

Abortion Law Litigation

2005-2012

Right to Life Inc v Abortion Supervisory Committee

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Power Point slides re RTL v ASC litigation
for the Auckland Christian Lawyers Association
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Issues

The broad issues which arose in *RTL v ASC* litigation in New Zealand were:

1. Auditing / review of clinical abortion practice.
2. Independent counselling for women considering an abortion.
3. Is the unborn child a person? Does the unborn child have rights?

Overseas:

Issue 1 arose in February 2012 in the UK in a different context- Daily Telegraph UK.

Issue 2 arose in the UK in August 2011- refer Daily Telegraph UK (re Ms Dorries MP) and UK Govt consultation was launched in February 2012.

Issues 2 and 3 also frequently arise in litigation and in state legislation in the USA.

Overview regarding New Zealand

- A. Introduction and abortion law provisions
- B. Historical background- 1970s, Royal Commission 1977
- C. The law since 1977- *Wall v Livingston* [1982] 1 NZLR 734 (CA)
- D. What was the context within which the litigation arose? re *RTL v ASC*
- E. High Court issues, arguments and judgment : refer [2008] 2 NZLR 825 (HC)
- F. Court of Appeal judgments: refer [2012] 1 NZLR 176 (CA)
- G. Supreme Court- leave application [2011] NZSC 97; followed by the substantive hearing- issues and arguments.
- H. Supreme Court (3-2)- majority decision and minority view [2012] NZSC 68; and refer recall of judgment application re costs [2012] NZSC 89.

A. Introduction

The recent litigation between *Right to Life Inc* and the *Abortion Supervisory Committee* concerned a dispute as to:

- the interpretation of the abortion law.
- the role of the Abortion Supervisory Committee and the scope of its powers and obligations under the Contraception Sterilisation and Abortion Act 1977 (CSA Act 1977).

The resolution of the dispute proceeded on the basis of orthodox principles of statutory interpretation and judicial review.

“Abortion law” defined

The “abortion law” is defined by the CSA Act 1977 as comprising of ss182- 187A of the Crimes Act 1961 and ss 10-46 of the CSA Act 1977.

Refer key provisions (set out in full at the end of the power point)

ss182- 187A of the Crimes Act 1961 re lawfulness

s 14 CSA Act 1977 powers of the ASC

s21 granting of licences

s21(1)(e) “adequate counselling services”

s24 renewal of licences of institutions

s25 cancellation of licences of institutions and s 30(7) revocation of appointment of certifying consultants

s30(5) balance of views

s 32 and 33 certification process (re s32(3) and s33(5A) re s187A grounds)

s 36 reports by consultants to the ASC

Long Title to the CSA Act 1977

B. Historical background

In the mid 1970s the lawfulness of abortions undertaken by medical doctors was tested in the courts in *R v Woolnough* [1977] 2 NZLR 508 (CA) and abortion became a major political issue.

Royal Commission in NZ: As a result in the mid 1970s in New Zealand there was a Royal Commission which consulted widely throughout NZ over many months, regarding contraception, sterilisation and abortion.

The Royal Commission Report 1977 rejected the liberal approach of the US Supreme Court decision in *Roe v Wade* and opted for a compromise, namely retention of the criminal sanctions for abortion, but permitted a woman to seek a lawful abortion on the certain grounds.

Historical background (continued)

Provisions of the CSA Act 1977 in NZ: As a result the New Zealand Parliament to enact the CSA Act which substantially gave effect to the recommendations made by the Royal Commission.

- Parliament also amended the Crimes Act so as to permit lawful abortion as now set out in the s187A(1) and (3) of the Crimes Act 1961.
- Parliament created the Abortion Supervisory Committee with various powers and functions including regarding the new abortion law, licensing of institutions and appointing certifying consultants.

C. The law since 1977:

The law since 1977: The primary position is that it is a serious crime and is unlawful to procure an abortion (punishable by 14 years imprisonment)- refer ss182A, 183 and 187A(1) Crimes Act 1961.

- However the secondary position is that to procure an abortion is lawful in New Zealand when a certificate is issued by two certifying consultants confirming that the case falls within the provisions of s187A(1) or (3) of the Crimes Act 1961.
- In short, abortion is not lawfully available 'on demand' in New Zealand. There is no right to an abortion in New Zealand.

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

Wall v Livingston: The New Zealand Court of Appeal in *Wall v Livingston* [1982] 1 NZLR 734 held that the doctor applicant had no right to challenge in Court the clinical decision of a certifying consultant to certify the performance of an abortion as falling within the permitted grounds in s187A(1) and (3) of the Crimes Act 1961- save for 'bad faith' by the certifying consultant.

The rationale was that (except if there was evidence of bad faith) courts would be in no position to second-guess the clinical decisions of doctors who had been authorised by Parliament to be the gate-keepers under the 1977 legislation.

D. What was the context within which the litigation arose?

The ASC is a statutory body set up pursuant to the CSA Act 1977 and the ASC (or its Chairperson) stated *inter alia* that:

- (a) In the ASC report (at P5) to Parliament of 2000 stated that “...*the procedures* [of the Act] ... *are not being followed as the law intended.*” Refer HC Judgment at [51]
- (b) The Chairperson of the ASC was quoted in 2000 (SST) that “*We do essentially have abortion on demand or request, however you like to put it...*” Refer HC Judgment at [53]
- (c) That the ASC had no control or authority or oversight in respect of the individual decisions of certifying consultants authorising abortions (ASC reports 1996 p7 and 2001 p4).
And refer HC judgment at [41]
- (d) The statistics annually reported by the ASC to Parliament consistently recorded that 98% of abortion performed were certified as lawful on the grounds in s187A(1)(a) of the Crimes Act 1961 that the continuation of the pregnancy would result in serious danger to the mental health of the woman.
Refer HC Judgment at [56]
- (e) In the ASC report of 2006, NZ had an abortion rate comparable to that of USA and Canada (where women have a constitutional right to an abortion). Refer HC Judgment at [44]- [56]

2005- prior to the present litigation

In 2005 RTL issued proceedings seeking judicial review alleging that ASC had:

- (a) the power and obligation to scrutinise / inquire/ review the practice of doctors who were certifying abortions pursuant to the abortion law.
- (b) An obligation to ensure licensed institutions provided independent counselling for women.

E. In the HC litigation RTL advanced three main points:

Firstly, the ASC did have the legal power and obligation to intervene to review the way in which doctors were applying the abortion law; the ASC had misunderstood its legal powers; and that *Wall v Livingston* did not preclude the ASC from calling for reports from consultants under s36 of the CSA Act 1977 in relation to clinical decisions in particular cases (ie an audit after the performance of an abortion).

Secondly, the ASC had failed to ensure that licensed institutions provided “adequate” counselling facilities for women, because the counselling services were not independent from the institutions providing the abortion service. (refer s31 and s21(1)(e) CSA Act 1977).

Thirdly, these arguments of statutory interpretation were enhanced by the existence of a State interest in the protection of the unborn child and by the rights of the unborn child. The asserted rights of the unborn child were not advanced in support of a right to sue or for standing for judicial review, but merely to enhance the application of orthodox principles of statutory interpretation.

In the HC litigation ASC replied with three main points:

Firstly, the ASC did not have the legal power and obligation to intervene to review the way in which doctors were applying the abortion law; the ASC had not misunderstood its legal powers; *Wall v Livingston* did preclude the ASC from calling for reports from consultants under s36 of the CSA Act 1977 in relation to clinical decisions in particular cases.

Secondly, the licensed institutions provided “adequate” counselling facilities for women, even if the counselling services were not independent from the institutions.

Thirdly, there was no State interest in the protection of the unborn child, the unborn child had no rights and no right to life; therefore such were irrelevant to the orthodox principles of statutory interpretation and to the litigation.

**In RTL v ASC [2008] 2 NZLR 825
the High Court held:**

- (a) Notwithstanding *Wall v. Livingston* [1982] 1 NZLR 734, the ASC had the power to undertake an ‘after the event’ review of the way in which certifying consultants were performing their functions including in relation to clinical decisions in individual cases (ie after the performance of an abortion)- refer paras [111]-[130].
- (b) Counselling: Counselling services that were not independent from the institutions were not “inadequate”.- refer paras [137]-[151].
- (c) No right to life: The unborn child had no right to life- refer paras [67]-[104].

Other issues addressed by the Court included what possible inferences could properly be drawn from the abortion statistics; and the issue of the lawfulness of the conduct of doctors.

F. In 2010 the Court of Appeal held:

In *ASC v RTL* [2012] 1 NZLR 176 the Court of Appeal held that:

1. Counselling (3-0): Counselling services that were not independent from the institutions were not “inadequate”, thereby affirming the High Court judgment.
2. No right to life (3-0): The unborn child had no right to life; and also implicitly held that there was no State interest in the preservation of the life of the unborn child, thereby affirming the High Court judgment.

In the Court of Appeal RTL had argued in support of the existence of a state interest in protection of the unborn child, a fundamental right to life at common law and s8 of the NZBORA.

In the Court of Appeal the ASC relied upon the ‘born alive’ rule and the High Court judgment.

In 2010 the majority of the Court of Appeal (Chambers and Stevens JJ) held (2-1):

In *ASC v RTL* [2012] 1 NZLR 176 the majority of the Court of Appeal held that:

1. *Wall v. Livingston* [1982] 1 NZLR 734 was of general application (both prospectively and retrospectively).
2. The correct interpretation of the CSA Act 1977 precluded the ASC from undertaking an ‘after the event’ audit of the way in which certifying consultants were performing their functions, including in relation to clinical decisions of medical consultants in individual cases.

In summary the majority of the Court of Appeal's (2-1) reasons were:

1. At [102] to permit after the fact review would cause “practical difficulties”.
2. At [103] the nature and scope of the professional obligations of the medical practitioner should be determined by the Health and Disability Commissioner (“HDC”) and other bodies.
3. At [103] disclosure of records has the potential to impact on the privacy of the medical practitioner and the patient; and should be considered by the HDC with fairness and natural justice.

In summary the Court of Appeal's (2-1) reasons were:
(continued)

4. At [103] s36 reports may give rise to disciplinary issues best dealt with by the HDC.
5. At [104] the ASC does not have express statutory power to investigate alleged breaches of obligations, enforce standards etc and the CSA Act is silent on such functions. Such are the province of the Medical Council and HDC. Any breaches of criminal law should be dealt with by police.
6. At [105] in contrast there is machinery regarding licensed institutions regarding the giving of reasons and possible legal challenges.

In summary the Court of Appeal's (2-1) reasons were:
(continued)

7. Therefore at [108] the power of the ASC to revoke appointments of certifying consultants is to be exercised where bad faith is demonstrated and the prohibition in *Wall v Livingston* is of general application.

These reasons of the majority (Chambers, Stevens JJ) were disputed by Arnold J in his minority judgment who stated that the ASC did have the duty and power to review the clinical decisions of certifying consultants in order to discharge its statutory role and functions.

Court of Appeal- minority judgment of Arnold J reasons:

1. At [105] that the general function of the ASC was to keep the statutory function of certifying consultants under review.
2. At [163(b)] s14(h) the ASC is required to *keep under review the procedures of s32 and 33 whereby it is determined by any case whether the performance of an abortion is justified*, which sections requires the application of the relevant legal criteria (ie in s187A of the Crimes Act 1961).
3. At [163(c-d)] s14(i) required the ASC to ensure the administration of the abortion law is consistent throughout NZ and s14(k) to report on the operation of the abortion law.

Court of Appeal- minority judgment of Arnold J reasons (continued)

4. At [168] that s30(5) Parliament struck a balance and the Act is to accommodate a range of views along the spectrum, but that does not mean the ASC has no obligation to turn its mind to views of medical consultants when considering their s30 appointment or re-appointment.
5. At [172] that s30(6), (7) powers to appoint for one year and revoke appointments of certifying consultants. The power to revoke contemplates revocation to ensure achievement of neutrality of the views of doctors.

Court of Appeal- minority judgment of Arnold J reasons (continued)

6. At [178] Parliament has already addressed the privacy issue of women, by providing for reports under s36 on a 'no-names' basis.
7. At [179] the absence of any machinery to deal with disciplinary matters is irrelevant, because the ASC is not concerned with such matters. The ASC does not need to concern itself with whether particular abortions are carried out lawfully, but does have to make appointment and revocation decisions (re doctors and institutions).

And given the s30(5) requirement of neutrality of views by consultants, the ASC is entitled to consider the views of consultants in order to assess whether consultants are approaching their work properly.

Court of Appeal- minority judgment of Arnold J reasons (continued)

8. At [213] the perspective of the ASC is not regarding disciplinary matters, but concerns systemic issues.
9. It is implausible Parliament would have intended to preclude the ASC from keeping under review the way consultants performed their role.
10. Therefore at [187]-[188], [196] *Wall v Livingston* does not limit the role of the ASC and the ASC's view to the contrary was wrong.
11. Therefore at [182] the ASC may conduct an audit (post abortion) to review the decision making of consultants in individual cases.

G. RTL was declined leave by 3JJ of the Supreme Court to appeal re the issue of counselling

Counselling: The Supreme Court at [2011] NZSC 97 affirmed the decision of the Court of Appeal regarding counselling by declining leave to appeal on that issue.

NB: Quite separately there were developments in the UK in August and September 2011 regarding the issue of whether counselling should be independent of the institution providing the abortion service as reported at www.telegraph.co.uk (search “Dorries MP”). This was followed by a formal process of consultation by the UK Government announced in February 2012.

RTL sought leave of the Supreme Court to appeal re the issue of a right to life for the unborn child on the grounds of:

A fundamental right to life based on:

1. Rights which have had systematic legal recognition and protection at common law are also recognised as fundamental common law rights, including a fundamental right to life.
2. At common law protection of the unborn child has existed for many centuries, including by the common law crime of abortion.
3. The absence of any good policy grounds to exclude a category of living humans from such a fundamental right.
4. International instruments and covenants support the existence of a right to life for the unborn child.

Leave application re a fundamental right to life and s8 NZBORA

5. The common law right to life contended for by RTL was not a right of claim asserted or enforced by the unborn child, but is a right protected indirectly by the CSA Act. The born alive rule does not oust that right to life.
6. *No adversarial clash of rights:* There is no adversarial clash of rights between the right to life of the unborn child and the rights of the mother, because Parliament in 1977 in the abortion law has already struck the balance between those rights.
7. *Long title:* Reliance was placed on the Long title of the CSA Act 1977 which had been approved by the whole of the House of Representatives sitting in Committee.
8. *Born alive rule:* That the born alive rule was arbitrary, a rule of mere convenience, outdated in the light of the medical affidavit evidence filed in Court and displaced by the Long title of the CSA Act 1977 which states that the unborn child has rights.
9. *S8 NZBORA:* s8 was too important to society and the legal system to be read down in the context of human rights, based on an artificially constructed legal definition of personhood.

Leave application re a fundamental right to life and s8 NZBORA- opposition by ASC

The ASC argued that:

1. The rights of the unborn child were protected by the mechanism in the CSA Act 1977 and did not affect the interpretation of the Act.
2. The born alive rule was not outflanked by medical advances.
3. The born alive rule was not ousted by the Long Title of the CSA Act 1977, but rather the CSA rested upon the born alive rule.
4. It was mostly unlikely that Parliament would have failed to address the position of the unborn child in s8, if Parliament had intended to extend s8 to the unborn child.

Supreme Court declined leave to appeal regarding the rights of the unborn child, but granted leave regarding the ASC's powers of review

In [2011] NZSC 97 the Supreme Court :

1. Declined leave to appeal regarding the rights of the unborn child on the basis that:

“... the legislation is based on the premise of the born alive rule, in the face of which the proposed arguments are untenable.”
2. Granted leave to appeal regarding the ASC's functions and powers of review of decisions of consultants in individual cases.
3. Granted leave to appeal regarding the High Court's findings re the approval rates for abortions and whether consultants were obeying the law. (This latter ground is not addressed in these slides, but the SC judgments can be read in full at [2012] NZSC 68).

In the Supreme Court, RTL argued in support of Arnold J's dissenting decision in the Court of Appeal:

RTL argued that the ASC's role was indicated by:

1. The s30(5) neutrality balance re certifying consultants in the CSA Act.
2. The s30 power to appoint and revoke appointments of certifying consultants.
3. The s36 power to call for reports from certifying consultants.
4. The s14 power and obligation to keep under review the operation of the abortion law.

All of which pointed towards a s36 role for the ASC to undertake macro level 'after the event' audit of certifying consultants to ensure the preservation of the balance in s30(5) was preserved.

Also referred to in oral argument in the Supreme Court by RTL counsel re the scope of s36, were the reports in February 2012 in the UK newspapers (and video footage on The Telegraph UK website) of UK doctors allegedly certifying illegal sex selection abortions. Debated in oral argument was the hypothetical question of the role of the ASC in New Zealand if that factual scenario was to occur in New Zealand. Refer:

<http://www.courtsofnz.govt.nz/from/transcripts/supreme-court-transcripts-2012> at 32, 82-87

In the Supreme Court, ASC argued in support of the majority decision of Chambers and Stevens JJ in the Court of Appeal:

The ASC argued:

1. That the ASC had no express or implicit statutory power to scrutinise or review the clinical decisions of certifying consultants.
2. The ASC could carry out its statutory functions under ss14 and 36 without reviewing the clinical decisions of certifying consultants.
3. To permit such a review would in effect require a clinical competence review by a non-expert committee, without full access to patient records necessary to carry out the review.
4. Other bodies were charged with the responsibility of ensuring professional competence and protection of rights of patients.

H. The Supreme Court majority judgments (Elias CJ, Blanchard and Tipping JJ) held that *Wall v Livingston* was of general application

The Supreme Court at [2012] NZSC 68 held that *Wall v Livingston* was of general application and:

1. ASC could not, even after the event, 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: para [40]
2. Although the ASC could ask a consultant how he was approaching decision-making in general over the whole of his workload under the Act, it could not question him about how he came to a diagnosis or conclusion in a particular case – even one selected at random and anonymised in the consultant’s response: para [40]
3. The Committee could, for example, ask about the use of particular diagnostic criteria or techniques by a consultant across the run of his or her caseload: para [45]

The (majority) Supreme Court's reasons for these findings included:

Reasons in summary included:

1. Individual decisions are a matter of medical judgment and expertise in the particular case and not to be questioned, whether before or after the decision has been acted on: para [40]
2. It would usually not be possible to reach a properly informed judgment on an individual decision without full access to the medical records: para [40]
3. Section 36 distinguished between the *keeping* of records (ie medical records relating to individual cases) by a consultant and the *submitting* of “reports relating to cases considered by him and the performance of his functions in relation to such cases”: para [41]

The majority of the Supreme Court's held that the obligations of the ASC included :

ASC's obligations included that:

1. The ASC ought to make generalised inquiries from time to time (in fulfilment of its functions of keeping under review the operation of the provisions of the abortion law (under s 14(1)(a)) and of ensuring consistency of the administration of that law throughout New Zealand (under s 14(1)(i)): para [46].
2. If as a result of its inquiries the ASC believed that a consultant held views on abortion, which were incompatible with the tenor of the Act, it could be expected to consider whether to renew his or her appointment and, in an extreme case might exercise its discretion to make an immediate revocation of an existing appointment: para[45].
3. The ASC could also communicate its concerns about whether a consultant may have been authorising abortions inconsistently with the abortion law to the Health and Disability Commissioner and the medical disciplinary authorities: para [45].

The minority of the Supreme Court (McGrath and Young JJ) held re analysis of the text of the CSA Act 1977 :

1. That an analysis of the text of the CSA Act 1977 read in context indicated that:
 - (a) The true scope of the Supervisory Committee's functions and powers is wider than the majority judgment recognised.
 - (b) Wherever it is reasonably necessary for the exercise of its functions, the ASC is empowered to seek information retrospectively from certifying consultants about the diagnoses in individual cases that led to their decisions on authorisation.

The minority of the Supreme Court (McGrath and Young JJ) held (re analysis of the text of the CSA Act 1977) that:

- (c) The functions of the ASC in s 14(1)(a) and (h) require that it keep “under review” (which meant continuing scrutiny):
 - (i) All the provisions of the “abortion law” which is defined as ss 10 to 46 of the CSA Act and ss 182 to 187A of the Crimes Act 1961; the former which deal with authorisation and performance of abortions and the latter of which proscribe the acts terminating pregnancy which are criminal offences. A central provision is s 187A, which states circumstances of exception to such unlawfulness: [62]- refer s 14(1)(a).
 - (ii) The operation and effect of the abortion law provisions “in practice”: [63] - refer s 14(1)(a).
 - (iii) The statutory procedure for determining in each case if an abortion is justified. This is a specific review function within the area already covered by s 14(1)(a). This element of repetition in s14(1)(a) and (h) in the drafting emphasises the importance of the specific function of the Supervisory Committee within the scheme of the Act: [64]

The minority of the Supreme Court (McGrath and Young JJ) held (re analysis of the text of the CSA Act 1977) that: :

(d) The functions of the ASC in s 14(1)(i) are in terms which require positive action as opposed to continuing scrutiny, namely:

(i) The ASC is to take “all reasonable and practicable steps” to ensure that two policy ends are achieved. The first is that the abortion law is administered consistently throughout New Zealand, and the second is that the Act and its procedures operate effectively: para [65].

(ii) The ASC is to take steps “to ensure the effective operation of [the] Act and [its] procedures”. This reference to the Act’s procedures must include those for determining whether performance of an abortion is justified, which are the focus of the previous function (ie as set out in s 14(1)(h)): para [65].

The minority of the Supreme Court (McGrath and Young JJ) held (re analysis of the text of the CSA Act 1977) that: :

- (e) The functions under s 14(1) are supported by the ASC's powers under s 14(2), which are expressed in broad terms namely "all such reasonable powers, rights, and authorities as may be necessary to enable it to carry out its functions", which is to be read with the ASC's specific power to require records be kept and reports made to it by certifying consultants under s 36. [66]
- (f) The ASC under s30 must set up and maintain a list of certifying consultants appointed for twelve month terms, with the power to reappoint and revoke appointments: [67]

The minority of the Supreme Court (McGrath and Young JJ) held (re analysis of the text of the CSA Act 1977) that: :

- (g) A mandatory consideration of the CSA Act is that it is desirable that medical practitioners whose views are incompatible with the tenor of the Act are not to be, or remain, appointed: [68]

- (h) Section 36 enables the ASC to obtain information for the purpose of exercising its functions by requiring that records are kept and reports submitted to it by certifying consultants concerning cases they have considered and functions they have performed under the Act: [69]

The minority of the Supreme Court (McGrath and Young JJ) held re *Wall v Livingston* :

2. The case of *Wall v Livingston*:

- (a) Does not support such a narrow reading of the ASC's functions: para [79].
- (b) Only concerned an attempt to review the lawfulness of an authorisation by consultants prior to the abortion being performed and accordingly did not analyse comprehensively the role of the ASC under the Act: para [79].
- (c) Only required consideration of the ASC's role during the period following an authorisation before the authorised termination took place: para [80].

The minority of the Supreme Court (McGrath and Young JJ) held re scope of s14 powers :

3. The scope of s14 powers of the ASC include:

- (a) S 14(1)(a) requires the ASC to maintain continuing scrutiny of the “abortion law” and how it is applied: para [81].
- (b) S 14(1)(h) requires such scrutiny by the ASC of the s32 and 33 procedures by which decisions are made by the certifying consultants in cases referred to them for determination: para [81].

The minority of the Supreme Court (McGrath and Young JJ) held (re scope of s14 powers of the ASC include (continued):

The scope of s14 powers of the ASC include (continued):

- (c) S 14(1)(i) charges the ASC with taking positive steps to ensure consistent administration of the scheme throughout New Zealand and the effective operation of the Act and *its procedures* (ie including the Act's procedures for determining if abortions are justified- which are the focus of the function in s 14(1)(h)): para [82]

- (d) The S 14(1)(i) “reasonable and practical steps” that may be taken are not spelt out in detail. The ASC is, however, given all reasonable powers necessary to carry out its functions under s 14(2). It is sufficient for present purposes to say that such “steps” and “powers” must include the Supervisory Committee’s duty to set up and maintain the list of the certifying consultants who will operate the procedure for authorisation, and the provision under s 36 for it to require consultants: para [83]

The minority of the Supreme Court (McGrath and Young JJ) held re the scope of s36 powers of the ASC:

4. The scope of s36 powers of the ASC are that:
 - (a) Section 36 complements s 14(2) of the Act, as it enables the ASC to require certifying consultants to keep records and submit reports relating to cases which they have considered “as the Supervisory Committee may require”.
 - (b) Section 36 by providing for the keeping of records and the submission of reports does not signal that the ASC is unable to inquire into diagnoses in particular cases. Rather, the stipulation in s36 that reports not contain the woman’s name and address indicates that Parliament envisaged reports could and would include details of particular cases, whilst still protecting patients’ privacy: para [85] .

The minority of the Supreme Court (McGrath and Young JJ) held the scope of s36 powers of the ASC are that (continued):

- (c) There was no difficulty arising from the fact that an investigation into individual decisions made by consultants under s 36 could give rise to disciplinary issues that are more properly the province of the Health and Disability Commissioner and other authorities better equipped under their legislation to address them; para [87]

- (d) Established principles of statutory interpretation require that where it is reasonably possible to construe two legislative provisions which are arguably inconsistent so as to give effect to both, that should be done in preference to reading down one of them. It is only if one is so inconsistent with, or repugnant to the other, that the two are incapable of standing together, that it is necessary to determine which is to prevail: para [92]

The minority of the Supreme Court (McGrath and Young JJ) held the scope of s36 powers of the ASC are that (continued):

- (e) The potential for overlap with other agencies is not extensive and, in any event, already exists in other contexts with bodies exercising roles in relation to standards of professional conduct on the one hand, and the police in investigating possible breaches of the criminal law on the other. In that context, the overlap in functions has been managed in a way that has allowed each statutory body or office holder to perform its role. There is no reason to believe the position of the ASC will be different: para [93]

- (f) For reasons we can state briefly, we are satisfied that the provisions of the 1977 Act in relation to the Supervisory Committee's powers need not be read down: para [91]

The minority of the Supreme Court (McGrath and Young JJ) held in conclusion

In summary the minority concluded that:

1. Investigation into individual cases is contemplated and permitted under the Act, in addition to generalised inquiries into the operation of the abortion law.
2. Such scrutiny is envisaged by ss 14(1)(h) and (i), 14(2) and 36, and may be required on occasion to ensure that the law is being applied consistently, effectively and in accordance with the policy of the legislation.
3. In this respect, after-the-fact review is in a different category from pre-operation review, examined in *Wall v Livingstone*.
4. The Supervisory Committee is statutorily entrusted with the supervision of the provisions of abortion law, particularly decision-making under ss 32 and 33, and its role in this respect should not be read down: para [97].

Addendum

“Abortion law” defined

The “abortion law” is defined by the CSA Act 1977 as comprising of ss182- 187A of the Crimes Act 1961 and ss 10-46 of the CSA Act 1977.

Refer key provisions (set out in full at the end of the power point)

Ss 159, 182- 187A of the Crimes Act 1961 re lawfulness

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s21 granting of licences

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s24 renewal of licences of institutions

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s30(5) balance of views

s 32 and 33 certification process (re s32(3) and s33(5A) re s187A grounds)

s 36 reports by consultants to the ASC

Long Title to the CSA Act 1977

Crimes Act 1961

159 Killing of a child

- (1) A child becomes a human being within the meaning of this Act when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, whether it has an independent circulation or not, and whether the navel string is severed or not.
- (2) The killing of such child is homicide if it dies in consequence of injuries received before, during, or after birth.

182 Killing unborn child

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

Crimes Act 1961

182A Miscarriage defined

For the purposes of [sections 183 to 187](#) the term *miscarriage* means—

- (a) the destruction or death of an embryo or fetus after implantation; or
- (b) the premature expulsion or removal of an embryo or fetus after implantation, otherwise than for the purpose of inducing the birth of a fetus believed to be viable or removing a fetus that has died

183 Procuring abortion by any means

- (1) Every one is liable to imprisonment for a term not exceeding 14 years who, with intent to procure the miscarriage of any woman or girl, whether she is pregnant or not,—
 - (a) unlawfully administers to or causes to be taken by her any poison or any drug or any noxious thing; or
 - (b) unlawfully uses on her any instrument; or
 - (c) unlawfully uses on her any means other than any means referred to in paragraph (a) or paragraph (b).
- (2) The woman or girl shall not be charged as a party to an offence against this section.

Crimes Act 1961

187A Meaning of unlawfully

- (1) For the purposes of [sections 183](#) and [186](#), any act specified in either of those sections is done unlawfully unless, in the case of a pregnancy of not more than 20 weeks' gestation, the person doing the act believes—
- (a) that the continuance of the pregnancy would result in serious danger (not being danger normally attendant upon childbirth) to the life, or to the physical or mental health, of the woman or girl; or
 - (aa) that there is a substantial risk that the child, if born, would be so physically or mentally abnormal as to be seriously handicapped; or
 - (b) that the pregnancy is the result of sexual intercourse between—
 - (i) a parent and child; or
 - (ii) a brother and sister, whether of the whole blood or of the half blood; or
 - (iii) a grandparent and grandchild; or
 - (c) that the pregnancy is the result of sexual intercourse that constitutes an offence against [section 131\(1\)](#); or
 - (d) that the woman or girl is severely subnormal within the meaning of [section 138\(2\)](#).
- (2) The following matters, while not in themselves grounds for any act specified in [section 183](#) or [section 186](#), may be taken into account in determining for the purposes of subsection (1)(a), whether the continuance of the pregnancy would result in serious danger to her life or to her physical or mental health:
- (a) the age of the woman or girl concerned is near the beginning or the end of the usual child-bearing years:
 - (b) the fact (where such is the case) that there are reasonable grounds for believing that the pregnancy is the result of sexual violation.

(emphasis added)

(continued PTO)

Crimes Act 1961

187A Meaning of unlawfully (continued)

- (3) For the purposes of [sections 183](#) and [186](#), any act specified in either of those sections is done unlawfully unless, in the case of a pregnancy of more than 20 weeks' gestation, the person doing the act believes that the miscarriage is necessary to save the life of the woman or girl or to prevent serious permanent injury to her physical or mental health.
- (4) Where a medical practitioner, in pursuance of a certificate issued by 2 certifying consultants under [section 33](#) of the Contraception, Sterilisation, and Abortion Act 1977, does any act specified in [section 183](#) or [section 186](#) of this Act, the doing of that act shall not be unlawful for the purposes of the section applicable unless it is proved that, at the time when he did that act, he did not believe it to be lawful in terms of subsection (1) or subsection (3), as the case may require.

[emphasis added]

Contraception Sterilisation and Abortion Act 1977 ("CSA Act 1977")

Long Title of the CSA Act 1977:

An Act to specify the circumstances in which contraceptives and information relating to contraception may be supplied and given to young persons, to define the circumstances under which sterilisations may be undertaken, and to provide for the circumstances and procedures under which abortions may be authorised after having full regard to the rights of the unborn child

CSA Act 1977

14 Functions and powers of Supervisory Committee

(1) The Supervisory Committee shall have the following functions:

- (a) to keep under review all the provisions of the abortion law, and the operation and effect of those provisions in practice:
- (b) to receive, consider, grant, and refuse applications for licences or for the renewal of licences under this Act, and to revoke any such licence:
- (c) to prescribe standards in respect of facilities to be provided in licensed institutions for the performance of abortions:
- (d) to take all reasonable and practicable steps to ensure—
 - (i) that licensed institutions maintain adequate facilities for the performance of abortions; and
 - (ii) that all staff employed in licensed institutions in connection with the performance of abortions are competent:
- (e) to take all reasonable and practicable steps to ensure that sufficient and adequate facilities are available throughout New Zealand for counselling women who may seek advice in relation to abortion:
- (f) to recommend maximum fees that may be charged by any person in respect of the performance of an abortion in any licensed institution or class of licensed institutions, and maximum fees that may be charged by any licensed institution or class of licensed institutions for the performance of any services or the provision of any facilities in relation to any abortion:
- (g) to obtain, monitor, analyse, collate, and disseminate information relating to the performance of abortions in New Zealand:
- (h) to keep under review the procedure, prescribed by [sections 32](#) and [33](#), whereby it is to be determined in any case whether the performance of an abortion would be justified:
- (i) to take all reasonable and practicable steps to ensure that the administration of the abortion law is consistent throughout New Zealand, and to ensure the effective operation of this Act and the procedures thereunder:
- (j) from time to time to report to and advise the Minister of Health and any district health board established by or under the [New Zealand Public Health and Disability Act 2000](#) on the establishment of clinics and centres, and the provision of related facilities and services, in respect of contraception and sterilisation:
- (k) to report annually to Parliament on the operation of the abortion law.

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

CSA Act 1977

21 Grant of licences

- (1) On receiving an application for a full licence in respect of any institution, the Supervisory Committee shall grant such a licence in respect of that institution only if it is satisfied—
- (a) that there are, in the institution, adequate facilities for the accommodation of patients for 1 or more nights; and
 - (b) that there are, in the institution, adequate surgical and other facilities, and adequate and competent staff, for the safe performance of abortions; and
 - (c) that there are, in the institution, adequate accommodation, surgical and other facilities, and competent staff to provide treatment and care of patients suffering complications arising while they are awaiting, undergoing, or recuperating from an abortion; and
 - (d) that the person who will be the holder of the licence if the application is granted is a fit and proper person to hold such a licence; and
 - (e) that adequate counselling services are available to women considering having an abortion in the institution, and are offered to such women whether or not they ultimately have an abortion.

.....

[emphasis added]

CSA Act 1977

24 Renewal of licences

- (1) Every holder of a licence may from time to time apply to the Supervisory Committee for the renewal of the licence for a further period of 1 year.
- (2) Every such application shall be made not earlier than 3 months and not later than 1 month before the date of expiry of the licence, and shall be accompanied by the prescribed fee.
- (3) On receiving an application for the renewal of a licence, the Supervisory Committee shall grant the application unless it is satisfied—
 - (a) that the institution no longer complies with the requirements of subsection (1) or (as the case may require) subsection (2) of [section 21](#); and
 - (b) that the holder of the licence has not, during the currency of the licence, taken all reasonable and practicable steps to ensure that the provisions of the abortion law were complied with in the institution.
- (4) Subject to the provisions of [sections 26](#) and [27](#), the decision of the Supervisory Committee in respect of every application for the renewal of a licence shall be final.
- (5) Where the Supervisory Committee refuses to grant an application for the renewal of a licence, it shall notify the applicant of its decision, and shall, if requested to do so by the applicant, give to the applicant a written statement of its reasons for refusing to renew the licence.
- (6) Where an application for the renewal of a licence is made in accordance with subsection (2) but is not determined before the date on which the licence is due to expire, the licence shall continue in force until the application is determined.

[emphasis added]

CSA Act 1977

25 Cancellation of licences

- (1) In any case where the Supervisory Committee believes, in respect of any licensed institution,—
 - (a) that it no longer meets the requirements of subsection (1) or (as the case may require) subsection (2) of [section 21](#); or
 - (b) that the holder of the licence has failed to take all reasonable and practicable steps to ensure that the provisions of the abortion law were complied with in the institution,—
it may, by notice in writing addressed to the holder, call upon him to show cause why the licence should not be cancelled.
- (2) If, after considering any representations made to it and evidence put before it by the holder of the licence, and all such other matters as it considers relevant, the Supervisory Committee is satisfied of either of the matters specified in subsection (1), it may cancel the licence.
- (3) Where the Supervisory Committee cancels any licence, it shall notify the holder accordingly, and shall, if requested to do so by the holder, give to the holder a written statement of its reasons for cancelling the licence.

[emphasis added]

CSA Act 1977

30 Supervisory Committee to set up and maintain list of certifying consultants

- (1) The Supervisory Committee shall set up and maintain a list of medical practitioners (in this Act termed certifying consultants) who may be called upon to consider cases referred to them by any medical practitioner and determine, in accordance with [section 33](#), whether to authorise an abortion.
- (2) Before drawing up the list, the Supervisory Committee shall determine the minimum number of certifying consultants required to ensure, so far as possible, that every woman seeking an abortion has her case considered expeditiously, and shall make that number of appointments in accordance with this section. Thereafter, the Committee shall keep that number under review, and shall from time to time make such further appointments, or revoke such number of appointments, as it considers necessary to meet any change in the circumstances.
- (3) Having determined the number of appointments to be made, the Supervisory Committee shall consult with the New Zealand Medical Association
- (4) In making appointments to the list, the Supervisory Committee shall ensure that the following requirements are met:
 - (a) at least one-half of the total number of appointees shall be practising obstetricians or gynaecologists.....
 - (b) there shall be a sufficient number of appointees practising in each area of New Zealand to ensure.....
- (5) In addition, in making such appointments, the Supervisory Committee shall have regard to the desirability of appointing medical practitioners whose assessment of cases coming before them will not be coloured by views in relation to abortion generally that are incompatible with the tenor of this Act. Without otherwise limiting the discretion of the Supervisory Committee in this regard, the following views shall be considered incompatible in that sense for the purposes of this subsection:
 - (a) that an abortion should not be performed in any circumstances:
 - (b) that the question of whether an abortion should or should not be performed in any case is entirely a matter for the woman and a doctor to decide.
- (6) Every appointment to the list of certifying consultants shall be for a term of 1 year, but the Supervisory Committee may reappoint any practitioner on the expiry of his term.
- (7) The Supervisory Committee may at any time, at its discretion, revoke the appointment of any certifying consultant.

[emphasis added]

CSA Act 1977

32 Procedure where woman seeks abortion

- (1) Every medical practitioner (in this section referred to as the woman's own doctor) who is consulted by or in respect of a female who wishes to have an abortion shall, if requested to do so by or on behalf of that female, arrange for the case to be considered and dealt with in accordance with the succeeding provisions of this section and of [section 33](#).
- (2) If, after considering the case, the woman's own doctor considers that it may be one to which any of paragraphs (a) to (d) of subsection (1), or (as the case may require) subsection (3), of [section 187A](#) of the Crimes Act 1961 applies, he shall comply with whichever of the following provisions is applicable, namely:
 - (a) where he does not propose to perform the abortion himself, he shall refer the case to another medical practitioner (in this section referred to as the operating surgeon) who may be willing to perform an abortion (in the event of it being authorised in accordance with this Act); or
 - (b) where he proposes to perform the abortion himself (in the event of it being authorised in accordance with this Act), he shall—
 - (i) if he is himself a certifying consultant, refer the case to one other certifying consultant (who shall be a practising obstetrician or gynaecologist if the woman's own doctor is not) with a request that he, together with the woman's own doctor, determine, in accordance with [section 33](#), whether or not to authorise the performance of an abortion; or
 - (ii) if he is not himself a certifying consultant, refer the case to 2 certifying consultants (of whom at least 1 shall be a practising obstetrician or gynaecologist) with a request that they determine, in accordance with [section 33](#), whether or not to authorise the performance of an abortion.
- (3) Where an operating surgeon to whom a case is referred under subsection (2)(a) is satisfied, [after considering the case, that it is one to which any of paragraphs \(a\) to \(d\) of subsection \(1\), or \(as the case may require\) subsection \(3\), of \[section 187A\]\(#\) of the Crimes Act 1961 applies, he shall, if he is willing to perform the abortion, either—](#)
 - (a) if he is himself a certifying consultant, refer the case to 1 other certifying consultant (who shall be a practising obstetrician or gynaecologist if the operating surgeon is not, and who shall not be the woman's own doctor) with a request that he, together with the operating surgeon, determine, in accordance with [section 33](#), whether or not to authorise an abortion; or
 - (b) if he is not himself a certifying consultant, refer the case to 2 certifying consultants (of whom at least 1 shall be a practising obstetrician or gynaecologist, and of whom 1 may be the woman's own doctor) with a request that they determine, in accordance with [section 33](#), whether or not to authorise the performance of an abortion.
- (4)(5)(6)(7)(8) [emphasis added]

CSA Act 1977

33 Determination of case

- (1) If, after considering the case, the certifying consultants are of the opinion that the case is one to which any of paragraphs (a) to (d) of subsection (1), or (as the case may require) subsection (3), of [section 187A](#) of the Crimes Act 1961 applies, they shall forthwith issue in accordance with subsection (5) of this section, a certificate in the prescribed form authorising the performance of an abortion.
- (2) If the certifying consultants are of the contrary opinion, they shall refuse to authorise the performance of an abortion.
- (3) If one of the certifying consultants is of the opinion that the case is one to which any of the said provisions applies and the other consultant is of the contrary opinion, they shall refer the case to another medical practitioner for his opinion, being a medical practitioner who is on the list of certifying consultants maintained under [section 30\(1\)](#).
- (4) If that other medical practitioner is of the opinion that the case is one to which any of the said provisions applies, the certifying consultant who is of the same opinion shall issue, in accordance with subsection (5), a certificate in the prescribed form authorising the performance of an abortion.
- (5) Where 2 certifying consultants determine that they should authorise an abortion, they shall forward the said certificate to the holder of the licence in respect of the licensed institution in which the abortion is to be performed.
- (5A) Where the operating surgeon is not one of the certifying consultants issuing the certificate, he shall endorse on the certificate a statement that he is willing to perform an abortion on the patient to whom the certificate relates, but a failure to comply with this requirement shall not invalidate the certificate for the purposes of [section 37\(1\)\(b\)](#) of this Act or [section 187A\(4\)](#) of the Crimes Act 1961.
- (6) If, in respect of any case, any certifying consultant has not reached a decision within 14 days after it was referred to him, he shall advise the Supervisory Committee in writing of the matter, and of the reasons for the delay.

[emphasis added]

CSA Act 1977

36 Certifying consultants to keep records and submit reports

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