly characterised as meaningless.[58] And some legal rights are conditional in the sense that they must be balanced against other rights or values. The rights protected by the New Zealand Bill of Rights Act fall into this category.

[77] But context is all-important, and that means attention must turn to the mother. From the perspective of a woman who wants an abortion, pregnancy and childbirth impose burdens of a profound and private nature, affecting her physical autonomy, her health, her relationships, and her socio-economic status. A claim to a legal right to life for the unborn child places it in an adversarial relation to her. So it does not seem sensible to speak of a right to life for the unborn child unless its mother owes it a correlative duty.

[78] As a matter of law, a woman need not take the unborn child's interests into account when seeking an abortion. On the contrary, she may request an abortion for any reason at all. She need not undergo counselling. It is a distinctive feature of the abortion law that others commit a serious crime by procuring a miscarriage or abortion, yet the woman may not be charged as a party notwithstanding that she presumably sought the abortion, and may have done so for reasons of convenience.[59] Indeed, she commits no offence under the abortion law if she procures an abortion by deceiving the consultants as to her mental or physical state; so long as a certificate has been provided and the medical practitioner performing the abortion

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[57] Glanville Williams (ed) *Salmond on Jurisprudence* (11th ed. 1957) at p265
[58] Evans "What Does it Mean to Say Someone Has a Legal Right" (1998) 9 Otago L.R 301, 304
[59] s183

does so in good faith, the abortion is lawful for purposes of ss183 and 186 of the Crimes Act and s44 of the CSA Act.

[79] The abortion law certainly asserts a state interest in protecting the unborn child, and not merely an interest in ensuring that women may have safe and legal abortions. In *R v Woolnough*, Richmond J held that the purpose of s182 was to protect the life or potential for life of the unborn child, and to protect the mother from the dangers of induced abortions.[60] That dual interest is also apparent in the long title to the CSA Act, in the s187A criterion of serious danger to the health or life of the mother, and in the precautionary CSA Act procedures for authorising abortions.

[80] For an interest to become the subject of a legal right, however, it must obtain not merely legal protection but also legal recognition.[61] The state's interest in protecting the unborn child is addressed by restricting the woman's autonomy. She may request an abortion for any reason, but the circumstances under which her request will be granted are limited by statute. Those provisions do not impose a duty in respect of the unborn child and, accordingly, do not found the correlative right. The woman must comply with the abortion law but when compliance with a given rule is understood merely as the condition of securing or avoiding certain further legal effects, then compliance is not considered a legal duty.[62]

[81] Further, "there can be no duty unless there is someone to whom it is due and no wrong unless there is some one who is wronged, that is to say, whose right has been violated'.[63] 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.[64] The rule is recognised by s159 of the Crimes Act, which is not part of the abortion law as defined but must be read in this context with s182, which is.

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[60] [1977] 2 NZLR 508 (CA) at p517
[61] *Salmond on Jurisprudence* (supra) at p263
[62] Evans (supra) at p302
[63] Salmond (ed) *Salmond on Jurisprudence* (7th ed., 1924) at p248 cf. *Salmond on Jurisprudence* (supra) at p264
[64] *Harrild v Director of Proceedings* [2003] 3 NZLR 289

[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.*[65] 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."[66] 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.[67]

[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.

[84] Mr Bassett also argued that the rule is archaic, for it had its origins in the 15th century when little was known about whether an unborn child was alive at any given time. Modern justifications for retention of the rule are founded on convenience rather than any medical or moral principle, and advances in medical science have rendered the rule redundant. He referred to affidavits of two medical specialists,

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[65] *Ibid*
[66] *Harrild* at p313
[67] *Re an Unborn Child* [2003] 1 NZLR 115; cf *Re Ulutau* (1988) 4 FRNZ 512 (where an order was made in respect of the child with effect from live birth.) and see Manning J., "Health Care Law Part 1: Common Law Developments" [2004] NZLR 181, 188

Professor Kevin Pringle and Mr Dereck Souter, to the effect that it is now possible to remove the fetus from the body of its mother and return it after surgery to complete gestation, a development that creates profound difficulties for the born alive rule. He cited the 2005 judgment of the New South Wales Court of Appeal in *R v Iby*, in which Spigelman CJ, for the Court, described the rule as anachronistic, having been developed when medical knowledge was primitive and infant mortality high.[68]

[85] The common law rule may be anachronistic insofar as it still rests on medical knowledge. But the modern justification for the rule is not a medical one. The rule retains vitality in the common law world for two related reasons; it reflects the autonomy afforded women of full capacity, and any other approach risks leading the Courts to assume control over their behaviour and lifestyle choices during pregnancy.[69] In any event, since the abortion law rests on the rule the legislature alone can determine, in this context, whether it ought to be abandoned. I should record in passing that the implications for the rule of the medical developments cited by Mr Bassett are controversial. The Committee filed an affidavit of Professor Spencer Beasley to the effect that open fetal surgery is not tantamount to live birth, for necessary conditions (the baby leaving the uterus permanently and change in oxygenation from the placenta to the baby's lungs) have not occurred.

[86] The Royal Commission used the term "unborn child", which was found in its terms of reference, but stated that it did so in a neutral way to distinguish the embryo or fetus from the born child.[70] It reviewed the common law and the Crimes Act, concluding that although wrongs may be done to the unborn child it cannot obtain a remedy unless and until it is born alive.[71] It concluded that the unborn child has a "status" that entitled it to protection but defined status broadly as a social position,

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[68] *R v Iby* (2005) 63 NSWLR 278 at [32]

[69] *St George's Healthcare NHS Trust v S: R v Collins, ex p S* [1998] 3 All ER 673, 691 (CA) (a woman is entitled not to be forced to submit to an invasion of her body against her will, even if her own life or that of her unborn child depends on it.); *Winnipeg Child and Family Services v G(DF)* (1997) 152 DLR (4th) 193 (SCC) (there is a conflict between the pregnant woman as an autonomous decision-maker and her fetus. The fetus' complete physical existence is dependent on the body of the woman and any intervention to further the fetus' interests will necessarily implicate, and possibly conflict with the mother's interests.); *Attorney-General (QLD) (Ex rel Kerr) v T* (1983) 46 ALR 275, 277 (to issue an injunction preventing an abortion would be to interfere "in the most serious way" with a woman's liberty of action.)

[70] Royal Commission Report at p180

[71] *Ibid* pp190-2

rank, relationship to others, or position as fixed by the law, or legal standing.[72] The case for protection of that status rested on moral considerations, namely that the unborn child is "one of the weakest, most vulnerable, and most defenceless forms of humanity".[73] Its recommendations recognised that an existing life, that of the mother, should be given greater weight than a "fetal life with its potential still unformed". It focused accordingly on defining the circumstances in which an abortion should be unlawful, and it did so in a manner broadly consistent with the existing law. Nothing in the Royal Commission's reasoning suggests it proposed to confer legal rights on the unborn child.

[87] From a legal perspective, then, the "right" of the unborn child to life is better characterised as a moral claim that the legislature has recognised in the substantive criteria and the procedures of the abortion law. Through the law the state has asserted that the unborn child has a claim on the conscience of the community, and not merely that of the mother. That claim cannot be characterised as a legal right, for there is no correlative duty on the mother, or any other actor in the abortion process, and the unborn child is not a legal person for purposes of the abortion law.

Does the unborn child enjoy the right to life under the New Zealand Bill of Rights Act?

[88] Section 8 of the New Zealand Bill of Rights Act provides:

> **8 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.

[89] The question whether s8 applies to the unborn child has not yet been decided. Mr Bassett argued that it does apply, for the unborn child may be "deprived of life" and is human. In the context of a statute dealing with human rights, the term "no one" should refer to all humans. That was said to be consistent with s29, which provides that the New Zealand Bill of Rights Act applies, so far as practicable, for the benefit of all legal persons as well as natural persons. He accepted that s8 has no

[72] *Ibid* p181
[73] *Ibid* p192

direct application to an unborn child, for an abortion may be authorised under the abortion law notwithstanding it. He argued rather that because s8 extends to the unborn child, the abortion law must be interpreted in accordance with s6, which provides that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the New Zealand Bill of Rights Act, that meaning shall be preferred to any other.

[90] Mr Bassett and Ms Aldred, who argued this part of the case for the respondent, referred to authorities from other jurisdictions, some of which recognise a constitutional right to abortion.

[91] The 14th Amendment to the Constitution of the United States of America provides that "… nor shall the state deprive any person of life, liberty, or property without due process of law ….". In *Roe v Wade,*[74] the Supreme Court held that the 14th amendment did not extend to the unborn. Rather, by protecting the liberty of the person the Constitution recognised a right of personal privacy, which was broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The Constitution did not define "person" in so many words but employed it, in almost every instance, in a way that applies only postnatally. However, the state had a legitimate interest in seeing to it that abortion is performed under circumstances that ensure maximum safety for the patient, and the state might also assert an interest in protecting potential life. The latter interest need not stand or fall on acceptance of the belief that life begins before live birth.

[92] Section 7 of the Canadian Charter of Rights and Freedoms provides:

> Everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[93] In *R v Morgentaler*[75] the Supreme Court of Canada considered whether s251 of the Criminal Code, which created an offence of using any means to procure a miscarriage, infringed s7. Dickson CJ, speaking in the majority, concluded[76] that the

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[74] 410 US 113 (1973)
[75] [1988] 1 SCR 30
[76] at [20]

section interfered with a woman's bodily integrity in both a physical and emotional sense, forcing her by threat of criminal sanction to carry a fetus to term unless she met certain criteria unrelated to her own priorities and aspirations.[77] That was a profound interference with a woman's body and thus a violation of security of the person.

[94] The Supreme Court has yet to decide whether the rights under s7 extend to a fetus. In *Borowski v Attorney General of Canada*[78] the Saskatchewan Court of Queen's Bench held that a fetus is not included in "everyone" so as to trigger the application of s7. That province's Court of Appeal upheld the decision.[79] By the time it reached the Supreme Court,[80] however, *Morgentaler* had been decided and the appeal was dismissed as moot.

[95] The question whether s7 extends to the fetus was also left open in *Tremblay v Daigle*,[81] this time on the basis that the case was a civil action between two private parties. Charter claims require that some sort of state action be impugned. But the Supreme Court concluded that the Quebec Charter of Human Rights and Freedoms did not confer the right to life on the unborn child. Article 1 of that Charter provides that every human being has a right to life, and to personal security, inviolability and freedom. Considered as a whole, the Charter disclosed no clear intention on the part of its framers to consider the status of a fetus. That was most evident in the absence of any definition of human being or person. The Supreme Court inquired rhetorically why the legislature, if it had intended to accord a fetus the right to life, would have left the protection of that right in such an uncertain state and dependent on the decision of third parties who might seek to intervene on its behalf.

[96] Article 2 of the European Convention on Human Rights provides that "everyone's right to life shall be protected by law". In *Vo v France*,[82] the European Court of Human Rights found it unnecessary to answer in the abstract the question

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[77] A pregnant woman wishing to have an abortion was required to apply to a "therapeutic abortion committee", which was empowered to issue a certificate stating that continuation of the pregnancy would be likely to endanger the pregnant woman's life or health.
[78] [1984] 1 WWR 15
[79] [1987] 4 WWR 385
[80] [1989] 1 SCR 342
[81] [1989] 2 SCR 530

whether the unborn child is a person for the purposes of Article 2. It examined existing case law and held that in the various laws on abortion the unborn child was not recorded as a "person" directly protected by Article 2 of the Convention and that if the unborn child does have a right to life it is implicitly limited by the mother's rights and interests.[83]

[97] The South African High Court held in *Christian Lawyers Association of South Africa v Minister of Health*[84] that the term "everyone" under the Right to Life provision of the Constitution of South Africa[85] does not encompass the fetus. It was unlikely the drafters would have failed to make express provision had they intended to include it. The Constitution guarantees everyone the right to security in and control over their body. Nowhere in the Constitution are a woman's rights in this respect qualified to protect the fetus.

[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.[86]

[99] Second, the meaning to be attached to the term 'no one'[87] may be derived from the provisions of the New Zealand Bill of Rights Act. Very few of the rights

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[82] (2005) 40 EHRR 12
[83] at [80]
[84] 1998 (4) SA 1113
[85] s11: "everyone has the right to life"
[86] s9 NZBORA
[87] Other sections use "everyone" (ss9, 11, 13, 14, 16-19, 21-25), "every person" (ss10, 15, 27) and "a person" (s20). Section 29 provides that except where the provisions of the Act otherwise provide, the Bill of Rights applies, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons.

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.[88] 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.[89] 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.[90] The issue was the 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 [section 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.[91]

[101] It is most unlikely that in these 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.

[102] I conclude that s8 of the New Zealand Bill of Rights Act does not extend to the unborn child. It follows that s6 of that Act does not apply to interpretation of the abortion law.

International instruments

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[88] ss9 and 10
[89] s11
[90] White Paper at 10.85
[91] Interim Report of the Justice and Law Reform Select Committee Inquiry into the White Paper at p53

[103] New Zealand is a signatory to the United Nations Convention on the Rights of the Child, Article 6 of which provides:

> 1. States Parties recognize 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.

A "child" is defined as including every human being under the age of 18 years,[92] but the Convention sets no lower limit to that definition. The Convention's preamble,[93] however, requires state parties to bear in mind the 1959 Declaration on 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".[94] 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.

Conclusions

[104] I acknowledge that the applicant attaches great importance to legal recognition of the right to life, putting it rather than the legislation at the forefront of its submissions. As presented by Mr McKenzie, the demand for recognition rests not on sectarian or religious doctrine but an appeal to liberalism, with its respect for individual rights and recognition of the equality of individuals. The unborn child is human and possesses individual human rights that it is the work of the law to protect, so it must be accorded a status in law equivalent, or nearly so, to that of its mother. Recognition of the unborn child's right to life curtails the mother's liberty, but only to the extent necessary to ensure similar liberties for all.[95] But evaluation of these arguments is the province of the legislature, not the Court, for they raise contentious

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[92] UNCROC Art 1
[93] paragraph 9
[94] United Nations Declaration on the Rights of the Child, preamble, paragraph 3
[95] Rawls J., *A Theory of Justice* (1st ed., 1971) at p201-4, 235-243

moral and social issues.[96] The immediate question is whether the abortion law and s8 of the New Zealand Bill of Rights Act recognise a right to life for the unborn child. I conclude that they do not.

Intensity of review

[105] I reject Mr Bassett's submission that a high intensity of review is appropriate, for several reasons. While the issue concerns a claim to life and so is important, a sliding scale of review is ordinarily confined to challenges founded on unreasonableness.[97] The abortion law also creates an elaborate procedure in which substantive decisions have been assigned to medical practitioners, while the Committee is an expert body, with access to specialist advice. Lastly, in those areas that are of greatest concern to the applicant the CSA Act creates no role for the Court, while the legislature itself exercises oversight of the abortion law and its operation.

The functions, powers and duties of the Committee concerning consultants' compliance with s187A

[106] The Committee's principal functions are set out in s14, which I have set out above. Mr McKenzie focused on two subsections, ss(1)(h) and (i), although others aid in understanding the Committee's place in the legislative scheme. Counsel joined issue on whether these functions extend to investigating compliance by certifying consultants. If so, two further questions arise: might the Committee use its powers under s36 to obtain information about the performance of their functions, and might it deal with poor performance by removing or not reappointing consultants under s30?

Section 14(1)(h): Keeping procedure under review

[107] The subsection provides that it is a function of the Committee:

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[96] cf *Winnipeg Child and Family Services v G (DF)* [1977] 3SCR 925 at [24]

> (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:

[108] Mr McKenzie argued that this provision extends to the substantive criteria in s187A, for the procedure in ss32 and 33 refers in turn to s187A, requiring that certifying consultants make their decisions under it. Ms Gwyn responded that it is confined to the procedural aspect of ss32 and 33.

Section 14(1)(i): Taking steps to ensure administration of law is consistent and effective

[109] The subsection provides that it is a function of the Committee:

> (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:

[110] Mr McKenzie submitted that the subsection focuses clearly on the work of certifying consultants, who administer the law throughout New Zealand, and the effective operation of the CSA Act and its procedures extends to s187A. Ms Gwyn responded that administration throughout New Zealand may concern licensed institutions rather than consultants and in any event administration is a clerical function. To interpret the subsection more broadly would be inconsistent with the tenor of the CSA Act as explained in *Wall v Livingston*.

Section 36: The Committee may inquire into certifying consultants' work

[111] Section 36 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.

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[97] *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 (CA) at 66

(2) No such report shall give the name or address of any patient.

[112] Mr McKenzie argued that this provision plainly extends to the consultant's functions under s187A and ss(2) envisages that the Committee will require reports in particular cases. Ms Gwyn acknowledged that the language is open-textured, but argued that the power can be exercised only in pursuit of the Committee's functions under the CSA Act. She pointed out that the Committee does require that consultants provide information about their decisions.

Committee's functions concerning consultants' compliance with s187A: discussion

[113] I begin with s14(1)(a), which is expressed in the widest terms, requiring the Committee to attend not only to all the provisions of the abortion law but also the operation and effect of those provisions in practice. That extends to s187A as a matter of definition. Section 14(1)(a) accordingly contemplates that the Committee will keep under review certifying consultants' compliance with s187A. To review is to re-examine something judicially or administratively, and includes consideration for purposes of correction.[98] It follows that the Committee must form its own judgment about the matters it must keep under review. The same may be said of its functions under s14(1)(k), which require that it report annually to Parliament "on the operation of the abortion law".

[114] Turning to s14(1)(h), it is true that 'procedure' might extend to the substantive criteria and not merely the process to be followed in applying them, but I am satisfied that it is confined to process in this context. I agree with Ms Gwyn that the phrase "whereby it is to be determined in any case whether the performance of an abortion would be justified" merely identifies the procedure concerned. It is the procedure "prescribed by" those sections that s14(1)(h) is concerned with. The substantive criteria of the abortion law, a defined term used elsewhere in s14, are prescribed by s187A. If Mr McKenzie were right, s14(1)(a) would also risk redundancy. I conclude that ss(1)(h) is confined to the procedure prescribed under sections 32 and 33. The Committee's function of keeping those procedures under review requires that it form its own view about their adequacy and effectiveness.

That conclusion is consistent with the corresponding recommendation of the Royal Commission, that the Committee's functions should include review of the process of decision-making.[99]

[115] Turning to ss(1)(i), I observe that the subsection is the penultimate provision within s14(1). That is consistent with Ms Gwyn's submission that it is likely to be concerned with clerical or administrative matters. I accept also that other provisions that expressly address the abortion law as a whole require the Committee to keep it under review or report, while provisions that require it to achieve results itself generally concern functions for which it is directly responsible, such as licensing of institutions, standards to be maintained in institutions, or provision of counselling facilities.

[116] However, I agree with Mr McKenzie that the subsection is concerned, at least in its first limb, with the work of certifying consultants and not only that of licensed institutions. The use of the defined term "abortion law" establishes that the law being administered extends to s187A, and that section is administered throughout New Zealand by certifying consultants and, arguably, the doctors who perform abortions. The natural meaning of "administration", in respect of a law, is enforcement of its provisions, the resolution of conflicts as to its meaning and the interpretation of its language. That conclusion is consistent with the corresponding recommendation of the Royal Commission, which was that the Committee's functions should include "… the maintenance of consistent standards in the interpretation and administration of abortion laws".[100] It follows that the Committee's functions extend to identifying any apparent inconsistencies and establishing whether they are attributable to divergence in standards. If so, it is for the Committee to take all reasonable and practicable steps to ensure that the law is applied consistently.

[117] So far as the second limb is concerned, I accept that the obligation to ensure the effective operation of the CSA Act and the procedures thereunder is expressed in general terms, while the first limb is concerned with the work of certifying

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[98] Blacks Law Dictionary (6th ed., 1990)
[99] Royal Commission Report, Recommendation 1(7), p295

consultants. But the second limb refers to the CSA Act rather than the abortion law. The CSA Act deals with licensing institutions, institutional standards, provision of counselling, appointment of consultants, and procedure for authorising abortions. I conclude that the second limb does not require the Committee to take all reasonable and practicable steps to ensure that the abortion law as a whole works effectively.

[118] Neither counsel attached much weight to s14(2). It is intended to ensure that the Committee has all the powers reasonably necessary for the performance of its functions. However, the issue is whether its functions extend to reviewing the work of certifying consultants under s187A.

[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 s187A criteria, to the extent that the Committee's s14 functions extend so far. I have concluded that ss14(1)(a) and (k) do require that it review the operation of the abortion law, including s187A, while ss14(1)(i) requires that it take steps to ensure that consultants administer the abortion law, including s187A, 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.[101] For reasons mentioned below, it is also consistent with the Committee's function of appointing and removing consultants, which is not referred to in s14.

[120] Ms Gwyn acknowledged that s36 is expressed in wide terms, but she argued that like s14 it must be interpreted consistently with *Wall v Livingston*, which confirmed that the Committee may not intervene in the individual decisions of certifying consultants. To require reports after the fact so that the Committee could

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[100] *Ibid* p295
[101] *Ibid* p296

reach its own view would be to intervene in future decisions, because the Committee would be influencing consultants' approach to s187A.

[121] I accept that by reviewing consultants' reasons for authorising or refusing abortions and forming its own judgment about consultants' compliance with s187A, the Committee may alter their approach in future cases. One would expect them to respond to informed criticism and to recognise a risk that serious non-compliance will result in disciplinary action. However, they remain free to exercise their clinical judgement in any particular case. Further, counsel's argument might lead to the conclusion that the Committee must eschew all possible influence upon consultants. But I observe that the Committee already seeks to influence them. I have mentioned that in recent years the Committee has sought to ensure that consultants both use recognised diagnoses when citing depression as the ground for an abortion and specify that the condition posed a serious danger to the mother's health. It also holds discussions with consultants, and is implementing a continuing medical education programme. In one case where a consultant expressed views apparently consistent with abortion on request, the Committee verified that she remained eligible under s30(5). Presumably the legislature envisaged that consultants' behaviour might be influenced by the Committee's annual reports and Parliamentary reaction to them.

[122] Is after the fact review consistent with *Wall v Livingston*? The Court held that:

> …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.[102]

And

> …even the supervisory committee is kept quite isolated from any individual case that might be dealt with by such consultants.[103]

[123] The Court was there addressing the question whether consultants' decisions could be reviewed before abortions were carried out. The question was whether anyone might intervene in "individual" decisions. The decision establishes that the Committee cannot review the decision of certifying consultants to authorise or refuse

[102] p738

an abortion before the abortion is carried out. The decision is left entirely to the consultants, bad faith alone excepted. However, the Court of Appeal did not conclude that there is no power to review a decision after the fact. Had it been asked to consider that question, it is unlikely that it would have spoken so unequivocally, for s36 certainly envisages that the Committee may exercise oversight of certifying consultants' performance of their functions and the Committee's own functions do extend to keeping the operation of the abortion law as a whole under review.

[124] Ms Gwyn also argued that to second-guess consultants' decisions would be a huge task, especially if it must be done to ensure consistency, and she added that the Committee is not expert. It need not, and does not presently, include obstetricians or gynaecologists among the two members who must be medical practitioners.

[125] I do not accept that the makeup of the Committee points to a narrower construction of s36 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.[104] 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.

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[103] p740
[104] ss15-17

[126] Under s30 the Committee appoints consultants for terms of one year only, and it may dismiss them in its discretion. So there is a mechanism – non-reappointment or removal – that the Committee could use to ensure that the law is being applied properly in practice, without intervening in individual decisions. It has never dismissed a consultant.

[127] I observe that s30(5) provides that the Committee should not appoint consultants who have fixed views one way or the other. One might conclude that it should only remove a consultant whom it has appointed if it discovers that he or she does has a fixed view one way or the other. But I prefer the view that s30(5) is concerned with eligibility, while the Committee's functions extend to assessing consultants' performance. The requirement that appointments be made annually also suggests that the Committee must concern itself with performance.

[128] The discretion is not fettered in any explicit way, but it goes without saying that it could be used only for the purposes of the CSA Act.[105] It would also have to be employed in a manner consistent with the Committee's carefully circumscribed functions under the abortion law. Decisions in individual cases are for the consultants alone. The Committee's principal functions concerning the abortion law as a whole are those of keeping the law and its operation under review and reporting to the legislature. I have found that it must form its own opinion about the operation of the law, investigating consultants' decisions to the extent necessary. Under s14(1)(i) it is required to take action itself to remedy consultants' administration of s187A, but only for the purpose of ensuring consistency. The function of appointing and removing consultants is not referred to in s14, but other provisions of the CSA Act point to the bases on which it might properly be exercised; ineligibility under s30(5), making decisions in bad faith (ss32, 33, and 40), and failing to keep records or supply reports necessary to allow the Committee to perform its own functions (s36).

[129] Ms Gwyn emphasised, in support of a limited role for the Committee, that enforcement of the abortion law is addressed by the criminal law. In particular,

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[105] *Padfield and Others v Minister of Agriculture Fisheries and Food and* Others [1968] 1 All ER 694; *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1947] 2 All ER 680, 682

under s187A a doctor who performs an abortion risks criminal liability if he or she believes it to be unlawful. And under s40 of the CSA Act, certifying consultants are protected from liability only for acts done in good faith under the powers conferred on them by the Act (I observe that it does not appear that they commit any offence if they act in bad faith qua consultant). She referred to *Wall v Livingston*, in which the Court noted that any process for enforcement of the law in a civil action must be used with great caution,[106] and *Paton v British Pregnancy Advisory Service Trustees*,[107] in which a man sought an injunction to prevent his wife from having an abortion that he contended was unlawful. The Court held that the husband had no right to stop his wife having an abortion or a doctor performing it. The legislation gave him no right to be consulted and treated the decision as a medical matter, and the Court could not punish her for refusing to comply with an injunction.

[130] I accept that the criminal law addresses enforcement. But this is not a case of the general civil law being employed to prevent a crime. Rather, the Committee has statutory functions to perform. The legislature evidently did not think those functions incompatible with criminal proceedings against those who procure or perform abortions unlawfully.

Insistence that consultants provide further details in their certificates

[131] One discrete particular of the third head of claim was that the Committee must insist that consultants specify, in the certificates that they complete, both the specific diagnosis and its severity. I reject this claim. While the Committee may require that consultants keep records and report to it, the details required of them in the certificates that they supply under s33 are addressed by Form 3A in the Abortion Regulations, which requires that the consultants specify the statutory grounds that justify an abortion but does not insist that the actual diagnosis and its severity be recorded. As the Court of Appeal put it in *Wall v Livingston*, there is no requirement that consultants give reasons.[108] Doctors who perform abortions must also record the

[106] p741
[107] [1978] 2 All ER 987 (QB)
[108] p739

abortion and the reasons for it, and a copy of that record must be sent to the Committee.[109]

[132] That does not preclude the Committee from advising consultants in the exercise of its powers under s36 that they must keep records of the diagnoses and their severity. Insistence on keeping such records would be a sensible and perhaps necessary step if the Committee is to verify its concerns about misuse of the mental health ground. There is evidence that such records may also be necessary in any event to comply with the consultants' obligations under the Code of Health and Disability Services Consumers' Rights.[110] I have mentioned that the Committee has already taken steps to encourage consultants to use recognised diagnoses and address the severity of the woman's condition. It is for the Committee to determine whether those steps allow it to discharge its own functions.

Making appointments for abortions before certifying consultants are seen

[133] The applicant contends that the Committee has tolerated a practice adopted by some licensed institutions of making appointments for abortions before certifying consultants have seen the women. Mr McKenzie submitted that this practice places undue pressure on women to have abortions.

[134] I reject these submissions. Mr McKenzie pointed to nothing in the CSA Act that prohibits the practice. Indeed, it might be thought consistent with the Act, because it minimises delays in performing abortions once authorised. It might be the subject of recommendations by the Committee for reform of the Act's procedures, but that is a matter for the Committee. Appointments are simply cancelled if women elect not to proceed, and the evidence of Janet Campbell, a counselling advisor, is to the effect that the practice does not put pressure on women to have abortions.

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[109] CSA Act, s45. The section does not limit s36 (s45(1)) and the records are not to give the name or address of the patient (s45(2))

[110] Health and Disability Commissioner's Report – Case 97HDC9291. The Commissioner considered that it would be "most unwise" for referring practitioners and certifying consultants not to keep an adequate medical record demonstrating the assessment upon which they reached their decisions under relevant legislation. Failure to do so would mean providers risked being unable to defend complaints made against them about whether they have provided services in a satisfactory manner

Conclusions: causes of action 1-4

[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.

[136] The applicant has failed to show that the procedures in ss32-33 of the CSA Act extend to compliance with the substantive criteria in s187A, 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. Nor do I accept that the Act prohibits the practice of making appointments for abortions before women are seen by certifying consultants.

Counselling women considering abortion: the Committee's functions

[137] Section 31 of the CSA Act provides that the Committee must appoint counsellors or approve counselling agencies:

> **31 Supervisory Committee to appoint or approve counselling services**
>
> (1) For the purposes of this Act, the Supervisory Committee shall from time to time—
>
> > (a) Appoint suitably qualified persons to provide counselling services for persons considering having an abortion; or
> >
> > (b) Approve any agency for the provision of such counselling services.
>
> (2) In appointing or approving persons or agencies for the provision of counselling services under this section, the Supervisory Committee shall have regard to the following matters:
>
> > (a) Every counselling service should be directed by an experienced and professionally trained social worker:

> (b) That suitably trained lay counsellors may also be used where there are insufficient professional social workers:
>
> (c) Every counsellor should be thoroughly familiar with all relevant social services and agencies, and able to advise patients, or refer them to appropriate agencies for advice, on alternatives to abortion, such as adoption and solo parenthood.

[138] Section 21(1)(e) provides that the Committee shall grant a licence for an institution only if it is satisfied:

> **21 Grant of licences**
>
> (1) On receiving an application for a full licence in respect of any institution, the Supervisory Committee shall grant such a licence in respect of that institution only if it is satisfied—
>
> (e) 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.

[139] The applicant says that the Committee has entirely failed to appoint or approve counselling services under s31, but rather has left it to licensed institutions to provide counselling facilities. This practice is contrary to the Act and results in the Committee failing to ensure that counsellors are independent of licensed institutions. The Abortion Regulations are said to be ultra vires to the extent that the forms they prescribe contemplate counselling within licensed institutions.

[140] The Committee says that it approves counselling services for purposes of s31(1)(b) by licensing institutions. And it contends that the legislation does not require that the counselling services be independent of licensed institutions. It acknowledges that the s31(2) criteria are not addressed directly when appointing counselling agencies in this way. But it does set standards for counselling, which ensure that the service is adequate.

Independence of counsellors

[141] 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.[111] 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,[112] 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.[113] If the legislature had intended to adopt that recommendation, however, it would have done so in s21(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 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.

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[111] Under the Health and Disability Commissioner Act 1994
[112] New Zealand Association of Counsellors (NZAC) and Aotearoa New Zealand Association of Social Workers (ANZASW)
[113] Royal Commission Report p288

Failure to appoint counsellors or counselling agencies

[144] Soon after the CSA Act came into effect, the Committee expressed concern that because there were too few counsellors it had been unable to appoint appropriate counsellors or counselling agencies under s31 but had been forced to rely on licensed institutions.[114] It appears that the practice has continued ever since. On 12 March 2004, the Secretary of the Committee wrote to the applicant stating that the Committee has never used the powers conferred on it by s31(1) to "directly" appoint counsellors or approve any agency for the provision of counselling services. It had no knowledge of the terms of employment contracts that exist between counsellors and District Health Boards. Rather, its "practical input" extended to setting standards of practice for counsellors and providing ongoing voluntary training for them via the counselling advisory committee set up under s15 of the CSA Act.

[145] Under s14(1)(e) the Committee is 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.

[146] Several points emerge. First, the Committee is to see to it that there are "sufficient and adequate" facilities. That is reinforced by s21, under which institutions may not be licensed unless there are adequate counselling facilities available. Second, adequacy takes meaning from s31(2), which I have set out above. Third, counselling is the woman's right. Certifying consultants must tell her of her right to seek counselling "from any appropriate person or agency" when they make a decision to authorise or refuse an abortion.[115] But she need not avail herself of counselling at all, still less from a Committee-approved counsellor.

[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

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[114] ASC Reports to Parliament for years ended 31 March 1978 and 31 March 1979

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.

[149] Turning to adequacy, the evidence establishes that the Committee sets comprehensive standards for counselling; they record that counsellors should have a recognised qualification, that they must engage in regular supervision, that information should be provided about the options available to a woman seeking an abortion, and that counsellors should be able to refer women to other agencies and counselling services. The requirements of s31(2) are set out, and also attached is a code of ethics emphasising that women must be fully informed of the alternatives and their consequences. This corresponds generally to the standards required of health professionals under the Code of Health and Disability Services Consumers' Rights.

[150] The application form for an institutional licence requires that the institution describe the available counselling services. It includes the qualifications of counsellors, by whom they are to be supervised, by whom they are employed, and the manner in which confidentiality and privacy will be ensured. Accordingly, the Committee does establish who is employing the counsellors. The evidence does not state explicitly that the Committee considers whether any agency providing the counselling is directed by an experienced and professionally trained social worker. This requirement may have been overtaken in practice by the Committee's standards, which require that all counsellors are qualified (s31(2) envisages that lay counsellors might do the work within a counselling service directed by a professional.) But it is implicit in the application form that the Committee does consider this question. It

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[115] s35

appears that it is also in the practice of visiting institutions that are the subject of licence applications and interviewing counselling staff.[116]

[151] This head of claim also fails.

Content of counselling: inclusion of information about post-abortion trauma

[152] The applicant says that counselling must include advice about post-abortion trauma. For authority, Mr McKenzie pointed to the Committee's function of ensuring that adequate counselling facilities are available. There is expert evidence that abortions can have adverse psychological side-effects, although the existence and extent of such problems is controversial. Ms Gwyn took the point that the allegation was not pleaded. I agree, and decline to deal with it.

Relief

[153] Mr McKenzie sought orders in the nature of mandamus, contending that the statutory functions of the Committee are "functions in the nature of duties" and that the Committee has used its discretion to thwart or frustrate the policy and objects of the legislation.

[154] I did not hear from Ms Gwyn on this aspect of the case. Mandamus is plainly inappropriate, for four reasons. First, the case is concerned with functions of the Committee, which must enjoy a discretion about when and how those functions are performed.[117] Second, the Committee's stance to date has rested on a misunderstanding of its functions; there is no reason to suppose that the Committee will refuse to act now that those functions have been clarified.[118] Good faith should be assumed until its absence is demonstrated. Third, the applicant's real complaint is that there is wholesale non-compliance by certifying consultants. That is a matter about which the Committee, having been put on notice of apparent non-compliance,

[116] Affidavit of Janet Campbell, Counselling Advisor, at paragraph 6
[117] *R v Fergusson* (1984) 2 NZ Jur 20; *Yukich v Sinclair* [1961] NZLR 752; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] 1 ALL ER 694
[118] *R v Hillingdon London Borough Council ex p Royco Homes Ltd* [1974] 2 ALL ER 643

should form a view under s14(1)(a) to the extent that it has not already done so. It would doubtless record its conclusions in its annual report to Parliament under s14(1)(k). Fourth, it would be difficult to formulate mandatory orders in appropriately precise terms, and the Court would very likely be drawn into supervision of the Committee's work,[119] a task that might quickly become inconsistent with the role of the legislature under the CSA Act.

[155] I take a different view of the availability of declaratory relief, which may complement Parliamentary oversight by clarifying the Committee's functions under the abortion law. Relief is discretionary, but in this socially divisive area the Court should not assume a policy role. Contrary to the Committee's submission, it does not matter that for all the Court knows the applicant may be opposed to abortion on any ground, or that the litigation will prove a poor strategic choice for the applicant if it results in the law being amended to decriminalise abortion. It will be apparent from what I have said that I also reject the Committee's submission that declaratory relief should be refused on the grounds that the claim is moot and the degree of non-compliance allegedly trivial.

[156] Counsel agreed at the hearing that the form of any declarations ought to be settled after the parties have considered this judgment. I propose to reserve the question whether declarations ought to be made until I have heard from counsel on both their form and their utility. For the guidance of counsel, declarations should also be confined to those properly within the scope of the pleading. The Registrar will convene a conference to set a timetable.

Costs

[157] Having succeeded in part, the applicant is entitled to costs, which I am minded to set on a 2B basis with provision for two counsel. Memoranda may be

[119] *Right to Life New Zealand Inc v Rothwell and Ors* at [125]

filed if costs cannot be agreed.

Miller J

In accordance with r540(4) I direct the Registrar to endorse this judgment with the delivery time of 11.00am on the 9th day of June 2008.

Solicitors:
P J Doody, Christchurch for Applicant
Crown Law Office, Wellington for Respondent