

ARTICLE

Privacy Law in the Abortion Context

SARAH ALAWI*

The law on abortion is currently out of touch with reality. Accessibility is treated as a medical problem, and protection against anti-abortion protests is reached vicariously through property law concepts. In both instances, the law is using the wrong mechanism to properly confront what it is seeking to protect. This article suggests that privacy law presents a more honest response to the issues that are at play. This is possible since, in recent years, privacy law has secured status as a right in New Zealand.

I Introduction

The topic of abortion is a hugely divisive and sensitive subject matter; “it engenders in the community every sort of response”.¹ For this reason, Parliament has maintained a neutral standpoint. The Supreme Court, in the decision of *Right to Life New Zealand Inc v Abortion Supervisory Committee*, has also distanced itself from the topic.²

Unfortunately, one of the consequences of remaining distanced from the topic has meant that the legal framework for the availability of abortions in New Zealand is not an honest one. The problem is three-fold. First, lawful abortions exist as an exception within the criminal law context. Secondly, the availability of abortions is “centrally focused” on the beliefs of the medical practitioners (whose decisions are non-reviewable). Thirdly, the decision to abort is categorised as a medical problem. This ignores the reality that most women wishing to abort do so due to decisional autonomy rather than issues with mental health. This point has been addressed by the Abortion Law Reform Association, saying

* BA, LLB(Hons), University of Auckland. The author is grateful to Stephen Penk who supervised the paper on which this article is based.

1 *R v Wolnough* [1977] 2 NZLR 508 (CA) at 519.

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

“[m]ore than 98% of all abortions in NZ are approved under the so-called mental health ground, showing how dishonest the current law is.”³

This article will suggest that privacy law presents a workable framework. In Part II the legality of abortions in New Zealand will be discussed. Part III analyses how abortion is more honestly categorised as a private decision than a medical one and examine how overseas jurisdictions support this view. Part IV examines anti-abortion protests as well as the lack of protection which exists for women entering clinics in this context, and considers how privacy law may present a more workable measure of protection.

II The Legality of Abortions in New Zealand

Abortion procedures in New Zealand are governed by the Contraception, Sterilisation, and Abortion Act 1977 (the CSA Act) and certain provisions in the Crimes Act 1961. The CSA Act defines in s 2 “abortion law” as ss 10 to 46 of the CSA Act and ss 182 to 187A of the Crimes Act. The starting point is s 182 of the Crimes Act, which provides:

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.

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.

Section 186 says that it is a crime to unlawfully supply or procure the means of an abortion.

The meaning of what is “unlawful”, for the purposes of s 186, is contained in s 187A. In summary, the section provides that an abortion within the 20 weeks’ gestation period is not unlawful if the person doing the act believes that:

- (a) the continuance of the pregnancy would result in serious danger to physical or mental health;⁴
- (b) there is a substantial risk that the child, if born, would be seriously handicapped, physically or mentally;⁵
- (c) the pregnancy is the result of incest or unlawful sex with a guardian;⁶ or
- (d) the woman or girl is severely abnormal within the meaning of s 138(2).⁷

Section 187A(2) states that while extreme age or sexual violation themselves are not grounds for a lawful abortion, these matters can be taken into account in determining whether the continuance of pregnancy would result in serious danger to life or physical or mental health.

The “person doing the act” must, under s 187A(4), be a medical practitioner. If the woman’s own doctor proposes to perform the abortion, and the doctor is not a certifying consultant, the doctor must refer the case to two certifying consultants for a determination under s 33. One of the certifying consultants must be a practising obstetrician or gynaecologist. If the woman’s own doctor proposes to perform the abortion, and the doctor is a certifying consultant, he or she may certify an abortion in conjunction with

3 Abortion Law Reform Association of New Zealand “Did You Know?” (28 September 2011) <www.alranz.org>.

4 Crimes Act 1961, s 187A(a).

5 Section 187A(aa).

6 Section 187A(b).

7 Section 187A(d).

another certifying consultant. An abortion that meets these requirements is lawful not only under s 186 but also under s 182 of the Crimes Act.

III Privacy Law and Abortion

A *Privacy law as the doctrinal underpinning of abortion law*

The United States Supreme Court decision of *Roe v Wade* found that a statute that made criminal all abortions—except “by medical advice for the purpose of saving the life of the mother”—violated the right of privacy. This, the Court said, is “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”.⁸ The Court focused on the negative effects of a forced pregnancy:⁹

Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by childcare. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

The focus on the “detriment” that a pregnant woman would suffer if the State were to deny the choice altogether is an unusual link to privacy law. This is because the focus is not on the woman’s entitlement to exercise her privacy rights (such as a right to autonomy or personal development) but on what may flow if those privacy rights were withheld. The analysis, in this regard, is therefore a clinical and paternalistic one.

In *Bowers v Hardwick*, Blackmun J made a more nuanced and definitionally correct reference to privacy law concepts. The Judge held:¹⁰

We protect those rights ... because they form so central a part of an individual’s life. “[T]he concept of privacy embodies the ‘moral fact that a person belongs to himself and not to others nor to society as a whole.’” ... We protect the decision whether to have a child because parenthood alters so dramatically an individual’s self-definition ...

More recently, protection against “interference with privacy” in art 17 of the International Covenant on Civil and Political Rights and respect for “private and family life” in art 8 of the European Convention on Human Rights, have also been said to include the decision to have or not to have a child.¹¹ The cases that flow from these jurisdictions are important as they demonstrate a growing consensus in the international arena that restricting access to abortion for women may amount to a violation of the right to privacy (including the right to personal autonomy, and to physical and psychological integrity). However, in *A, B and C v Ireland*, the Grand Chamber of the European Court of Human Rights observed that “[t]he

8 *Roe v Wade* 410 US 113 (1973) at 153.

9 At 153.

10 *Bowers v Hardwick* 478 US 186 (1986) at 204 (citation omitted).

11 See, for example, *KL v Peru* CCPR/C/85/D/1153/2003, 22 November 2005; *LMR v Argentina* CCPR/C/101/D/1608/2007, 28 April 2011; and *A, B and C v Ireland* (2011) 53 EHRR 13 (Grand Chamber, ECHR).

woman's right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child."¹²

B The suitability of privacy law as the applicable body of law

In *C v Holland*, Whata J said that "it is now too late to cogently argue that judges in New Zealand are unable to adjudicate on the content and boundaries of a privacy right..."¹³ This decision was delivered in 2012, suggesting that privacy law is a modern area of the law. This means that the position taken by the CSA Act, which is more than 35 years old, is out of date with the current legal trend.

From a definitional approach, privacy law is a suitable framework to guide the legality of abortions in New Zealand. The best-known¹⁴ definition of privacy is "the right to be let alone".¹⁵ The "inviolable personality", a term captured by this definition, refers to dignitary interests and bodily integrity. In the abortion context, the right to be let alone would refer to the State censoring itself from a woman's decision to not remain pregnant. *Roe v Wade* is a good example.

The right to privacy also encapsulates a form of retreat from the conformist pressures of social norms. Under this view, "social retreat is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness ... formulate unique ideas, opinions, beliefs and ways-of-living ...".¹⁶ This definition of privacy appeals to the abortion context because it entitles pregnant women wishing to abort to retreat from the abortion debate and withdraw from any resulting societal pressures.

DeCew refers to privacy as a form of "control" over one's ability to make important decisions about family and lifestyle.¹⁷ The idea of control is closely connected to Warren and Brandeis' definition of privacy in that it appeals to the inviolable personality. However, DeCew's definition focuses more on the power of the individual to remain autonomous, rather than focusing on the State's duty of non-interference. Under this view, parenthood is obviously an important decision relating to family and lifestyle. It is therefore up to the pregnant woman, herself, to control (within the gestation limit) whether to choose that lifestyle for herself.¹⁸

Reiman views privacy as fundamentally connected to personhood. He defines privacy as:¹⁹

The right to privacy protects my capacity to enter into intimate relations, not because it protects my reserve of generally withheld information, but because it enables me to make

12 *A, B and C v Ireland*, above n 11, at [213].

13 *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672 at [74].

14 Stephen Penk and Rosemary Tobin *Privacy Law in New Zealand* (Brookers, Wellington, 2010) at 3.

15 Samuel Warren and Louis Brandeis "The Right to Privacy" (1890) 4 Harvard L Rev 193.

16 John DR Craig "Invasion of Privacy and Charter Values: The Common-Law Tort Awakens" (1997) 42 McGill LJ 355 at 361.

17 Judith Wagner DeCew *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (Cornell University Press, New York, 1997) at 77.

18 I acknowledge that this definition can lead to complicated inquiries, as it can trigger further privacy claims—for example, fathers' rights.

19 Jeffrey Reiman *Critical Moral Liberalism: Theory and Practice* (Rowman & Littlefield Publishers, Maryland, 1997) at 165.

the commitment that underlies caring as *my* commitment uniquely conveyed by *my* thoughts and witnessed by *my* actions.

This definition is helpful as it focuses on the right of the woman to choose when to make the commitment to be a mother. This definitional approach is interesting in that it looks beyond the relationship between the individual and the State. It focuses on the ability of the individual to choose whether to form intimate relationships with others (in this context, the ‘other’—the unborn child—is “contingent”).²⁰

C *Privacy law and abortion in New Zealand cases*

In *Harris v McRae*, the United States Supreme Court confined the stated position in *Roe v Wade* to a purely negative right.²¹ In that case, the question for the Court was whether the *Roe v Wade* decision included an entitlement to public funding for abortions that are not medically necessary. It was held that the answer is no. The Court took the view that “although government may not place obstacles in the path of a woman’s exercise of her freedom of choice, it need not remove those not of its own creation”. Indigency, it was held, “falls in the latter category”. The Court added:²²

The financial constraints that restrict an indigent woman’s ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.

This decision was criticised for confining the right to privacy to a right without access. As Mackinnon puts it, “[t]he women in *Harris*... needed something to make their privacy effective.” Solinger adds:²³

[T]he abstract freedom to choose is of meager value without meaningful options from which to choose and the ability to effectuate one’s choice. The traditional concept of privacy makes the false presumption that the right to choose is contained entirely within the individual and not circumscribed by the material conditions of the individual’s life...

The *Harris* decision is not explicitly pertinent to a New Zealand context. In New Zealand, women can be eligible to have their procedures publicly funded depending on the licenced institution.²⁴

However, the conceptual difficulties in the *Harris* decision emerge in a related context. The law places the ultimate decision to abort “on the shoulders of the medical profession”.²⁵ As Tipping J in *Wilcox v Police* put it, the availability of an abortion is “centrally focused” on the belief of the medical practitioners.²⁶ For this reason, the

20 Tipping J in *Wilcox v Police* [1994] 1 NZLR 243 (HC) at 248 uses the term *contingent* to explain the interests of the unborn child.

21 *Harris v McRae* 448 US 297 (1980).

22 At 316.

23 Rickie Solinger *Abortion Wars: A Half Century of Struggle, 1950–2000* (University of California Press, California, 1998) at 147.

24 The Health and Disability Services Eligibility Direction 2011 sets out the eligibility criteria for publicly funded health and disability services in New Zealand. Generally, an abortion is free for New Zealand permanent residents or citizens.

25 The determination of an abortion case is mandated by ss 32 and 33 of the Contraception, Sterilisation, and Abortion Act 1977 Act.

26 *Wilcox v Police*, above n 20, at 253.

New Zealand position may be criticised for going further than the outcome in *Harris*. Financial status is, at least, objectively ascertainable and closer to being controlled by the agent's own affair. The judgement of a medical practitioner, on the other hand, is completely subjective in nature and thus indeterminable. Crucially, there is no right of review either by the Committee or anyone else, including the pregnant patient. This means that she can do little to secure her own affairs.

The Supreme Court decision of *Right to Life New Zealand Inc v Abortion Supervisory Committee* is the most recent authority on the issue of reviewability in the abortion context. The majority confirmed the position taken in *Wall v Livingston*, by taking the view that the Committee cannot, even after the fact, make any inquiry or investigation into a medical practitioner's decision-making in an individual case where that would tend to question a decision actually made in a particular case.

In *Wall v Livingston*, the Court of Appeal observed that while the Committee has a responsibility for the "general" oversight of the work of certifying consultants throughout New Zealand, it has no control, authority or oversight in respect of the individual decisions of consultants.²⁷ The Court explained:²⁸

That deliberate absence of any review process inside the Act itself is probably founded upon three considerations. First, special attention has been given in the Act to the preservation of anonymity of the woman patient. Secondly, the whole process of authorisation appears designed to place fairly and squarely upon the medical profession as represented in any particular case by the certifying consultants a responsibility to make decisions which will depend so very much upon a medical assessment pure and simple. And thirdly, there are the adverse medical implications which could arise from the passage of time should such a determination be easily open to review. Thus it can be said that the Act itself has put aside the dangers and anxieties and frustrations together with moral as well as medical argumentation that might develop by permitting the substitution of one set of medical opinions for others as the result of some generally available process of review or appeal.

In the Supreme Court decision of *Right to Life*, the majority drew a distinction between "caseload" and "individual cases", stating:²⁹

What the Committee is at liberty to seek from consultants is information about how they have generally approached their caseload. It could also seek background information of statistical significance such as anonymised information of a socio-demographic kind not germane to the... decision in any case.

The approach taken by the courts is an appropriate one given the circumstances in which these cases arose. In *Wall v Livingston*, the facts involved an application for judicial review by a doctor of the decision of two certifying consultants who had authorised an abortion for a teenage girl. The doctor formed the view that there was no ground under the CSA to justify the carrying out of the abortion. In the Supreme Court, *Right to Life New Zealand Inc (RTL)* brought judicial review proceedings claiming that many abortions were wrongfully certified, and this has led to abortion "on demand". In both circumstances, the finding against reviewability protected the woman's choice not to remain pregnant.

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

28 At 739.

29 *Right to Life*, above n 2, at [42].

However, the same reasoning applies to a reverse set of facts. In obiter, the Court of Appeal noted there is no right of review even if the woman herself may wish to review a decision determining that the case for authorising the performance of an abortion had not been made out.³⁰ Here, the Court aligns itself with the stated position in *Harris*. The *Harris* decision exempted the State from a positive obligation to ensure the resources necessary for autonomous decision-making. Similarly, in removing the potential margin for review, the *Right to Life* decision removed any positive obligation owed by the State to ensure that the woman's choice to abort is protected.

The bad faith exception is currently the only potential for which the right to choose may overcome unfavourable medical judgement. However, this does little to preserve a woman's privacy interests since bad faith is very difficult to detect and will require intervention only in a "clear case".³¹

The other side of the coin is that non-reviewability protects the patient's informational privacy.³² The reasoning behind patient confidentiality is obvious. Information relating to abortion generates the most sensitive sort of personal information. It reveals private information that is both backward-looking (sexually active, pregnant) and forward-looking (seeking to end pregnancy).

Informational privacy is crucial in this context because it "assures these people space in which they are free of public scrutiny, judgement, and accountability". It also gives individuals the freedom to "choose not to reveal about themselves" certain facts which may also be "acutely sensitive".³³

DeCew prefers a different line of reasoning. She argues there is a need for informational privacy because there is a real possibility of "exploiting, aggregating, or misusing the information" about individuals.³⁴ DeCew adds this is particularly relevant in today's electronic medical records: "[w]hile paper records and copying machines have never been particularly secure, computerized records introduce new risks and new opportunities for abuse."³⁵ Nissenbaum takes a similar approach: "[t]he power of computers and networks to gather and synthesize information exposes individuals to the scrutiny of others in unprecedented ways."³⁶ This largely refers to the virtually unlimited access that is available to most of these databases. A related concern is the centralisation of such sensitive information, which "places too much power in a single public agency."³⁷

The Court of Appeal in *Right to Life* relied on two lines of reasoning which belong to privacy law jurisprudence. First, reviewability would impinge on the privacy of both the woman and the relevant medical practitioner or provider. Secondly, any disclosure of records would only tell part of the story. It may be critical for other relevant information

30 *Abortion Supervisory Committee v Right to Life New Zealand Inc* [2011] NZCA 246, [2012] 1 NZLR 176 at [32].

31 *Right to Life*, above n 2, at [29].

32 Noting, however, that privacy law exists separately to the action for breach of confidence. Tipping J, in the majority decision of *Hosking v Runting* [2005] 1 NZLR 1 (CA) was "in general agreement" with the judgment delivered by Gault P (for the majority), but wrote a separate judgment starting at [223] of that decision.

33 WA Parent "Privacy, Morality, and the Law" (1983) 12 *Philos Public Aff* 269 at 270 as cited in Helen Nissenbaum "Toward an Approach to Privacy in Public: Challenges of Information Technology" (1997) 7 *Ethics & Behaviour* 207 at 209.

34 Judith Wagner DeCew "The Priority of Privacy for Medical Information" (2000) 17(2) *Soc Phil & Poly* 213 at 214.

35 At 215.

36 Nissenbaum, above n 33, at 218.

37 DeCew, above 33, at 221.

to be obtained from the woman patient and/or her medical practitioner.³⁸ This would create the potential for privacy interests to be interfered with to an uncertain or unlimited degree.

In his Honour's dissent, Arnold J preferred to reverse the priority of these competing claims. The Judge would have allowed reviewability of the medical practitioner's decision. He took the view that Parliament has already made a policy trade-off by deciding that abortion is not a matter to be left simply to the affected woman and her doctor. For example:³⁹

[I]t has taken as more circumscribed approach, specifying criteria for abortions, establishing processes for the consideration of applications and for the performance of abortions and constituting a supervisory committee to administer those processes and keep them under review. In other words, Parliament has chosen to interfere with the privacy interests of women seeking abortions and with their professional relationships with their medical advisers.

It is clear that the CSA Act protects informational privacy. The Act requires that all records and reports made to the Committee keep the patient's name and address anonymous.⁴⁰ The purpose is to report only on "the operation of the abortion law" and "its activities during the preceding 12 months".⁴¹

D *Concluding remarks*

This section has suggested that privacy law is able to present a workable framework in governing the legality of abortions in New Zealand. The courts and the legislature have, albeit to a limited degree, acknowledged a privacy right which exists within the abortion context (insofar as the protection of informational privacy is concerned). Although in my assessment, privacy law can apply in a more meaningful way, that is by holding that the decision to abort is a private one.

However, privacy law is bound up with competing claims. It is not the aim of this article to specify in any detail the competing claims that lie in the abortion context; although I agree with the Grand Chamber's comment that the decision to abort must be weighed against other competing rights and freedoms invoked, including those of the unborn child. What is clear, at this stage, is that the availability of abortions is not suitably placed as an exception within the criminal law and that privacy law, as an alternative, is able to offer a more honest response to the reality in which many abortions are procured.

IV Anti-Abortion Protests

Anti-abortion protests are not uncommon in a New Zealand context. The courts have looked at circumstances where anti-abortion protesters "with very strong views about abortions" use extra-legal deterrence techniques such as shaming, harassment, and obstruction in an effort to "help [women] point out what [they are] doing".⁴²

38 *Abortion Supervisory Committee*, above n 30, at [103].

39 At [178].

40 Contraception, Sterilisation, and Abortion Act 1977, s 36. See specifically, s 36(2).

41 Sections 14(1)(k) and 39.

42 See Alice Clapman "Privacy Rights and Abortion Outing: A Proposal for Using Common-Law Torts To Protect Abortion Patients and Staff" (2003) 112 Yale LJ 1545 at 1550–1553.

In *White v Police*, the appellant sang songs about women entering the premises at the time.⁴³ The appellant positioned himself at the entranceway of the clinic so that any woman approaching the clinic on foot had to pass very close to him at the time when he was making a protest. In *Wilcox v Police*, ten protesters blocked the front and rear entrances to prevent the entry of women who were intending to have abortions that day. A more recent example involved a group of protesters that had picketed outside Thames Hospital every Friday for the previous 18 months and had attracted media attention for causing upset to pregnant women entering the premise.⁴⁴

It is clear to see that anti-abortion protests located on or around abortion clinics pose a quandary for the courts. As Fogarty J put it, these women are likely to have “mixed views about their own conduct” and are “likely to be emotionally on edge, if not already upset anyway”.⁴⁵ Unsurprisingly, abortion doctors are often also targets. This is more common in overseas jurisdictions. In New Zealand, this has not been tested before the courts though our Supreme Court has decided on analogous confrontations, such as that in *Brooker v Police*.⁴⁶

A *The current legal framework*

The Trespass Act 1980 is the only means of protection against anti-abortion protesters. The Act provides:⁴⁷

3 Trespass after warning to leave

- (1) Every person commits an offence against this Act who trespasses on any place and, after being warned to leave that place by an occupier of that place, neglects or refuses to do so.
- (2) It shall be a defence to a charge under subsection (1) if the defendant proves that it was necessary for him to remain in or on the place concerned for his own protection or the protection of some other person, or because of some emergency involving his property or the property of some other person.

In the abortion context, the courts have tended to apply the Act in favour of the owners or occupiers of the clinic. As a starting point, anti-abortion protesters are likely to be deemed trespassers within the meaning of s 3(1) from the start. They will usually require only one warning to leave because it is unlikely that they would have express or implied authority to go onto the premises of the hospital or clinic to begin with. Once they are warned to leave but refuse to do so, their only defence is the enactment of the common law doctrine of necessity under s 3(2).

Following *Wilcox v Police*, s 3(2) poses an obstacle for protesters in the abortion context. The subsection refers to the phrase “some other person” (“for his own protection or the protection of some other person”). Tipping J took the view that when Parliament

43 *White v Police* HC Christchurch CRI 2004-409-000064, 12 May 2004.

44 “Anti-abortion protesters upsetting, says Waikato DHB” (14 May 2014) Stuff <www.stuff.co.nz>.

45 *White v Police*, above n 43, at [12].

46 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91.

47 Trespass Act 1980, s 3.

used the word “person” in s 3(2), “there was in the background no settled common law principle that an unborn child was relevantly a person”.⁴⁸

The protection afforded in trespass cases is, in any event, very limited. Protection is only triggered once it is proved that the person charged (i) was trespassing on the premise; (ii) was warned to leave the premise by an occupier; and (iii) had refused to do so. This is problematic in two ways. First, not all protests involve setting foot on the premise. For example, in *Brooker v Police*, Mr Brooker’s conduct did not constitute an offence under the Trespass Act because his protest was situated on the grass verge on the road outside the constable’s house.⁴⁹ Secondly, the trespasser must be warned to leave by an occupier. To come within the meaning of an “occupier”, a person must have a sufficient degree of control over premises.⁵⁰ This means that a woman entering the clinic cannot herself put forward a claim.

Trespass laws are intended to protect property, not persons. In the abortion context, the reverse is true. Thus, the conclusion is that trespass laws do not accurately encompass what the courts are actually seeking to protect.

It is worth noting that the Harassment Act 1977 is not a preferred body of law in the circumstances. This is because, as defined by s 3 of the Act, a person “harasses” another person if he or she engages in a pattern of behaviour directed against that person (being a pattern of behaviour that includes doing any of the specified acts on at least two separate occasions within a period of 12 months). Whether the same woman would enter the clinic on two separate occasions will vary depending on the circumstances and, in any event, it is unlikely that the same person or group of people would pester her on both occasions.

It is proposed that privacy law is the applicable body of law for protection against anti-abortion protests through two causes of action. Below is an overview.

(1) The intrusion tort

In order to satisfy the elements of the tort, Whata J in *C v Holland* confirmed that the plaintiff must show:⁵¹

- (a) an intentional and unauthorised intrusion;
- (b) into seclusion (namely intimate personal activity, space or affairs);
- (c) involving infringement of a reasonable expectation of privacy; and
- (d) that is highly offensive to a reasonable person.

The intrusion tort is suited to this context because it allows the courts to focus directly on the personal rights of these women, rather than on the property rights of abortion clinics. Importantly, this form of privacy does not depend upon any publicity given to the person whose interest is invaded or to his or her affairs.

In my view, the abovementioned elements are sufficiently broad so as to enable protection against anti-abortion protests. The elements can be set out in the following way:

48 *Wilcox v Police*, above n 20, at 252.

49 *Brooker v Police*, above n 46, at [10].

50 See *Wheat v E Lacon & Co Ltd* [1966] AC 552 (HL).

51 *C v Holland*, above n 13, at [94].

“an intentional and unauthorised intrusion”

- There must be an affirmative act, not an unwitting or simply careless intrusion. The meaning of “unauthorised” excludes consensual and/or lawfully authorised intrusions.⁵²
- This requirement is likely to be easily met. The overarching purpose of anti-abortion protests is to intrude, in the hope of pleading with women entering the clinic.

“into seclusion”

- This will be a question of fact, according to social conventions and expectations.
- It is socially accepted that abortion procedures are an intimate personal affair.

“involves a reasonable expectation of privacy”

- This is a two-prong test. There must be a subjective expectation of privacy which is objectively reasonable. The classic marker of this is the public/private divide.
- This limb will pose the greatest difficulty for potential claimants (see below).

“which is highly offensive”

- Several factors, including the degree of intrusion, context, conduct and circumstances of the intrusion, the motive and objectives of the intruder and the expectations of those whose privacy is invaded, are all relevant to whether or not the intrusion is “highly offensive”.
- This requirement is unlikely to pose any real difficulties. Regard will probably be had to the courts’ position taken in trespass cases. For example, in *White v Police*, Fogarty J accepted that the woman was likely to be “emotionally on an edge if not already upset”, such that the appellant’s “unpleasant confrontation” could not be justified.⁵³

(2) The reasonable expectation of privacy

Since abortions take place in public buildings, the case does not easily fit within the conception of a reasonable expectation of privacy.

In *Hamed v R*, the Supreme Court considered whether the use of surveillance in a public space breaches the reasonable expectations of privacy.⁵⁴ The Court was split on this issue. In the majority, Blanchard J took the view that “[p]eople in the community do not expect to be free from the observation of others... in open public... nor would any such expectation be objectively reasonable.”⁵⁵

This view is aligned with the seminal article written by William Prosser. Prosser stated:⁵⁶

On the public street, or in any other public space, the plaintiff has no right to be alone, and it is no intrusion of his privacy to do no more than follow him about. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than

52 At [95].

53 *White v Police*, above n 43, at [12].

54 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305. The law on this point is fitting in this context since the purpose of anti-abortion protests is to *observe* the women entering the hospital or clinic.

55 At [167].

56 William L Prosser “Privacy” (1960) 48 CLR 383 at 391–392.

making a record, not differing essentially from a full written description, of a public sight which any on present would be free to see.

In the minority, Elias CJ took the view that there can be a reasonable expectation of privacy in public spaces. The Chief Justice held:⁵⁷

[P]eople may have reasonable expectations that they will be let alone... even in public spaces in their private conversations and conduct. There is public interest in maintaining as a human right space for privacy in such settings.

The Chief Justice's view appeals to a notion of "public privacy".⁵⁸ The idea is that people do not think of themselves as entirely accessible to the public at large simply because they happen to be outside their homes. This is a high-level approach to privacy which requires looking beyond physical solitude. Most modern definitions of privacy offered by scholars prefer this view.

A preferred view is one taken by Allen. She argues that we need privacy because it "make(s) it possible for a person to use public places for their intended governmental, commercial, and recreational purposes".⁵⁹ The suggestion is, therefore, given the intimate circumstances involved, the operation of an abortion clinic depends on the presupposition of privacy norms. This has little to do with spatial privacy.

(3) Public disclosure of private facts

It is possible that the protesters' technique could involve public disclosure, such as posting videos on the Internet of women entering the premises. Such public disclosure of private facts would put the case in the more traditional tort of the invasion of privacy.

Hosking v Runting is the leading authority on this point. The leading judgment of the Court held that this tort has two elements:⁶⁰

- (a) the existence of facts in respect of which there is a reasonable expectation of privacy; and
- (b) publicity given to those private facts would be considered highly offensive to an objective reasonable person.

In that case, the plaintiffs sought to prevent publications of photos taken of their children while they were on a shopping trip in one of New Zealand's busiest retail precincts. It was held that the plaintiffs' concerns were "overstated" because there was no reasonable expectation of privacy in the context of a photograph being taken in a public space:⁶¹

The photographs taken by the first respondent do not disclose anything more than could have been observed by any member of the public in Newmarket on that particular day.

57 *Hamed v R*, above n 54, at [12].

58 See Andrew Jay McClurg "Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusion in Public Places" (1995) 73 NCL Rev 989.

59 Anita L Allen *Uneasy Access: Privacy for Women in a Free Society* (Rowman & Littlefield, New Jersey, 1988) at 125.

60 *Hosking v Runting*, above n 32, at [117].

61 At [164].

Under this view, it can be said that a pregnant woman entering the clinic or hospital would have no reasonable expectation of privacy since she “could have been observed by any member of the public” in or around the premise that day. The case, therefore, would fail to meet the first stage of the inquiry.

On the other hand, it is possible to distinguish the facts in *Hosking* from the abortion context. Shopping vicinities attract all sorts of people. The same cannot be said in the abortion context: those entering and exiting the abortion clinic are likely to be of a very small class of women all undergoing an extremely personal experience or are the support person linked to someone who is. Those seeing the publication on print, however, are likely to be part of a wider class, detached from the intimate experience. Viewed in this way, the image is not merely being disseminated to a larger public audience, but an altogether *different* audience than those present on that particular day.

In a separate judgment, Tipping J concurred with Gault P and Blanchard J. However, his Honour took the view that, in most cases, there can be no reasonable expectation of privacy unless publication would cause a high degree of offence to a reasonable person. This combines the two elements set out by the majority as one overall inquiry.

On the facts, the Judge held:⁶²

They were taken in a public space. There is no evidence which satisfies me that publication would be harmful to the children, either physically or emotionally. There is, in my view, no greater risk to the safety of the children than would apply to a photograph of any member of society taken and published in a similar way.

Tipping J’s approach probably allows for an easier threshold to be met. Under his Honour’s test, there is a reasonable expectation of privacy because publication would cause a high degree of offence to a reasonable person. In *Hosking*, the children were simply shopping with their parents. This is a mundane activity that reveals nothing about the individuals’ private lives. In the abortion context, however, the setting captures everything: that the woman is pregnant and that she wishes to abort. Both facts are extremely sensitive, and disclosure of such facts is likely to be emotionally harmful. The courts have already acknowledged this setting in trespass cases.⁶³

B *Bubble-zone legislation: a proposal*

Privacy law competes notoriously with the right of freedom of expression. This is especially true in the context of protests. This, unsurprisingly, poses a quandary for the courts because Judges have to decide which interest is worth protecting in the context of competing claims.

It is possible that a balancing approach may be reached. In the United States and Canada, some states and provinces have passed legislation generally known as “buffer-zone” or “bubble zone” legislation. These legislations create a “bubble” around abortion-providing clinics within which protesters’ speech and actions are restricted. Outside the bubble-zone, the protesters’ freedom of speech is maintained. For example:

62 At [260].

63 See *White v Police*, above n 43, at [12]. Fogarty J acknowledged that the woman was likely to be “emotionally on an edge if not already upset” prior to the defendant’s confrontation.

- (a) Under United States federal law, s 636 of the Freedom of Access to Clinic Entrances Act 1994 prohibits physically obstructing access to clinics, damaging clinical property, injuring or intimidating clients or staff.⁶⁴
- (b) In Canada, the Access to Abortion Services Act 1995 was passed. The purpose of the Act is “to ensure that women who choose to use abortion services will have unimpeded access to those services. It will also ensure that those who provide these services can do so safely and without harassment.”⁶⁵

This model provides a guiding framework for New Zealand. The bubble-zone is a balance of competing claims because the purpose is not to restrict the freedom expression but to protect people from the potentially harmful consequences of such expression occurring in a particular place, time and manner.

Bubble-zone legislation is especially appropriate when we consider the purpose of anti-abortion protests. Protesters perceive protests as a kind of “wake-up call” for these women. This is done in the hope that she or they would be sufficiently deterred from undergoing the procedure minutes before the scheduled appointment. The reality is that by that point the decision has already been made. Parliament’s medicalised approach to abortion laws has meant that these women have to pass many hurdles of medical judgement to get to accessibility.

V Conclusion

It is clear that the current law on abortion is in need of review, although given its context an ultimate solution may be impossible to reach. This article has concluded that privacy law presents an honest framework, although I submit that it is not necessarily a flawless one. There are competing claims which exist within privacy law and the inner workings of them will need to be explored in more detail—a task which is for another day. The aim of this article has been to look into workable alternatives or, at the very least, open up a constructive reform debate.

64 Freedom of Access to Clinic Entrances Act 18 USC § 248.

65 Access to Abortion Services Act RSBC 1996 c 1.