

ARTICLE

**An Analysis of New Zealand's Abortion Law System
and a Guide to Reform**

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From a purely legal perspective, abortion in New Zealand is neither prohibited outright nor available “on request”. Instead, it is legally permissible in a narrow set of circumstances. Despite this, it is widely claimed that, in practice, abortion is available “on request”. While not passing judgement on the accuracy of this claim, this article will discuss how such a state of affairs is possible under the abortion law system. Particular emphasis will be placed on the role played by “certifying consultants”. Whilst the abortion law system can detect that a certifying consultant has refused to approve an abortion request in circumstances where the procedure is legally permissible, the inverse is not true. Accordingly, the abortion law system is unable to prevent certifying consultants from granting abortions in a wider range of circumstances than those envisaged by Parliament. The article then discusses whether reform of the law is needed. This question is addressed from three different moral perspectives: “pro-life”, “pro-choice”, and a “middle-ground” view. The conclusion reached is that members of all three camps have reason to favour reform, although those reasons differ. However, there is a need for caution: failure to take care when reforming the law may lead to adverse consequences for all stakeholders in abortion matters.

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I Introduction

Abortion is undoubtedly one of the most controversial issues in contemporary moral discourse, a topic on which all people have an opinion, and one which involves matters of the utmost importance to liberal societies: life, death, health and liberty. At the risk of oversimplifying what are often complex and nuanced positions on a long moral spectrum, there are three primary approaches to the morality of abortion.

At one end of the spectrum is the “pro-choice” camp, which argues that a pregnant woman should be entitled to receive an abortion “on demand” or “on request” in the first trimester of pregnancy.¹ In other words, a woman’s request for an abortion should generally be approved, regardless of her reasons for wanting the procedure. This view is generally based either on the premise that a foetus in the first trimester is not yet a full-fledged “person” and is therefore subordinate to the pregnant woman,² or on the argument that the woman’s interests should be given precedence regardless of whether the foetus has personhood.³ At the other end of the spectrum sit those who have labelled themselves as “pro-life”.⁴ Their moral belief is founded on the premise that life begins at conception.⁵ From this starting point, they claim that abortion is effectively an act of murder and should only occur where the pregnant women would suffer serious harm or death from continuance of the pregnancy.⁶ The abortion would be justified in such circumstances as a form of self-defence.⁷ Sitting between these two endpoints is the

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- 1 Although “abortion on demand” and “abortion on request” are often used interchangeably, there is a subtle distinction between the two terms, as outlined in Royal Commission of Inquiry “Contraception, Sterilisation and Abortion in New Zealand: Report of the Royal Commission of Inquiry” [1977] 11 AJHR E26 at 273. “Abortion on request” is where a pregnant woman is entitled to request an abortion for any reason whatsoever, but a doctor may refuse to perform it if he or she does not consider it to be justifiable from either a medical or moral perspective. A system of “abortion on demand” is one in which a pregnant woman is entitled to request an abortion for any reason whatsoever and a doctor must comply with this request regardless of his or her medical or moral views on the matter.
 - 2 The claim made is that a foetus lacks personhood either in the scientific or the philosophical sense of the word. For an example of an argument that a foetus is not a “person” for philosophical purposes, see Michael Tooley “Abortion and Infanticide” in Russ Shafer-Landau (ed) *Ethical Theory: An Anthology* (2nd ed, Wiley-Blackwell, Chichester, 2013) 390.
 - 3 See, for example, Judith Jarvis Thompson “A Defence of Abortion” (1971) 1 *Philosophy & Public Affairs* 47.
 - 4 An example of a jurisdiction which had a “pro-life” legislative scheme was, until very recently, Ireland. In that jurisdiction, the Offences Against the Person Act 1861 (UK) 24 & 25 Vict c 100, ss 58 and 59 made it an offence to procure an abortion save for where the pregnancy constituted “a real and substantial risk to the life, as distinct from the health, of the mother” (*Attorney-General v X* [1992] IESC 1, [1992] 1 IR 1 at [37]). See Health Service Executive *Investigation of Incident 50278 from time of patient’s self referral to hospital on the 21st of October 2012 to the patient’s death on the 28th of October, 2012* (June 2013) at Appendix A for a summary of Ireland’s pro-life orientated abortion law system. Ireland recently shifted away from this pro-life stance with the enactment of the Protection of Life During Pregnancy Act (Republic of Ireland) 2013.
 - 5 As will be seen in Part II(B) of this article, New Zealand law does not agree with this factual claim.
 - 6 There also exist extreme viewpoints that endorse an absolute prohibition on abortion, even in circumstances where the procedure is necessary to save the pregnant woman’s life and the unborn child’s death is inevitable in any event.
 - 7 The concept of performing a lethal medical procedure as an act of self-defence was created by Ward LJ in *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147 (CA). In that case the Court of Appeal of England and Wales was faced with the issue of whether it would be lawful to perform an operation to separate conjoined twins (Mary and Jodie). Jodie had a

“middle-ground” view. This position states that there are various circumstances in which a woman should be granted an abortion, but also considers that in some cases competing considerations will warrant the denial of a woman's abortion request.

As with many matters of public interest, Parliament has been forced to take a moral stance on abortion. It did so three decades ago when it created the various legal rules and entities that New Zealand's abortion law system is comprised of. As discussed later, Parliament elected to assume a middle-ground position. Yet despite the decisive manner in which Parliament declared its moral intent, there are those who argue that in practice it has failed to create an abortion law system which implements this middle-ground position. Now that the Supreme Court has definitely settled the correct interpretation of New Zealand's abortion legislation, it is an appropriate time to take stock.

This article has no intention of taking sides in the moral debate on abortion. Instead, it aims to provide an amoral analysis of New Zealand's abortion law system, before briefly critiquing this system from the perspective of members of each of the three moral camps. Accordingly, this article will hopefully be of value to all people who are interested in abortion law, regardless of their personal moral views.

The article will first provide an exposition of the structure of New Zealand's abortion law system in Part II, including an explanation of the Abortion Supervisory Committee's powers to monitor compliance with the law. Part III will then explain the extent to which other branches of government are able (or unable) to monitor compliance with abortion laws. Part IV will briefly discuss the widely held belief that abortion is effectively available on request in New Zealand. Although no opinion will be offered on the accuracy of this claim, this article will demonstrate that if de facto abortion on request does exist, it has been facilitated by the abortion law system. Finally, Part V will argue that members of all three moral camps have reason both to favour reform but also to stay with the status quo. The article will then briefly identify some potential pitfalls to reform for those who wish to pursue it.

II The Contraception, Sterilisation and Abortion Act 1977 Scheme

New Zealand's abortion law system is primarily governed by the Contraception, Sterilisation and Abortion Act 1977 (the CSA Act), which operates in tandem with the Crimes Act 1961. The correct interpretation of the CSA Act's abortion provisions was finally settled by the Supreme Court's 3:2 decision in *Right to Life New Zealand Inc v Abortion Supervisory Committee (Right to Life SC)*.⁸ This article will accept that the majority's interpretation of the CSA Act states the current law of New Zealand and will aim to provide a critique of the abortion law scheme as so interpreted.⁹

healthy heart and set of lungs, but Mary's were too weak to nourish her. Instead, Mary's body was staying alive by leeching oxygenated blood from Jodie through a shared artery. The facts before the Court demonstrated that Jodie's heart would fail within months should the status quo continue, and both twins would die as a result. On the other hand, a separation procedure would cause Mary's immediate death, but enable Jodie to live. Ward LJ concluded at 203–204 that the reality of the situation was “that Mary is killing Jodie”, and that the procedure could therefore be legally justified as a form of “quasi-self-defence”.

8 *Right to Life New Zealand Inc v Abortion Supervisory Committee* [2012] NZSC 68, [2012] 3 NZLR 762 [*Right to Life SC*].

9 However, note that the majority's interpretation of the Contraception, Sterilisation and Abortion Act 1977 has been criticised. See McGrath and William Young JJ's dissenting judgment in *Right to Life SC*, above n 8, at [55]–[97]; Arnold J's dissenting judgment in *Abortion*

A The philosophy behind the law: the Royal Commission of Inquiry Report on Abortion

The CSA Act was instigated by a Royal Commission of Inquiry (the Royal Commission) report.¹⁰ Most, but not all,¹¹ of the report's recommendations regarding abortion were adopted in the CSA Act. The Royal Commission stated that abortion is prima facie morally wrong and to that end an unborn child¹² is entitled to "a measure of protection by the law".¹³ Therefore, abortions should not be available "on request"¹⁴ or for reasons of "social convenience".¹⁵ However, the Royal Commission did not consider unborn children's interests to be absolute.¹⁶ It recognised that society has other duties which can conflict with the interests of an unborn child. In particular, the Royal Commission clearly stated that society has "a duty of protection of the life and health of the pregnant woman".¹⁷ Furthermore, the Royal Commission recognised that in some circumstances these competing considerations will outweigh an unborn child's interests to such an extent that an abortion is morally justifiable.¹⁸ Consequently, the report recommended a system of abortion law that operates in the middle of the spectrum of pro-choice and pro-life viewpoints: the so-called middle-ground.¹⁹

B The foundation of the law: the Crimes Act 1961—abortion is (sometimes) a criminal offence

The foundation of New Zealand's abortion law system is the common law "born alive" rule which declares that, from a legal perspective, an unborn child is not a "person".²⁰ This rule is codified in s 159 of the Crimes Act, which states that a child becomes a "human being" for the purposes of the Crimes Act "when it has completely proceeded in a living state from the body of its mother". Consequently, it is not possible to be convicted of criminal offences such as murder or assault as a direct result of attempts to abort an unborn child. Similarly, the right to life under s 8 of the New Zealand Bill of Rights Act 1990 does not apply to unborn children.²¹

Supervisory Committee v Right to Life New Zealand Inc [2011] NZCA 246, [2012] 1 NZLR 176 [*Right to Life CA*] at [154]–[214]; and Miller J's judgment in *Right to Life New Zealand Inc v Abortion Supervisory Committee* [2008] 2 NZLR 825 (HC) [*Right to Life HC*].

10 Royal Commission of Inquiry, above n 1.

11 *Right to Life HC*, above n 9, at [2].

12 This article uses the term "unborn child" to describe the entity inside a pregnant woman from the point of conception to birth. This terminology has been adopted for pragmatic purposes, and because it is used in the long title to the Contraception, Sterilisation and Abortion Act 1977. No inferences about the author's personal moral views should be taken from the use of the term "unborn child".

13 Royal Commission of Inquiry, above n 1, at 273.

14 At 273.

15 At 200.

16 See also *Right to Life HC*, above n 9, at [1].

17 Royal Commission of Inquiry, above n 1, at 199.

18 At 198–199 and 270–272.

19 *Wall v Livingston* [1982] 1 NZLR 734 (CA) at 737.

20 *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA) at [114]–[119]. See also *Right to Life HC*, above n 9, at [81]–[83]; and *Right to Life CA*, above n 9, at [56]–[59].

21 *Right to Life HC*, above n 9, at [100]–[102]; and *Right to Life CA*, above n 9, at [60]–[64]. Leave to appeal this point was denied by the Supreme Court in *Right to Life New Zealand Inc v The Abortion Supervisory Committee* [2011] NZSC 97.

Instead, the law provides protection to unborn children through ss 183–187 of the Crimes Act, which specifically make it a criminal offence to “unlawfully” attempt to perform an abortion,²² or supply materials for the purpose of procuring an abortion.²³

Although it is not an offence to take measures to prevent conception from occurring,²⁴ ss 183–187 will be triggered once a fertilised egg, also known as a zygote, has become implanted in the woman's uterus.²⁵ These provisions form the centre of the abortion law system.

The operative part of the ss 183–187 offences is the word “unlawfully”, a term given extensive definition in s 187A. This provision delivers an exhaustive list of circumstances in which the acts referred to in ss 183–187 are “lawful”. In other words, attempting an abortion is a criminal offence unless one of the s 187A exceptions applies. The width of these exceptions becomes progressively narrower as the pregnancy progresses. The reasoning underlying this is that the closer an unborn child is to birth, and therefore the closer it is to attaining legal personhood, the more worthy of legal protection it becomes.²⁶

Prior to 20 weeks gestation, the pregnancy can be terminated on a number of grounds. For present purposes the most relevant grounds are that the person performing the abortion believes that continuing 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”.²⁷ This exception reflects the viewpoint that the pregnant woman's health and well-being heavily outweigh the child's interests. Once 20 weeks gestation has occurred the law provides greater protections to the unborn child by only allowing an abortion if it is believed to be “necessary” to prevent “serious permanent injury” to the woman's physical or mental health.²⁸

C The Contraception, Sterilisation and Abortion Act 1977 certification process

The CSA Act aims to facilitate the operation of the Crimes Act's abortion provisions by dictating procedures to be followed after a woman's request for an abortion.²⁹ After receiving an abortion request, the pregnant woman's doctor must decide whether one of the s 187A exceptions “may” apply to the case at hand. If so, the doctor must refer the case to two “certifying consultants” (Consultants).³⁰ If the Consultants “are of the opinion” that a s 187A exception applies, they will issue a certificate authorising the performance of an abortion (a certificate).³¹ The Consultants do not have to provide reasons for their decision, other than stating on which s 187A limb the abortion has been approved.³²

22 Crimes Act 1961, s 183.

23 Section 186.

24 See generally Nicola Peart “Prevention and Termination of Life Before Birth” in PDG Skegg and Ron Paterson (eds) *Medical Law in New Zealand* (Brookers Ltd, Wellington, 2006) 473 at 473–476.

25 Crimes Act, s 182A; and Bruce Robertson (ed) *Adams on Criminal Law — Offences and Defences* (online looseleaf ed, Brookers) at [CA182A.01].

26 Peart, above n 24, at 471.

27 Crimes Act, s 187A(1)(a).

28 Section 187A(3).

29 Contraception, Sterilisation, and Abortion Act 1977, ss 32–33.

30 Section 32(2). Note that if the doctor is a Consultant then he or she only needs to refer the case to one other Consultant for approval, see s 32(2)(b)(i).

31 Section 33(1). The section also contains provisions dictating what is to occur if the two consultants reach contrary conclusions, see s 33(3)–(4).

32 Abortion Regulations 1978, sch 1, Form 3A, Note 2. See also *Right to Life SC*, above n 8, at [18].

Once a certificate has been issued, a doctor will be free to perform an abortion on the pregnant woman. A doctor who performs the abortion in pursuance of a certificate will be immune to a conviction under the Crimes Act, unless it can be proved that he or she did not believe his or her actions were lawful.³³ Conversely, performance of an abortion without a certificate is an offence under the CSA Act,³⁴ save where it is performed in an emergency situation.³⁵

D *The Abortion Supervisory Committee*

The operation of the abortion law system, and in particular the process of certification discussed above, is overseen by the Abortion Supervisory Committee (the Committee).³⁶ The Committee consists of three members (two of the three members must be medical practitioners)³⁷ whom are appointed by Parliament.³⁸

The Committee has a variety of functions, two of which are pertinent to this discussion. First, under s 14 the Committee has broad duties to:

- (1) keep under review the procedure for abortion approval outlined above;³⁹
- (2) “take all reasonable and practicable steps” to ensure that abortion law is applied consistently throughout New Zealand;⁴⁰ and
- (3) ensure that the CSA Act operates effectively.⁴¹

Secondly, and in furtherance of these duties, the Committee has the specific task of appointing the Consultants who have final say on whether an abortion should be granted in any given case.⁴² In making these appointments, the Committee must take into account “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”.⁴³ The personal opinion that “an abortion should not be performed in any circumstances” and the polar-opposite opinion that “whether an abortion should or should not be performed in any case is entirely a matter for the woman and a doctor to decide” are deemed to be incompatible with the CSA Act.⁴⁴ The purpose of s 30(5) is to ensure that Consultants make decisions in line with the CSA Act’s middle-ground moral philosophy. The provision aims to ensure that only doctors who are “able and qualified to make determinations in a clinically detached way against medical expertise and experience”,⁴⁵ and who will not be swayed by moral opinions radically different to those underpinning New Zealand abortion law,⁴⁶ are appointed as Consultants.

33 Crimes Act, s 187A(4).

34 Contraception, Sterilisation, and Abortion Act, s 37(1)(b).

35 Section 37(2).

36 Section 10(1).

37 Section 10(2).

38 Section 10(3).

39 Section 14(1)(h); and see Part II(C) of this article.

40 Section 14(1)(i).

41 Section 14(1)(i).

42 Section 30.

43 Section 30(5).

44 Section 30(5).

45 *Wall v Livingston*, above n 19, at 738.

46 See the discussion of the moral viewpoint that underlies the Contraception, Sterilisation and Abortion Act above at Part II(A) of this article.

(1) No power to review individual decisions

One of the primary arguments advanced by the applicants in *Right to Life SC* was that the Committee has the power and duty under the CSA Act to carry out “after-the-fact” reviews of decisions made by Consultants, point out any errors made in their decision-making process,⁴⁷ and take disciplinary action where appropriate.⁴⁸ This was said to arise out of three provisions in the CSA Act:

- (1) the Committee’s s 14 duties;
- (2) the s 30(5) statement on the ideal moral views of Consultants and the Committee’s s 30(7) power to revoke Consultants’ appointments “at its discretion”; and
- (3) the duty imposed on Consultants to keep records of every case that come before them and submit these records to the Committee on request.

The Supreme Court rejected this argument and held that the most the Committee may do is “ask a consultant how he was approaching decision-making in general”.⁴⁹ If such “generalised inquiries” lead the Committee to believe the Consultant holds views on abortion that are inconsistent with the CSA Act, then it may choose to revoke his or her appointment.⁵⁰ The Committee cannot “make any inquiry or investigation into the decision-making in an individual case where that would tend to question a decision actually made in a particular case”.⁵¹ This is because the CSA Act treats the legality of an abortion as a question of “completely detached medical judgment” that is to be left solely in the Consultants’ domain.⁵² That the CSA Act holds such a view is reflected in its omission to expressly equip the Committee with the investigative powers—such as the ability to access medical records—needed to review Consultants’ decisions.⁵³ Furthermore, the fact that Consultants are not required to provide reasons for their decisions, beyond stating which s 187A Crimes Act exception applies, strengthens the conclusion that such decisions cannot be reviewed.⁵⁴ This lack of jurisdiction is consistent with the Committee’s role of “general oversight only” in New Zealand’s abortion laws—the Committee is not a quasi-inquisitorial body tasked with carrying out comprehensive investigations of alleged Consultant malpractice.⁵⁵

This discussion shows that Consultants enjoy a significant degree of autonomy and freedom from Committee control when carrying out their duties under the CSA Act. The Committee only has the duty to ask Consultants how they are approaching decision-making in general and only has the power to revoke a Consultant’s certification if these generalised enquiries reveal that he or she has a moral mind-set inconsistent with the CSA Act’s moral philosophy. This is a fairly superficial degree of scrutiny.

47 *Right to Life CA*, above n 9, at [94].

48 At [92].

49 *Right to Life SC*, above n 8, at [40] and [42]. The Court stated at [46] that the Committee is in fact obligated to engage in such questioning from time to time.

50 At [45].

51 At [40].

52 *Wall v Livingston*, above n 19, at 739.

53 *Right to Life SC*, above n 8, at [40].

54 *Wall v Livingston*, above n 19, at 739.

55 *Right to Life SC*, above n 8, at [44].

III Do the Courts, Police, and Health and Disability Commissioner have a Role to Play?

Having established that the Committee lacks the necessary powers to closely monitor and supervise Consultants, the obvious question that arises is whether Consultants can in practice issue or decline to issue certificates on grounds other than those set out in the Crimes Act. A possible answer is that governmental agencies or authorities other than the Committee are able to monitor Consultants to ensure that they operate within the parameters of their statutory discretion.

In fact, in the *Right to Life* litigation the Court of Appeal and the Supreme Court partially justified their restrictive interpretations of the Committee's powers on the basis that in-depth investigations of Consultants' actions are best dealt with by the criminal justice system⁵⁶ or the Health and Disability Commissioner (the Commissioner).⁵⁷ In other words, any concerns about the Committee's limited ability to investigate Consultants are allayed by virtue of these other agencies' powers to perform such investigations.

This part of the article will demonstrate that the extent to which the police or the Commissioner can investigate Consultants' behaviour is more limited than the Courts indicated. Similarly, the Judiciary is unable to use its powers of judicial review to ensure that Consultants remain within the boundaries of their legislative authority when assessing abortion requests. The upshot is that it is extremely difficult, if not impossible, to determine whether Consultants are carrying out their tasks in accordance with the mandates of the CSA Act or whether they are instead making decisions on the basis of their own moral leanings.

A *The Judiciary*

Whenever examining an exercise of statutory powers, the obvious question that arises is whether, and to what extent, that exercise is capable of being controlled through judicial review. In regards to the abortion law system, any chances of the Judiciary playing a supervisory role through its judicial review powers were eliminated shortly after the CSA Act's enactment.

In *Wall v Livingston* a paediatrician sought judicial review of two Consultants' decision to authorise an abortion.⁵⁸ The paediatrician had treated the pregnant woman on an unrelated matter in the past but was not involved with her pregnancy. This application was rejected on the grounds that the claimant did not have standing.⁵⁹ The primary reason for this was that the CSA Act makes it clear that only a small, narrowly defined, group of individuals (namely the pregnant woman, the Consultants involved in the case, and possibly the referring doctor) have rights and responsibilities under the certification process. Individuals outside of this group are unable to show "that the exercise of statutory powers under these provisions would operate to their personal advantage or

56 *Right to Life SC*, above n 8, at [93]; and *Right to Life CA*, above n 9, at [127] and [136].

57 *Right to Life SC*, above n 8, at [44]–[45]; and *Right to Life CA*, above n 9, at [103] and [126].

58 *Wall v Livingston*, above n 19.

59 The Court of Appeal applied the test for standing laid out by the House of Lords in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL). This test requires the issue of standing to be considered within the factual and legal context of the case.

disadvantage”, and therefore do not have standing.⁶⁰ Similarly, although the CSA Act aims to protect unborn children, it does not expressly give them any actual rights.⁶¹ Instead, the abortion authorisation process protects unborn children in an indirect fashion.⁶² Accordingly, it is not possible for someone to claim to have standing on the basis that he or she is representing the unborn child's interests.⁶³

The Court declined to decide whether Consultants' decisions are amenable to judicial review in circumstances where the applicant has standing.⁶⁴ It did stress, though, that if review is possible, its scope will be extremely limited.⁶⁵ There are three reasons for this. First, the decision being reviewed would be a medical judgment by a medical practitioner.⁶⁶ Secondly, Parliament has signalled that a high level of deference should be given to Consultants. This is evidenced by the fact that the Committee, a “specialist body established under the CSA Act to exercise oversight of the legislation”, is unable to review Consultants' decisions.⁶⁷ Finally, the Courts will be cautious when considering criminal law issues in a civil context, as they run the risk of supplanting the criminal courts' function.⁶⁸

The legacy left by *Wall v Livingston* is that judicial review of a Consultants' decision is unavailable in all but the rarest of circumstances. The narrow scope of standing makes it hard to envisage a successful application for review being brought by anyone other than a pregnant woman who has been denied an abortion. Even then, the restricted grounds of review would cause all but the most extraordinary allegations of flawed decision-making to fail. This situation may change depending on the outcome of the ongoing administrative law debate as to whether the Judicature Amendment Act 1972 merely creates procedural rights or has a jurisdiction-conferring effect.⁶⁹ But until then, non-reviewability prevails.

B *The Police*

It is beyond doubt that investigations of abortions performed illegally by doctors or laymen will be conducted by the police and the criminal justice system. Similarly, it could be argued that a medical practitioner's refusal to provide an abortion in emergency circumstances may be a failure to provide necessities and protect from injury in contravention of s 151

60 *Wall v Livingston*, above n 19, at 740–741. For a discussion of the effect this reasoning has on the standing of the father, or lack thereof, see J Caldwell “Abortion: the father's lack of standing” [1988] NZLJ 165.

61 *Wall v Livingston*, above n 19, at 737.

62 *Right to Life HC*, above n 9, at [61].

63 *Wall v Livingston*, above n 19, at 740.

64 At 740.

65 At 741.

66 The Courts are generally reluctant to review medical decisions made by a doctor. See *Shortland v Northland Health Ltd* [1998] 1 NZLR 433 (CA).

67 *Wall v Livingston*, above n 19, at 741.

68 At 741. The need for civil courts to be cautious when considering criminal matters was recently reemphasised in *Ambrose v Attorney-General* [2012] NZAR 23 (HC) at [36].

69 For judicial statements that the Judicature Amendment Act 1972 has jurisdiction conferring effect, see *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA) at 429; and *Velich v Body Corporate No 164980* (2005) 6 NZCPR 143 (CA) at [45]. Support for the argument that the statute merely has procedural effect can be found in *Daemar v Gilland* [1981] 1 NZLR 61 (CA) at 63–64; and *Falun Dafa Assoc of New Zealand Inc v Auckland Children's Christmas Parade Trust Board* [2009] NZAR 122 (HC) at [24]. Substantive discussion of this debate is beyond the scope of this article.

of the Crimes Act.⁷⁰ However, the Supreme Court in *Right to Life SC* went a step further by holding that the police also have a role to play in the investigation of alleged misbehaviour by a Consultant. As will be demonstrated, the Supreme Court heavily overstated the police's powers and duties in making this claim.

(1) Pragmatic barriers to mounting an investigation

There are several pragmatic issues that would seriously impede a police investigation of a Consultant's decision to grant a certificate in a situation where s 187A is not triggered. Note, however, that these pragmatic issues do not apply to an investigation of a Consultant's refusal to grant a certificate.

These barriers to mounting an investigation arise out of two unique characteristics of illegally performed abortions. First, in contrast with most cases of medical malpractice, it is not the patient who suffers unjustified harm as a result of the practitioner's conduct. Instead it is a different entity: the unborn child. Secondly, the harm that occurs is the same harm that eventuates where an abortion is legally performed: the destruction of the unborn child. This means there will generally be a lack of concrete evidence that wrongdoing has occurred. In conventional cases of medical malpractice there will often exist some sort of physical or mental harm that will arouse initial suspicions. However, as the primary purpose of an abortion is to destroy the unborn child, there is usually no physically ascertainable difference between legal and illegal abortions. Instead, whether there is cause for concern about a Consultant's conduct will turn entirely on the Consultants' reasoning process, a process that only a small number of people (if any) are privy to.

Accordingly, although anyone may lay a complaint with the police,⁷¹ the cooperation of the woman on whom the procedure was performed will usually be crucial to the investigation, as she will be one of the few people with knowledge of the circumstances surrounding the abortion. This is a common feature of medical malpractice due to the confidential nature of doctor-patient interactions. However, ordinarily the patient in a medical malpractice case will have reason to cooperate with the investigation, as they are the one harmed by the misconduct, whereas a woman who requests an abortion, and is granted that procedure, will rarely wish to complain.⁷² Supporting this conclusion is medical evidence that "an overwhelming majority" of women who receive abortions believe they "made the right decision in having an abortion".⁷³

Of course, the police could use a search warrant issued under the Search and Surveillance Act 2012 to obtain access to the Consultant's abortion case records. These records may contain information that could be used to aid the police's investigation and could be admitted as evidence in a criminal trial. However, in order to obtain a warrant, the police must convince the issuing officer that there are "reasonable grounds ... to

70 This point is yet to be tested, but such an argument could be advanced by analogy with *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235 (HC) at 249 where Thomas J stated that medical treatment constitutes a necessary of life where "required to prevent, cure or alleviate a disease that endangers the health or life of the patient". See also *Shortland v Northland Health Ltd*, above n 66.

71 This is in contrast with the issue of standing for judicial review, discussed above in Part II(A) of this article.

72 Bernard Robertson "Supervision of abortion" [2012] NZLJ 257 at 257.

73 David M Fergusson, L John Horwood and Joseph M Boden "Reactions to abortion and subsequent mental health" (2009) 195 BJPsych 420 at 423.

suspect that an offence” has occurred.⁷⁴ In light of the problems identified above, it is difficult to see how the police would be able to demonstrate the existence of “reasonable grounds to suspect”. Perhaps some sort of undercover sting operation could be mounted in order to gather the necessary evidence. But, as will be seen in the next section, the police, in fact, have no legal reason to investigate Consultants in the first place.

(2) Legal disinterest in investigating

The points raised above are trifling in comparison to the ultimate factor precluding the police from controlling Consultants' conduct. The abortion offences in the Crimes Act and the CSA Act only apply to the individual who performs the abortion, and that individual will usually have immunity from prosecution if a certificate has been issued. More importantly, neither statute makes it an offence for Consultants to issue a certificate when they do not believe that s 187A grounds for an abortion exist. Therefore, Consultants who issue certificates where they do not consider s 187A grounds to exist will only come under police scrutiny if they then personally perform the abortion (as it could then be alleged that at the time they performed the abortion they “did not believe it to be lawful”).⁷⁵ A Consultant who has merely issued, or declined to issue, a certificate will not be a police concern, regardless of how reprehensible this act was.

To be clear, the police can and do have an important role to play in the supervision of New Zealand's abortion law system. But this role does not extend to the actions of Consultants in their capacity as Consultants. Accordingly, the suggestion that “the police would investigate” the lawfulness of Consultants' decisions is limited in its accuracy.⁷⁶

C *The Health and Disability Commissioner*

The Commissioner operates with the assistance of the powers and procedures set out in two legislative instruments: the Health and Disability Commissioner Act 1994 (HDC Act) and the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 (the Code).⁷⁷

One of the Commissioner's roles is to investigate alleged breaches of the Code.⁷⁸ The Code creates a set of “Consumers' Rights”,⁷⁹ with “consumers” defined as being consumers of health or disability services.⁸⁰ “Any person” may complain about an alleged breach of the Code to the Commissioner.⁸¹ Upon receiving a complaint, the Commissioner may carry out an investigation;⁸² and if the Commissioner decides that the Code was breached he or she may perform a number of actions, including instigating disciplinary

74 Search and Surveillance Act 2012, s 6(a).

75 Crimes Act, s 187A(4).

76 *Right to Life CA*, above n 9, at [136].

77 Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 [Code of Health and Disability Services Consumers' Rights] was drafted by the Commissioner in accordance with the principles set out in s 20 of the Health and Disability Commissioner Act 1994, before then being submitted to the House of Representatives. See Health and Disability Commissioner Act 1994, ss 19–20.

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

79 Code of Health and Disability Services Consumers' Rights, reg 2.

80 Schedule 1, cl 4.

81 Health and Disability Commissioner Act, s 31(1).

82 Section 40.

proceedings.⁸³ Finally, and most importantly, when carrying out the investigation, the Commissioner has the power under s 62 to require any person who has information relevant to the investigation (including documents) to hand over that information.⁸⁴ This includes the power to personally question that person under oath.⁸⁵

The existence of this potent s 62 power lends weight to the argument that the Commissioner fills the void left by the Committee's restricted investigative powers. Whilst the Committee lacks the power to obtain the information needed to determine whether a Consultant took irrelevant considerations into account when making a certificate decision, the Commissioner does not have this problem.

This argument holds true in the case of a Consultant who has allegedly refused to grant a certificate on the basis of improper considerations. In such circumstances a variety of rights, including the right to have services provided in a manner that minimises potential harm to the pregnant woman⁸⁶ and the right to be fully informed,⁸⁷ would most likely have been infringed. The Commissioner would therefore be able to do what the Committee cannot, which is to require the Consultant to provide a detailed explanation of the specific decision.

However, cracks appear in the argument once this power is read in the context of the Code and the rest of the HDC Act. As outlined above, the Code confers rights to "consumers". It is not entirely clear why the term "consumer" was used instead of "patient". The most probable reason is that recipients of disability services are often opposed to the medicalisation of their condition implied by the term "patient".⁸⁸ What is clear though, despite the issue being untested, is that it is unlikely that unborn children qualify as "consumers"; it is quite a stretch to say that an unborn child is the recipient of healthcare services in an abortion context.⁸⁹ Furthermore, the definition of "health consumer" in the HDC Act refers to a "person".⁹⁰ As discussed above, an unborn child is not a legal person.⁹¹ This interpretation is confirmed by a cursory examination of the rights contained within the Code, such as the right to give informed consent⁹² and the right to support,⁹³ which clearly cannot be exercised by unborn children. Therefore, Consultants will only fall foul of the Code if they breach the pregnant woman's rights.

Of course, it is possible for a Consultant to breach the pregnant woman's rights in the process of illegally authorising an abortion. For example, the Consultant might breach the Code if he or she fails to give the pregnant woman adequate information about the abortion process.⁹⁴ But unjustified harm caused to the unborn child will not, in itself,

83 Section 45(2)(f).

84 *Nicholls v Health and Disability Commissioner* [1997] NZAR 351 (HC) at 358.

85 Health and Disability Commissioner Act, s 62(2).

86 Code of Health and Disability Services Consumers' Rights, sch 1, cl 2, right 4(4).

87 Schedule 1, cl 2, right 6.

88 PDG Skegg "A Fortunate Experiment? New Zealand's Experience with a Legislated Code of Patient's Rights" [2011] 19 Medical L Rev 235 at 238-239.

89 This same point applies in regards to the Health Practitioners Competence Assurance Act 2003. That statute contains provisions enabling the investigation and punishment of medical practitioners' conduct, but s 64(1) states that complaints can only be made about conduct which affects a "consumer".

90 Health and Disability Commissioner Act, s 2.

91 Part II(B) of this article.

92 Code of Health and Disability Services Consumers' Rights, sch 1, cl 2, right 7.

93 Schedule 1, cl 2, right 8.

94 In *Health and Disability Commissioner Report on Opinion - Case 98HDC12437* (98HDC12437, 23 February 2000) the Commissioner considered an allegation, made by a woman who had

amount to a breach. Furthermore, as pointed out above, empirical evidence suggests that a woman who successfully requests an abortion is unlikely to subsequently lay a complaint.⁹⁵

D Conclusion

In conclusion, although the Judiciary, the Police, and the Commissioner have valid roles to play in New Zealand's abortion law system, the limited extent of their powers leaves significant regulatory gaps in which Consultants can act with impunity. Crucially, these gaps create an environment in which Consultants who allow pro-choice biases to influence their decision-making will avoid detection, but in which a pro-life Consultant would likely be identified. Therefore, the Supreme Court's claim that the investigation of Consultant misconduct can be adequately undertaken by the Police and the Commissioner should be rejected as false. As Arnold J in the Court of Appeal pointed out, although there do exist some areas of overlap, the Police and the Commissioner are directed at different objectives than Consultant compliance with the CSA Act, and are thus unable to effectively fulfil this objective.⁹⁶ The next part of this article will assess how this lack of accountability ties in with the claim that women in New Zealand are able to obtain abortions on request.

IV De Facto Abortion On Request?

It is widely believed that, despite Parliament's attempts to create a middle-ground system, de facto abortion on request is available in New Zealand. Stated briefly, the claim made is that Consultants have adopted a very wide interpretation of the s 187A(1)(a) grounds for a lawful abortion: "that the continuance of the pregnancy would result in serious danger (not being danger normally attendant upon childbirth) to ... [the] mental health, of the woman".⁹⁷ Under this interpretation, Consultants consider any pregnant woman who wants an abortion to be in serious danger of suffering damage to her mental health if forced to continue the pregnancy. Accordingly, a pregnant woman who requests an abortion is almost guaranteed to be granted one on mental health grounds if no other exception applies.

There are several sets of statistics that appear to support this theory. It must be stressed, however, that statistics can be misleading; there may be several causative factors behind any given statistic and one should be cautious before reaching any definitive conclusions based on numbers alone. The first set of statistics that are claimed to support the de facto on request hypothesis is that New Zealand's annual abortion rates are comparable with foreign jurisdictions that have pro-choice orientated laws. For example, in 2010 a total of 18.1 abortions per 1000 of the mean estimated population of women

received an abortion, that her rights to be fully informed, receive services of an appropriate standard and give informed consent were breached by the various medical practitioners involved in the process (including the Consultants). The claim was unsuccessful on the facts, but the Commissioner accepted that in principle such breaches are possible in the context of an approved abortion.

95 See Part III(B)(1) of this article.

96 *Right to Life CA*, above n 9, at [199].

97 Peart, above n 24, at 488.

aged 15–44 years were performed in New Zealand.⁹⁸ By way of comparison, the jurisdiction of England and Wales—which has a more relaxed approach of allowing an abortion in the first 24 weeks of gestation if “continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman”⁹⁹—had 17.1 abortions per 1000 of the mean estimated population of women aged 15–44 in 2010. Sweden, which provides abortion on request in the first 18 weeks of pregnancy,¹⁰⁰ had 20.9 abortions per 1000 of the mean estimated population of women aged 15–44 in 2010.¹⁰¹ Finally, the United States of America, which endows women with a constitutional right to abortion in the first three months of pregnancy, had 19.6 abortions per 1000 people in 2011.¹⁰²

Secondly, the approval rate of requests made to Consultants is extremely high. For example, over 99 per cent of abortion requests referred to Consultants in the Christchurch region in 2005 were approved.¹⁰³ Thirdly, the vast majority of abortions performed in New Zealand are approved on the grounds that continuing the pregnancy would result in serious danger to the woman’s mental health: 97.6 per cent of the abortions performed in 2011 were approved on this basis.¹⁰⁴ This statistic has led one commentator to sarcastically comment that “one can only assume that prior to 1977 [the enactment of current abortion laws] New Zealand women suffered mental health problems on a large scale”.¹⁰⁵

Finally, the Committee itself has stated that New Zealand’s abortion laws have received a “de facto liberal interpretation”.¹⁰⁶ Similarly, Dr Christine Forster—an ex-Chair of the Committee—has been quoted as saying that “[w]e do essentially have abortion on demand or request [in New Zealand]”.¹⁰⁷ The above factors and statistics led Miller J in *Right to Life HC* to state that he has “powerful misgivings about the lawfulness of many abortions” and that the evidence suggests that “New Zealand essentially has abortion on request”.¹⁰⁸ However, it should be noted that the Court of Appeal subsequently criticised Miller J for making this statement.¹⁰⁹

This article does not intend to address the accuracy of the claim that New Zealand has de facto abortion on request. Although the data certainly appears to be compelling

98 It is worth noting though that New Zealand’s abortion rate has been steadily decreasing recently, and the number of abortions performed in 2011 (the most recent year in which data is available) was the lowest in 12 years. The Abortion Supervisory Committee has suggested that this may have been due to changes in people’s sexual practices, including an increased use of contraceptives: Linda Holloway, Patricia Allan and Tangimoana Habib *Report of the Abortion Supervisory Committee* (Abortion Supervisory Committee, E.28, 30 June 2012) at 5.

99 Abortion Act 1967 (UK), s 1(1).

100 The Abortion Act (1974:595) (Sweden), s 1.

101 Holloway, Allan and Habib, above n 98, at Graph 1.4.

102 Dallas Welch *Abortion Statistics: Year ended December 2012* (Statistics New Zealand, 19 June 2013) at 3–4.

103 *Right to Life HC*, above n 9, at [47]. Unfortunately the Abortion Supervisory Committee does not generally publish statistics of abortion approval rates in its annual reports. Therefore, it has not been possible to provide the full picture on abortion approval rates nationwide.

104 Linda Holloway, Patricia Allan and Tangimoana Habib *Report of the Abortion Supervisory Committee* (Abortion Supervisory Committee, E.28, 30 June 2011) at Table 8.1.

105 Robertson, above n 72, at 257.

106 L Rothwell and P Reid *Report of the Abortion Supervisory Committee* (Abortion Supervisory Committee, E.28, 30 June 2005) at 5.

107 *Right to Life HC*, above n 9, at [53] quoting a Sunday Star-Times article from 5 November 2000.

108 At [56].

109 *Right to Life CA*, above n 9, at [134].

evidence, it must be stressed (again) that statistics can be highly misleading.¹¹⁰ This article has instead demonstrated that if New Zealand does have de facto abortion on request, this state of affairs has been facilitated by the lax checks and balances of the current abortion law system.

V Reform

So far, this article has explained the operation of New Zealand's abortion law system, and demonstrated that although this system is capable of preventing pro-life philosophies from affecting Consultants' decisions, it is less capable of detecting pro-choice biases. Part V will now assess whether there is need for reform.

Obviously one's opinion on abortion law reform will be intimately linked with one's moral views on the subject. For that reason, and in keeping with its neutral tone, this article will briefly consider this question from the perspective of the three primary moral viewpoints: pro-life, middle-ground, and pro-choice. Ultimately, this article concludes that people of all moral leanings have reason to favour reform, although the reform process may be more difficult than many expect.

A Middle-ground

Whether those who desire a middle-ground abortion law system see a need for reform depends mainly on whether the claim outlined in Part IV—that New Zealand has de facto abortion on request—is correct. As stated above, an analysis of the accuracy of this claim is beyond the scope of this article. Nevertheless, the fact the Committee believes that New Zealand's abortion laws are being consistently disobeyed by Consultants,¹¹¹ yet is powerless to take action, and the fact that none of the other authorities discussed above have the means to take action either, should be cause for concern. What will be briefly addressed is whether the current system could be modified in some way to reduce Consultants' ability to deviate from the middle-ground and whether this would be desirable.

The most simple and obvious solution to this perceived problem would be to remove some, or all, of the freedoms from control enjoyed by Consultants. Possible methods of doing this include:

- (1) confirming that Consultants' decisions are amenable to judicial review and widening the scope of these review powers beyond that set out in *Wall v Livingston*;
- (2) passing legislation that makes it an offence for a Consultant to issue a certificate where he or she does not believe that s 187A grounds exist, and (possibly)

110 For example, it is unclear what percentage of abortion requests made to doctors do not receive a referral to a Consultant. There is therefore a possibility that Consultants' high approval rates are due to the fact that most unjustified abortion requests are filtered out at a lower tier. See Linda Holloway and Patricia Allan *Report of the Abortion Supervisory Committee* (Abortion Supervisory Committee, E.28, 30 June 2010) at 18. Similarly, Statistics New Zealand has warned against comparing New Zealand's abortion rates with overseas jurisdictions, as some countries only collect data on some abortions that are performed, not all of them: Welch, above n 102, at 3.

111 *Right to Life HC*, above n 9, at [50]–[53].

endowing the police with wider search powers that will better equip them to detect such an offence; or

- (3) bestowing the Committee with the explicit power and duty to investigate Consultants' files in order to determine whether they are making decisions in accordance with the s 187A criteria.

The efficacy of these approaches, or of any other means of monitoring Consultants' behaviour, is beyond the scope of this article. For now, it is worth sounding a word of caution to those who wish to travel down this path, as it is rife with potential difficulty. In particular, whilst subjecting Consultants to significant controls may prevent them from injecting a pro-choice mentality into their decisions, it may also have the undesired side-effect of compromising their decision-making in some other manner.

It is unlikely that the freedom from controls that Consultants enjoy in their decision-making is a legislative accident. Instead, there exist numerous reasons (which benefit several stakeholders) for this freedom from interference. One such reason is that there is a strong need to resolve abortion requests quickly and efficiently as "restricting a woman's capacity to exercise a difficult choice is fraught with potential for untold mental health consequences".¹¹² This need for speed serves as a justification for the absence of means of prospectively challenging Consultants' decisions, notwithstanding the fact that one of the primary aims of administrative justice, putting mistakes right,¹¹³ suffers as a result. Imposing certain requirements on Consultants, such as a requirement that they make meticulous records of their decisions, which can be scrutinised by the Committee, may cause undue delays. Similarly, Consultants' immunity from the wrath of the criminal law is arguably a necessary evil in order to ensure that they are able to focus on the task at hand without fear of reprisal. As Peart points out, determining whether continuance of the pregnancy would cause "serious danger" to the woman's "physical or mental health" is a highly difficult exercise.¹¹⁴ If Consultants are exposed to heavy-handed criminal sanctions, then what is already a difficult judgment to make may be further compromised by the fear of legal liability.¹¹⁵

Therefore, any attempt to reform the law must be carefully thought through to determine whether it will truly advance the middle-ground objective. Whilst reform may be able shift New Zealand away from de facto abortion on request, if it does so by making

112 Ronfli Sifris "Restrictive Regulation of Abortion and the Right to Health" [2010] 18 Medical L Rev 185 at 199. See also *Wall v Livingston*, above n 19, at 739.

113 Tom Mullen "A Holistic Approach to Administrative Justice?" in Michael Adler (ed) *Administrative Justice in Context* (Oxford, Portland, 2010) 383 at 404.

114 Peart, above n 24, at 488.

115 The recent death of a pregnant woman in Ireland serves as a cautionary tale of the dangers of exposing medical professionals to wide legal liability for performing an abortion. The woman—who was 17 weeks pregnant—died from sepsis seven days after being admitted to an Irish hospital. The unborn child also died. Several days prior to her death the woman and her husband had unsuccessfully requested an abortion. The Health Service Executive, above n 4, at 71 concluded that under "[i]nternational best practice" the woman should have been provided with an abortion. In any event, a miscarriage was "inevitable" regardless of whether one was induced or not. However, the hospital staff refused to provide an abortion. The Health Service Executive, above n 4, at 69 states that a material factor in the hospital's refusal to provide an abortion was that the relevant doctors' "clinical professional judgement" had been compromised by "concerns about the law". In other words, the very narrow grounds on which abortions were permissible in Ireland at the time (as discussed in above n 4) and the absence of a clear immunity for doctors acting according to best medical practice were key factors in the doctors' failure to take adequate steps to prevent the woman's death.

it unduly difficult for women who genuinely meet the legislative criteria to obtain an abortion, then it will hardly have been a worthwhile exercise.¹¹⁶

B *Pro-life*

If those who subscribe to middle-ground views have reason to be dissatisfied with New Zealand's abortion law system, then pro-life advocates will obviously be more upset. Their response may be to demand the repeal of the current abortion law system, and the implementation of a rule that only permits abortion where necessary to save the pregnant woman's life or protect her from severe physical or mental harm.¹¹⁷ Such a test for legality would be consistent with the pro-life philosophy that abortion must only be permitted in circumstances analogous to self-defence.¹¹⁸

This approach may be attractive in its simplicity, but extreme care must be taken to ensure that abortions are granted quickly and consistently in genuine self-defence circumstances. As discussed above,¹¹⁹ there is a risk that subjecting medical practitioners to the threat of significant legal sanctions, or closely monitoring their conduct, will cloud their decision-making abilities or cause undue delay in circumstances where time is of the essence.¹²⁰ This risk would be amplified in a pro-life system, as the limited circumstances in which abortions are permissible would leave medical practitioners with a low margin of error. Should such a risk eventuate, pregnant women may suffer grievous or fatal harm that could have been avoided.

Were the law reform to have the consequence, unintended or otherwise, of preventing medical practitioners from providing life-saving abortions, it may be inconsistent with the New Zealand Bill of Rights Act 1990. More specifically, s 8 grants all women the right not to be deprived of life except on such grounds as are established by law and are consistent with fundamental justice. There exists a strain of jurisprudence stating that the word "deprived" has an expansive definition which requires the State to take steps to prevent the realisation of a real risk to the life of an identified individual.¹²¹ In taking these steps the State must also consider whether its laws fail "properly to reflect the level of state

116 The discussion below on the right not to be deprived of life is also pertinent here. See Part V(B) of this article.

117 The rule could use similar terminology to s 37(2) of the Contraception, Sterilisation and Abortion Act, which states that a medical practitioner may perform an abortion without a certificate if he or she believes that it is "immediately necessary to save the life of the patient or to prevent serious permanent injury to her physical or mental health". Almost identical language is used in s 187A(3) of the Crimes Act, which permits performance of an abortion after 20 weeks' gestation if "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".

118 New Zealand's self-defence law, as contained in s 48 of the Crimes Act, enables an individual to defend someone else from attack by using "reasonable" force in the circumstances he or she believes to exist. It was established in *R v Wang* [1990] 2 NZLR 529 (CA) at 535–536 that whether force used is "reasonable" (including whether it is reasonable to perform a pre-emptive strike) depends on the imminence and seriousness of the perceived threat, and whether it can be avoided using alternative means. The more force used in professed self-defence, the more imminent and severe the threat must be. Therefore, an abortion can generally only be described as self-defence where continuing the pregnancy will have severe consequences for the pregnant woman's well-being, and where no alternative course of action is available.

119 See Part V(A) of this article.

120 Once again, the recent incident in Ireland, discussed in above n 115, is salient.

121 See *Osman v United Kingdom* (1998) 29 EHRR 245 (ECHR); *Edwards v United Kingdom* (2002) 35 EHRR 487 (Section III, ECHR); and *Venables v News Group Newspapers Ltd* [2001] Fam 430.

responsibility that a bill of rights demands".¹²² If a medical practitioner fails to grant an essential abortion to a woman, and if the laws enacted by Parliament facilitated this lethal error, then the State will have arguably unjustly deprived the woman of life. In practice, a clearly worded law reform would be immune to any legal challenge based on an inconsistency with the right not to be deprived of life.¹²³ But the practical and political consequences of trumping such a fundamental right should not be underestimated.

On the other hand, granting medical practitioners a large degree of immunity from sanction for performing or approving an illegal abortion is unlikely to advance the pro-life cause. If the freedom from control enjoyed by Consultants has in fact created *de facto* abortion on request,¹²⁴ then it would be naive to think that granting similar protections to those tasked with making abortion decisions under the reformed system would create a different outcome. Pro-life advocates must therefore embark on the same analysis of systems of accountability as that faced by middle-ground advocates.

C *Pro-choice*

Similarly to the above two segments, a pro-choice advocate's opinion of the status quo depends on the validity of the claim outlined in Part IV. If, despite the issues raised in this article, Consultants are making decisions in accordance with the Act's middle-ground philosophy, then pro-choice advocates will obviously have reason to demand reform. But what position would pro-choice advocates take if there is veracity in the claim made in Part IV that abortion on request is effectively available in New Zealand? One could argue that pro-choice advocates would be content with the fact that abortion on request is effectively available in New Zealand. Such a conclusion is understandable, but *de facto* abortion on request does not in fact endow women with the full set of entitlements that pro-choice advocates seek.

Pro-choice advocates would argue that although abortion may be *de facto* available on request, the process women must endure to have their request fulfilled is demeaning and does not respect their personal autonomy. It was noted in Part IV that Consultants are allegedly providing abortion on request by stating that the pregnant woman is in serious danger of suffering damage to her mental health if forced to continue with the pregnancy. In other words, for a pregnant woman to obtain an abortion she must suffer the indignity of having two Consultants state that she lacks the mental fortitude to carry the pregnancy to term. The Consultants' decision portrays the pregnant woman "as someone who is not completely in control of her actions, who will be driven to madness if relief [abortion] is denied to her".¹²⁵ This depiction flies in the face of many pro-choice dialogues, which treat the decision to have an abortion as one made by an "autonomous, rational woman" exercising her moral rights to bodily integrity and reproductive autonomy.¹²⁶ Similarly, the fact a pregnant woman is not given the full power to decide whether to continue the

122 Paul Rishworth "The Right Not to be Deprived of Life" in Paul Rishworth and others (eds) *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 217 at 226.

123 New Zealand Bill of Rights Act 1990, s 4.

124 See Part IV of this article.

125 Sally Sheldon "Who is the Mother to Make the Judgment?: The Constructions of Woman in English Abortion Law" (1993) 1 Fem LS 3 at 11. This quote comes from a discussion of the way in which women seeking abortions were portrayed in debates leading up to the enactment of the Abortion Act 1967 (UK).

126 Kate Gleeson "The strange case of the invisible woman in abortion-law reform" in Jackie Jones and others (eds) *Gender, Sexualities and Law* (Routledge, New York, 2012) 215 at 216.

pregnancy, and must instead hope that benevolent medical professionals approve her request, has been described as “disempowering”.¹²⁷ These points have been adopted by the United Nations Convention on the Elimination of All Forms of Discrimination against Women, which stated that New Zealand’s abortion laws “[make] women dependent on the benevolent interpretation of a rule which nullifies their autonomy”.¹²⁸

Pro-choice advocates therefore have reason to argue for the formal adoption of an abortion on request or demand regime regardless of the truthfulness of the claim assessed in Part IV. However, merely revoking the prohibition on abortion would only address the issue of legality. If New Zealand’s abortion system is to be truly pro-choice, it must address the practical, resource-based issue of funding, or the lack thereof. There is a risk, however small, that the relevant authorities may either refuse to fully subsidise abortion services, or only subsidise essential abortions, under a formal on request or demand system, due to the recategorisation of many abortions from being a medical need to being a matter of choice.

Summarised briefly, New Zealand’s current healthcare system is governed by the New Zealand Public Health and Disability Act 2000. Under this statute, the Ministry of Health delegates the provision of healthcare to District Health Boards (DHBs) via contracts known as “Crown Funding Agreements”.¹²⁹ Incorporated into all Crown Funding Agreements is the “Service Coverage Schedule”: an annually published document that sets out a range of healthcare services that DHBs are contractually obliged to provide to the populace of their district. Currently the Service Coverage Schedule states that DHBs must provide “Termination of Pregnancy services” to eligible women within their district.¹³⁰

There is no guarantee that funding for all abortions would be included in the Service Coverage Schedules under a reformed abortion law system. Policymakers may conclude that whilst abortions that are necessary to preserve the pregnant woman’s health deserve funding, abortions undertaken purely as a matter of choice are a lower priority than other demands on the health system. Should such a concern come to fruition, for many women the reformed abortion law system would be pro-choice in name only.

This claim may sound alarmist, but it is not unfounded. In fact, even under the status quo (in which all abortions are legally classified as exigencies) the funding system has created inequalities in access to abortion services. Although DHBs are required to provide abortion services within their district, they do not have to provide services in every region or town within that district.¹³¹ The upshot is that many women in New Zealand, particularly those in rural areas, currently have to travel extremely long distances to access abortion services.¹³² This severely increases the difficulty of accessing abortion services for many

127 “What is wrong with these laws?” Abortion Law Reform Association of New Zealand <www.alranz.org>. See also Carol Smart *Law, Crime and Sexuality: Essays in Feminism* (SAGE Publications, London, 1995) at 128.

128 *Concluding observations of the Committee on the Elimination of Discrimination against Women: New Zealand* CEDAW/C/NZL/CO/7 (2012) at [33].

129 New Zealand Public Health and Disability Act 2000, ss 10 and 23(1)(a).

130 Ministry of Health *2012/2013 Service Coverage Schedule* at [4.15]. Authorised abortions can only be legally performed in an institution that has received a licence under the Act: Contraception, Sterilisation, and Abortion Act, s 18.

131 Martha Silva and Rob McNeill “Geographical access to termination of pregnancy services in New Zealand” (2008) 32 *Australian and New Zealand Journal of Public Health* 519 at 519.

132 At 520–521. Note that 16.2 per cent of the New Zealand female population live in regions where first-trimester abortion services are not provided. Women in these regions have to, on average, perform a 442km return trip in order to access first-trimester abortion services. The greatest

women. It therefore does not require a huge stretch of the imagination to envisage the creation of a funding policy that blocks the path to a truly pro-choice legal system.

Unfortunately, it is currently difficult to legally challenge health care rationing decisions. Although such decisions are amenable to judicial review, their polycentric and specialised nature means that in practice the Courts tend to accord significant deference to the decision-maker.¹³³ This state of affairs has been facilitated by Parliament's conscious decision not to include anything in the New Zealand Bill of Rights Act that could be interpreted as endowing women with a right to abortion on request or on demand. This is in contrast with jurisdictions such as Canada and the United States of America, where the right to "liberty and security"¹³⁴ and the right not to be deprived of "life, liberty or property without due process of law"¹³⁵ ensure that effective abortion on request is available.¹³⁶ Were such a right to exist in New Zealand, it would be possible to judicially review a healthcare authority's decision not to provide a woman with subsidised abortion services within her locality.¹³⁷ Such review powers could be used to secure effective access to abortion for all women.¹³⁸

For the reasons discussed above, for law reform to create a genuinely pro-choice system, it needs to include measures that safeguard women's power to choose against unfavourable allocations of resources.

VI Conclusion

It is commonly said that matters of morality are not black and white, but are instead shades of grey. In New Zealand's case, this statement can also be applied to the abortion law system which Parliament has created in an attempt to fulfil the Royal Commission's moral proclamations. Although it purports to reflect a middle-ground moral stance, New Zealand's abortion law system is theoretically quite amenable to the prevalence of pro-choice orientated decision-making by those equipped with the powers to approve or deny abortion requests. At the same time though, determining whether such pro-choice philosophies have permeated the system in practice is a highly difficult task.

The question of reform is also heavily coloured in shades of grey. Whilst members of all three moral camps arguably have reason to demand reform, this may turn out to be a

travel distance is the 1,130km return trip to Christchurch that women from Southland must endure.

133 Rachael Baillie "Judicial Restraint When Reviewing Health Care Rationing Decisions: A Healthy Approach?" (2012) 18 Auckland U L Rev 137 at 142-148.

134 Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK), s 7; and *R v Morgentaler* [1988] 1 SCR 30.

135 United States Constitution, amend XIV, § 1; *Roe v Wade* 410 US 113 (1973); and *Planned Parenthood of Southern Pennsylvania v Casey* 505 US 833 (1992).

136 See generally Rishworth, above n 122, at 217-219; and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at 211-212.

137 See Baillie, above n 133, at 154-156 for an explanation of how the Canadian Charter of Rights and Freedoms has been used to judicially review healthcare rationing decisions, although note her scepticism about this approach at 157-158.

138 A healthcare rationing decision was successfully challenged in *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456, albeit this challenge was brought using the procedures available under the Human Rights Act 1993 rather than by way of judicial review. However, Parliament's decision to effectively override the decision by passing the New Zealand Public Health and Disability Amendment Act 2013 serves as a cautionary tale in regards to the efficacy of using the Courts to attack healthcare rationing decisions in New Zealand.

more difficult task than initially expected. There exist numerous matters which make the question of whether the law should permit abortions a more complicated one than “yes”, “no”, or “sometimes”. Pro-choice advocates must remain conscious of the distinction between making a procedure formally available and making it substantially available. Meanwhile, those in middle-ground or pro-life camps may have to face up to the uncomfortable realisation that creating a qualified abortion prohibition which will be applied in a uniform manner is a highly difficult, if not impossible, task. Regardless of the direction one's moral compass points, the road to reform will not be an easy one to travel.