

## **‘There is a Row about Foetal Abnormality Underway’: THE DEBATE ABOUT INCLUSION OF A EUGENICS CLAUSE IN THE CONTRACEPTION, STERILISATION, AND ABORTION ACT, 1977–1978**

On 15 December 1977 the New Zealand Parliament passed the highly restrictive Contraception, Sterilisation and Abortion Act that determined the grounds on which a woman could legally procure an abortion. The passage of the law was the culmination of passionate debate between Members of Parliament (MPs). Indeed, a member of the ruling National Party’s Cabinet in the 1970s recalls that the abortion question caused ‘the bitterest parliamentary debates of the decade’.<sup>1</sup> Occurring during a period of great social change in New Zealand, the abortion debate had raged across the country since the late 1960s and the governing National Party hoped the law would finally bring matters to an end. But its passage was also extremely controversial outside of Parliament, provoking strong criticism from the public regarding the contents of the law as well as the process the government had employed to pass it.<sup>2</sup>

Researchers have examined numerous dimensions of the history of abortion in New Zealand, including clandestine abortion in the nineteenth century; male involvement in the procurement of abortion during the interwar period; the emergence of abortion as a major public issue starting in the late 1960s; the devastating impact of the law’s passage on the vibrant feminist movement; and the formation of SOS (Sisters Overseas Service) to help women fly to Australia to obtain safe abortions.<sup>3</sup> This essay focuses on an entirely different dimension, namely the highly contentious claim that foetal abnormality should be a ground for legal abortion. The original Contraception, Sterilisation and Abortion Bill tabled in Parliament in August 1977 included foetal abnormality as an indication for abortion. However, reference to it was deleted in the final hours leading up to the parliamentary vote on 15 December. Yet, just six months later, Parliament amended the new abortion legislation, reinstating foetal abnormality as a ground for abortion. Specifically, the Crimes Amendment Act (Act No. 6 of 1978), which specifies ‘all offences for which the offender may be proceeded against and tried in New Zealand’, passed in May 1978, states that an abortion is lawful when doctors determine ‘that there is a substantial risk that the child, if born, would be so physically or mentally abnormal as to be seriously handicapped’, and the clause remains in the Crimes Act, unchanged, today.<sup>4</sup>

Allowing abortion to prevent the birth of ‘seriously handicapped’ children is eugenic abortion. While the historiography demonstrates that there were publicly aired eugenic attitudes in New Zealand in the early twentieth century, we are far less familiar with eugenic arguments put forward in public debates that took place in the 1970s. This essay elucidates the three stages of the debate over the issue that took place in Parliament in 1977 and 1978. Examining the battle over acceptance of abortion in cases of foetal abnormality sheds new light on a significant, yet rarely discussed, dimension of public opinion about reproductive control in New Zealand’s recent history.

### *Part 1: The Endorsement of Eugenic Abortion by the Royal Commission of Inquiry*

The Crimes Act of 1961 stated it was ‘unlawful’ to procure, or supply the means of procuring, an abortion, but by the early 1970s court rulings had found the meaning of the term ‘unlawful’ vague and unsatisfactory.<sup>5</sup> In response to such rulings, and the growing public demand for abortion law reform (shown below), the Labour government in June 1975 appointed the Royal Commission of Inquiry into Contraception, Sterilisation and Abortion to investigate the legal, social and moral issues raised by existing law and practice relating to the three forms of fertility control. It was also charged with recommending changes to the law.<sup>6</sup>

Dozens of groups and individuals contributed opinions to the royal commission; 10,513 pages were collected in the form of submissions and notes of evidence. Given the public's evident desire to participate in proceedings, the six commissioners — three women and three men, all Pākehā — twice requested additional time to complete their task, and ultimately it took 21 months to do so. The royal commission submitted its report in March 1977, and it agreed with the courts that the existing law on abortion was 'undefined and lacking in certainty'.<sup>7</sup> The report's findings were unanimous and set the terms for subsequent debate. The conservative National government, by then in power, closely followed the report's recommendations when drafting the Contraception, Sterilisation and Abortion Bill tabled a few months later.<sup>8</sup>

When recommending a remedy to the unsatisfactory legal situation, the report was contradictory. It declared that 'the foetus has a status from implantation which entitled it to preservation and protection', yet it allowed for abortion on a number of grounds, one of which is the focus of this essay: when there was 'a substantial risk that if the pregnancy were not terminated and the child were to be born, it would have or suffer from such physical or mental abnormality as to be seriously handicapped'.<sup>9</sup> Recognizing that this recommendation required explanation, the report stated, 'It is not immoral to terminate a pregnancy where the foetus is likely to be born with a severe physical or mental handicap, because the burden of the handicapped person to himself and to his parents may be greater than the sum total of their happiness.'<sup>10</sup>

The commissioners acknowledged that some New Zealanders found this recommendation problematic because to them it appeared to be bordering on euthanasia; such critics perceived 'no logical difference between permitting abortion for a foetal defect and terminating the life of a born child, young or old, whose physical and mental capacities are seriously impaired'.<sup>11</sup> The commissioners were persuaded by witnesses, however, who gave 'distressing but clear evidence that there are many mothers who are neither physically, mentally or emotionally equipped to rear an intellectually handicapped child and who would be entirely willing to consent to an abortion where ante-natal tests reveal a strong probability that the child will be born with a substantial degree of physical or mental impairment'.<sup>12</sup> Elsewhere the report stated, 'A number of parents of handicapped children spoke to us and told us of their experiences in rearing those children. Some had found it to have been rewarding in that it had helped them in their marriage and had resulted in closer family ties. To others the experience was the reverse. They had found the bringing up of a handicapped child to be quite beyond their resources.'<sup>13</sup> Ultimately, the commissioners decided, 'We are of the view that mothers in this situation should be given this choice.'<sup>14</sup> Clearly the commissioners' recommendation reflected deep sympathy for women and parents, not intolerance or hatred of 'handicapped' persons.

The report, in effect, favoured eugenic abortion. In what follows, 'eugenic abortion' is defined narrowly as the termination of a foetus known or feared to be physically or mentally damaged or defective, or deemed somehow seriously 'abnormal'. The term was commonly used by English-speaking advocates of abortion law reform in the mid-twentieth century. For example, the British feminist group Abortion Law Reform Association (ALRA) lobbied for, and succeeded in having, what they called a 'eugenic clause' included in the 1967 Abortion Act — the clause that New Zealand's Parliament adopted verbatim ten years later (see below).<sup>15</sup> As another example, in 1977 researchers Rebecca J. Cook and Bernard M. Dickens, both long-standing and highly respected scholars and advocates of accessible safe abortion for the sake of women's health and welfare, analysed abortion laws that existed in Commonwealth countries. Among the legal categories for abortion that they developed in their analysis was 'Eugenic (Fetal Impediment)', and their survey was published by the Commonwealth Secretariat in 1977, the same year that New Zealand passed

the Contraception, Sterilisation and Abortion Act.<sup>16</sup> Indeed, the term 'eugenic abortion' was deployed by some New Zealanders during the public debate leading up to its passage, as shown below.

Very importantly, the desire to terminate a foetus<sup>17</sup> rather than give birth to a disabled child, often termed eugenic abortion at the time, should not be conflated in simplistic, anachronistic fashion with the virulent form of eugenics that existed in Nazi Germany, where the murder of disabled Germans was state policy in the 1930s. The assumption that eugenics can automatically be equated with Nazism is incorrect; eugenics has a far more complex history, as historians have amply demonstrated in recent decades.<sup>18</sup> Although it always had an 'evaluative logic at its core' that judged some people to be of more value than others, past eugenics movements have reflected a wide range of ideologies and social goals depending on where and when they took root, ranging from a wish to prevent the birth of 'undesirable' members of society (negative eugenics) to a desire to improve a population's health through public health initiatives for the poor (positive eugenics).<sup>19</sup> The desire to abort a foetus known or feared to be somehow impaired can in fact include multiple motives. In the debate about the morality of eugenic abortion that took place in New Zealand, reasons for wanting it made legally available included, for example, the morally abhorrent wish to avoid the high cost to the public purse of institutionalizing disabled people in state facilities. But far more frequently parents and organizations spoke about the severe financial hardship of caring for a seriously disabled child and the conviction that parents would be unable to provide proper care. Such statements echo the findings of Barbara Brookes, whose study of the impact of disability at birth from the 1940s to the 1970s discusses how the birth of a mentally impaired child had gendered repercussions, with mothers assumed to have 'special responsibility' for the child's welfare and fathers expected to play the role of breadwinner, and how this frequently put 'the marital relationship under great strain'.<sup>20</sup> Who has the right to judge a woman for choosing abortion when she lived in a society that viewed caring for a disabled child as mainly a mother's responsibility, and often failed to offer genuine, generous support to parents facing the prospect of raising a child born with severe disabilities? The position taken by some advocates of the rights of disabled people that the ubiquity of pre-natal testing is itself a 'backdoor to eugenics' is extremely important and needs to be taken seriously, but discussion of that assertion is beyond the scope of this essay.<sup>21</sup>

One reason for the royal commission's decision to recommend allowing abortion in cases of foetal abnormality was knowledge that it had been included in British legislation ten years previously. Britain reformed its abortion law in 1967 'amidst an international storm of controversy', and passage of the new law had a profound impact on the abortion debate in New Zealand, as it did elsewhere.<sup>22</sup> Aware that no perfect process existed for identifying cases of foetal impairment, the report stated, 'We can find no better formula than that which was adopted in the British Abortion Act 1967, which permits abortion if there is a substantial risk that if a child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.'<sup>23</sup> Significantly, Commissioner Dorothy Winstone prepared a document for the commission titled 'Fetal Defects – Is There a Special Case?', in which she drew upon the findings of the Lane Committee Report on the working of the 1967 British abortion law, published in 1974. Winstone wrote, 'Because my understanding of the intricate nature of fetal defects is limited, I suggest that the section of the Lane Report [on ante-natal diagnosis of fetal abnormality] ... could be helpful' and included it in her document.<sup>24</sup> In her summary of the state of research into pre-natal diagnosis, she noted that 'Almost 2,000 genetic defects have been catalogued', a comment that made its way into the royal commission's report.<sup>25</sup> She also quoted the British doctor John Lorber, associate professor of child health at Sheffield University, who told the New Zealand Herald he was surprised that in New Zealand abortion for foetal abnormality was not legally allowed, implying the country was behind

the times: 'It is astonishing that such a situation should exist in an advanced country .... To bring into the world somebody whom you know will be badly handicapped is totally unreasonable. In Britain the aborting of babies known to be affected by spina bifida and mongolism is now regarded as entirely normal.'<sup>26</sup>

The decision to look to Britain's 1967 abortion legislation for guidance is unsurprising, given the close cultural ties shared by the two countries. Yet the royal commission was highly selective when choosing what aspects of the relatively liberal British law to include in its recommendations. By deciding to include the eugenics clause, commissioners knew they were reflecting widespread public support for inclusion of foetal defect as a legal indication for abortion. And, as the subsequent parliamentary debates would demonstrate, support (as well as opposition) was also found across party lines.

The medical profession, for example, was broadly supportive. A survey sent to all 3400 resident registered medical practitioners in 1969, of which 50.7% were completed and returned, found that 59.7% of respondents answered 'yes' and a further 17.9% answered a 'qualified yes' when asked if 'significant risk that the child would be born mentally or physically defective' should be a ground for obtaining a legal abortion.<sup>27</sup> In 1971, a questionnaire was distributed to 93 fellows and members of the Royal College of Obstetricians and Gynaecologists, to which 87 responded by saying if the law was extended, 'an amendment to specifically include termination of pregnancy because of possible fetal abnormalities should be supported'.<sup>28</sup> Individual doctors and other medical groups also expressed support for eugenic abortion, some urging the royal commission to adopt the British eugenics clause; one who did so said, 'It is inhumane and socially undesirable to compel a woman to complete a pregnancy when a foetus is seriously damaged or likely to be so.'<sup>29</sup> The General Practitioner's Society said 'termination should be allowed' when detection of foetal abnormality is certain,<sup>30</sup> and in their submission to the royal commission, the New Zealand Medical Students Association (NZMSA) stated that if a new law on abortion was to be deemed necessary, it should include a 'eugenic clause', such as the one included in Britain.<sup>31</sup>

Significantly, the report also stated that while the New Zealand Crimes Act of 1961 did not allow for abortion because of foetal defects, 'abortions on those grounds have in fact been carried out in both public and private hospitals'.<sup>32</sup> (This had also been the case in Britain and elsewhere.<sup>33</sup>) While it offered no substantiating evidence, the claim has been subsequently confirmed, albeit anecdotally. For example, a nurse who was sent to jail in 1971 for procuring illegal abortions said that in the 1960s she 'had seen abortions being carried out, including some for reasons of fetal abnormality or intellectual impairment, these done at the wish of the parents. I had seen badly deformed children being born and not resuscitated for humane reasons. Let's be honest about that too. I had been brought up on a farm and seen calves ripped from their mother's womb.' And Dr. John Ainsworth, who was the registrar at National Women's Hospital from 1970 to mid-1972, recalled, 'There was never any difficulty at National Women's [performing abortions in] cases of fetal abnormality. Some serious conditions could be diagnosed by x-ray, and these pregnancies were most often terminated.'<sup>34</sup>

Unsurprisingly, those at the frontline of care, women's organizations, supported eugenic abortion. A 1972 study conducted in Dunedin reported that 76.8% of 151 women randomly surveyed thought abortion should be legally allowed if 'There would be a risk of a child being born deformed.'<sup>35</sup> The New Zealand Federation of University Women surveyed members in 1974, and of the 568 who responded, 89.4% endorsed abortion when there was 'a serious threat to the health of the foetus'. And in their submission to the royal commission, the National Council of Women reported the results of a 1975 survey of their members, to which 666 women responded: 74.9% said foetal

abnormality should be included as a legal indication for abortion.<sup>36</sup> Specifically, a ground on which abortion should be legally permitted was 'If there is a serious threat to the health of the foetus (e.g., Down's Syndrome, German Measles, use of drugs).'<sup>37</sup> Even a 'few' members of the conservative group Feminists for Life 'might support fetal abnormality as a reason'.<sup>38</sup>

Regarding religious opinion, two of the three main Protestant churches, Baptists and Presbyterians, concurred. In 1970, the Baptist Church of New Zealand passed a resolution calling for access to abortion on a number of grounds, including 'When continuation of the pregnancy is likely to result in the birth of a child with grave physical or mental deformities', and at its assembly the following year, the Presbyterian Church recommended that abortion be lawful when 'there is a serious risk of abnormality to the unborn infant', which became the church's official position.<sup>39</sup> (The Methodist Church also adopted policies in favour of abortion law reform.<sup>40</sup>)

The public, too, generally supported eugenic abortion. The New Zealand Abortion Law Reform Association commissioned the National Research Bureau to conduct a number of surveys of public opinion in the first half of the 1970s, and each showed a strong majority of respondents was in favour of abortion when 'Birth would probably result in a seriously deformed child': 70.8% in 1972, 69.4% in 1974 and 72% in 1976.<sup>41</sup> And a survey conducted randomly of 578 women aged 16 to 55 years in greater Auckland between November 1972 and February 1973 showed that 75.8% of interviewees supported legalizing abortion when 'Birth would probably result in a seriously deformed child'; the only two grounds that received greater support were when 'The life of the mother is endangered by the pregnancy' and 'Pregnancy is a result of rape'. While the vast majority of European women supported eugenic abortion (79.8%), half of Māori women surveyed did so too (51.1%).<sup>42</sup>

Some groups representing the interests of disabled people, such as the Muscular Dystrophy Association, agreed the option to abort a foetus because of abnormalities should be available.<sup>43</sup> In a thoughtful submission, the New Zealand Society for the Intellectually Handicapped (NZSIH) said 'abortion for eugenic reasons was unacceptable', but added 'The attitudes of the parents and families of handicapped people are relevant', and although 'No parent should feel compelled to accept abortion because of the possibility of the birth of a handicapped child', there were some members who feel 'that for certain more severe degrees of abnormality parents should have the right to choose termination of pregnancy'.<sup>44</sup> Indeed, who would know better the implications and challenges of raising disabled children than parents already doing so.

Of course, a number of individuals and groups making submissions to the royal commission vehemently opposed abortion on grounds of foetal abnormality, as one would expect given the ugly history of treatment of disabled people in the name of eugenics in many countries earlier in the twentieth century. The group Catholic Women, for example, was adamantly opposed.<sup>45</sup> The Committee for Life for the Handicapped also objected passionately and in principled terms to the assumptions that 'The handicapped person is an unjustifiable burden on society', 'that the right to life is conditional upon absolute self sufficiency', and that 'physical or mental normality is a condition of the right to live'.<sup>46</sup> It went on to state that 'to seek and destroy pre-natally the handicapped or possibly handicapped children' was 'a despicable vendetta against the less fortunate' and a 'blatant ... form of social discrimination'.<sup>47</sup> Some doctors concurred and were extremely critical of eugenic abortion. As one asked rhetorically in a letter to the New Zealand Medical Journal in 1973, 'Is it within our rights to despatch fellow human beings while small because they are defective?'<sup>48</sup> Opponents, however, appear to have been a vocal minority.

Aside from threats to a woman's life or her physical or mental health, the only indications for abortion deemed acceptable by the royal commission had eugenic implications. The commission allowed for abortion to prevent mental or physical defects; in addition to foetal abnormality, the other two indications were incest and when the pregnant woman is 'severely mentally subnormal'.<sup>49</sup> When discussing 'severely intellectually handicapped women' in her report for the royal commission, Winstone cited concerns about both foetal abnormality and the women's welfare. Regarding the former she wrote, 'In the majority of such cases women are likely to give rise to normal children although the risk of an abnormal child being born is very much higher than for pregnancies occurring in women of normal intelligence.' Regarding the latter: 'The procedure of abortion without the understanding of the woman concerned is less disturbing to her than allowing the pregnancy to proceed and the woman to go on to childbirth without understanding.'<sup>50</sup> There was apparently no opposition to the additional two indications.

The general, though by no means total, acceptance of abortion in cases of foetal abnormality was not the first time eugenic policies found significant public support in New Zealand.<sup>51</sup> Indeed, it indicates continuity with the past and the resilience of eugenic ideas. As historians have shown, hereditarian thinking emerged in the late nineteenth century when desire to decrease the presence of the 'unfit' led, for example, to the passage of legislation aimed at discouraging disabled people from settling in the colony: the Imbecile Passengers' Act passed in 1882 required 'a bond from the person responsible for a ship that discharged any person "lunatic, idiotic, deaf, dumb, blind or infirm" who might become a charge on public or charitable institutions'.<sup>52</sup>

Eugenics was at its height in the 1920s, spurred by the decreasing size of the Pākehā family and the failure of 57% of conscripted men to meet the minimum health standard for joining the armed forces in World War I.<sup>53</sup> These phenomena fed the belief that the colony's pioneering spirit had declined in large part because of bad heredity and 'low morality'. The Committee of Inquiry into Mental Defectives and Sexual Offenders of 1924–1925 stated action was needed to stop the 'unchecked multiplication of the feebleminded' that was 'leading to ... the serious deterioration of the race' and recommended forming a Eugenic Board.<sup>54</sup> In 1928, the government passed the Mental Defectives Bill that established separate hospitals for the 'feebleminded', a form of segregation. After World War II, the primary preoccupation of Pākehā New Zealanders was their population size: in 1945 the government appointed the Select Committee on Dominion Population 'to consider ways and means of increasing the population in the Dominion'; anxiety about the low white birth rate outweighed fears about the production of the 'unfit'.<sup>55</sup>

Public concern about the physical 'quality' of foetuses seems to have returned in the 1960s. This was probably because of new medical knowledge about both the causes of foetal abnormality and ways to diagnose it. Rubella provides an example of the former. Outbreaks of rubella in the 1950s and subsequent widespread reportage of its harmful effects in utero heightened many New Zealanders' awareness of the possibility of damaging foetuses through contracting disease.<sup>56</sup> (A 1972 advertisement for vaccination against rubella had the headline 'Rubella: A Menace to the Unborn'.<sup>57</sup>) A 1968 study of abortions performed in the National Women's Hospital in Auckland reported rubella to be the second most common indication for the procedure: out of a total of 58 abortions, 11 were because of the viral infection (25 were for 'psychiatric disease', the number one indication). Already by then, according to the study's author, 'abortion for suspected foetal abnormality ... is commonly accepted in society.'<sup>58</sup>

The thalidomide catastrophe of the early 1960s increased New Zealanders' knowledge of the possibility of causing severe birth defects in utero by ingesting teratogenic medication. The damaging effects of what was called the 'disaster drug' in New Zealand,<sup>59</sup> as well as in at least

Australia, Belgium, Britain, Canada and Germany,<sup>60</sup> were reported in regional and national newspapers, with some articles including photographs of deformed babies.<sup>61</sup> The reportage includes references to women in New Zealand who had ingested thalidomide considering procuring abortions, as well as coverage of the desperate attempt of American actress Sherri Finkbine to terminate her pregnancy after learning she had taken the drug.<sup>62</sup> As one woman said in a letter to a newspaper, 'What is the use of everyone being asked to destroy any medicine containing thalidomide that had been prescribed for them? ... In fact not only has this request come so late, it's downright useless.'<sup>63</sup>

Studies undertaken by post-graduate students studying medicine at the University of Otago suggest that thalidomide had a significant impact on women's awareness of the possible harmful effects of medication and that there was a rapidly growing feeling that they should have the right to choose to abort a damaged foetus. In 1962 a student interviewed ten women pregnant 'at the time of the most intensive publicity [about thalidomide] and who therefore might be considered sensitive to the implications of the problem'.<sup>64</sup> Nine of the women were aware of thalidomide and its damaging impact on foetuses; one also knew about Finkbine's efforts to procure an abortion. The following year, a study produced 'in view of the recent thalidomide incident' reported that 'Recent publicity given to thalidomide has made the expectant mother more wary' of taking drugs while pregnant.<sup>65</sup>

In the 1962 study, no woman reported she would have an abortion because of foetal abnormality; as one said, she would 'wait, worry and see'. (Notably, one woman thought 'mercy killing' was justified in cases of 'severe deformity'.<sup>66</sup>) But by the early 1970s, studies that asked about the desirability of eugenic abortion were finding polar opposite results to the 1962 study. In 1971, 14 Dunedin mothers between the ages of 22 and 30 were surveyed about their opinions of abortion and 13 thought it 'was acceptable on humanitarian and eugenic grounds'.<sup>67</sup> The following year, a study of the opinions of 14 women, 16 to 46 years in age, reported that all of them believed 'that if any defect could be diagnosed intra uterine' abortion should be allowed.<sup>68</sup> Finally, in 1973 a study in which 25 people selected at random from the general public were interviewed about their views on abortion found that 14 of them (56%) 'felt that if there was reasonable evidence to suggest that the child may be defective in some way then abortion was justified'. Most people seemed to be more concerned with the risk of mental rather than physical abnormalities; ten assumed the 'eugenic reason' was already legal.<sup>69</sup> Interestingly, the effects of thalidomide were once again brought to public attention in the early 1970s when families of thalidomiders in Australia and New Zealand began taking legal action against the company that sold the drug.<sup>70</sup> In newspaper articles reference was made to 'the deformed and limbless children' who needed special equipment to assist 'in the daily trial of living'.<sup>71</sup> The impact of such coverage on public perception of disability is, however, unknown.

By the mid-1970s advancements in medical science had made abnormalities more detectable, and therefore more visible than ever before. Because of the increasing types of pre-natal medical diagnostic tests available, such as amniocentesis (available at, for example, Christchurch Women's Hospital since 1975),<sup>72</sup> diagnostic ultrasound scanning and transabdominal fetoscopy, it was becoming possible to detect ever-more types of foetal abnormalities. It was clearly assumed by many that this knowledge would result in greater demand for abortions. For example, a 1973 study of the transmission risk of having a baby with Down syndrome referred to the availability of genetic counselling, amniocentesis and abortion.<sup>73</sup> By then, according to the royal commission's report, causes of foetal abnormalities were known to be varied, including genetic (examples given include TaySachs disease, spina bifida, Down syndrome, muscular dystrophy and haemophilia), viral (such as rubella), drug induced (without mentioning specific drugs) and environmental (such as exposure to radiation).<sup>74</sup> It appears the commissioners believed that medical advances in diagnosis of foetal

abnormality required a medical response in the form of abortion when no remedy was available. In sum, evidence suggests that increased knowledge of the causes of foetal abnormality and the ability of medical science to identify it contributed to the rapidly growing normalizing of the idea that terminating 'defective' fetuses should be an option.

### *Part 2: Deletion of the Eugenics Clause from the Bill*

On 19 August 1977 the Minister of Justice, David Thomson, introduced the Contraception, Sterilisation and Abortion Bill into Parliament, and it included the eugenics clause stipulating that it would be legal to have an abortion when 'there is a substantial risk that the child, if born, would be so physically or mentally abnormal as to be seriously handicapped'.

Following the tabling of the Bill, public reaction was intensely negative. Women's health advocates called it an insult to women because of its numerous barriers to accessing abortion services. However, in what follows, I focus mainly on the debate surrounding the recommendation to allow eugenic abortion.

When the Bill was introduced, the topic of abortion, in the words of Bill Rowling, leader of the Labour Opposition, had already given New Zealand 'as big a bashing as any issue over the years'.<sup>75</sup> The debate that ensued in Parliament was passionate and emotional, pitting anti-abortionist MPs demanding respect for the 'sanctity of life' against liberals and feminists who objected to the extreme restrictiveness of the law and the lack of respect it implied for women and doctors. Feminists, in fact, were few, given that Parliament comprised 83 men and just four women. Significantly, the four female MPs joined forces across party lines to try to stop the Bill's passage.

A particularly powerful, articulate feminist MP was Whetu Tirikatene-Sullivan, the Labour representative for the Southern Maori constituency, who on the day the Bill was tabled declared that 'freedom from unwanted reproduction is the very essence of women's equality'.<sup>76</sup> Tirikatene-Sullivan would prove to be an impressive defender of women's right to reproductive control during the debate over the Bill; she also stated that abortion had been practised in Māori culture prior to the arrival of Europeans.<sup>77</sup>

The second reading debate took place on 11 October 1977, and on that day MPs voiced opposition to the eugenics clause. Labour MP Jonathan Hunt endorsed the stance of the NZSIH that 'abortion for eugenic reasons is unacceptable' and expressed a 'strong belief in the value of every individual human being of whatever intellectual, physical or other attributes'. He announced he would move amendments aimed at protecting the rights and wellbeing of the 'handicapped'.<sup>78</sup> National MP Barry Brill also objected to the clause, saying he hoped 'New Zealand will defend its reputation as an ... enlightened country that is prepared to adopt a leading stance in the protection of life and the rights of all living, rich or poor, healthy or disabled'.<sup>79</sup>

On 13 December 1977, the Bill was brought forward for the last time. It went into committee and, during the all-night sitting, parliamentarians made numerous amendments. The overnight marathon was later widely criticized because parliamentarians were plainly exhausted and many, including Prime Minister Robert Muldoon himself, were not even present when numerous amendments were put to a vote. (Muldoon was absent for eight hours of the debate.<sup>80</sup>) At 6:05 in the morning on 14 December, Labour MP Basil Arthur, who was a member of the anti-abortion Society for the Protection of the Unborn Child (SPUC), moved an amendment to delete the eugenics clause. It was quickly passed by 'bleary-eyed Parliamentarians'.<sup>81</sup> Subsequently this was called the Arthur amendment.



After the committee finished making amendments, Parliament divided the original Bill into nine separate Bills in order to incorporate the widespread changes being proposed into existing laws, the most important of which were the Contraception, Sterilisation and Abortion Act of 1977 and the Crimes Amendment Act of 1961. On 15 December, when all nine Bills were passed at once, Brill defended the decision to delete the eugenics clause by claiming it did not prevent women from procuring abortions because of foetal abnormality. Instead, he said, women could continue terminating pregnancies in cases of foetal abnormality in order to save their mental health:<sup>82</sup>

It has been suggested that foetal abnormality as a ground for abortion has been removed from the Bill and that this in some way makes the law restrictive, yet this really records nothing more than what has been the law for many years in New Zealand.... Foetal abnormality had been included in the Bill as a specific ground for abortion in its own right, and by removing it from the Bill Parliament has returned it to its present status — namely, as one of the factors to be considered by the doctors who have to ascertain whether the mental health of a woman is likely to suffer as a consequence of foetal abnormality. It is my understanding that, under the present law as it is interpreted in cases of serious foetal abnormality, it is accepted almost as a matter of course that mental illness is likely to occur in the mother. If that is so now, then it will continue to be so following the passage of this Bill, and therefore there is no amendment on that ground.<sup>83</sup>

The new abortion law was passed and the next day signed into law, and it was to take effect on 1 April 1978. At a news conference on 19 December, Muldoon said he was not happy about the Arthur amendment, which begged the question why he was absent when it was voted upon.<sup>84</sup> Indeed, his ‘seemingly cavalier approach to the debate’, according to one reporter, explained why he ‘was in trouble with the public’.<sup>85</sup>

### *Part 3: The Return of the Eugenics Clause in the Crimes Amendment Act*

Passing the new law did nothing to appease New Zealanders who wanted increased access to safe abortion, indeed it only served to intensify their anger. The vote was a conscience vote, meaning the traditional practice of voting according to party policy was suspended. Therefore many Labour MPs had voted for the new law to the fury and/or despair of party members who opposed the restrictive law. Moreover, reports that numerous MPs slept at times during the all-night committee stage, or, as in the case of the Prime Minister himself, simply failed to vote on controversial amendments, added to the already existing impression that women’s health and their very lives were at the mercy of arrogant and ignorant middle-class men.

With regards to the law itself, the list of indications for lawful abortion sparked the greatest outrage, not because of what the law contained but because of two indications that were omitted: rape and foetal abnormality. An editorial in the *New Zealand Listener*, published in January 1978, reported ‘a row about foetal abnormality’ was underway.<sup>86</sup> And a front-page story in the *Evening Post*, published the day after the Bill was signed into law, was about reaction to the Arthur amendment.<sup>87</sup> Letters to the editor in newspapers expressed a range of reactions: certainly some praised the Arthur amendment, whereas the mother of ‘a physically handicapped child’ wrote with bitterness about how ‘many good moral people were so sorry about’ her child’s handicap but ‘none of these people ever helped in any way ... Sir Basil Arthur does not mind if children are born deformed or mentally deficient; has he ever experienced the stares and cruel remarks that such children attract?’ She ended by sarcastically asking, ‘By the way, for what was he knighted? His humanity, I presume.’<sup>88</sup>

Criticism of the Arthur amendment was voiced by feminists and liberals, Pākehā and Māori alike, who declared New Zealand was getting left behind by being deprived of a medical intervention being offered elsewhere for a morally defensible reason. In an article in the *New Zealand Listener* titled 'Abortion — More than a Feminist Issue', Jocelyn Brooks and Lyn Dawson wrote:

It is not difficult to appreciate the anguish of parents who have reason to suspect that the foetus is developing abnormally.... One case has arisen already in which the mother of a paraplegic child faces the probability of having another. Under the previous law this woman would have been able to obtain the abortion she wanted but not now. She faces a second tremendously demanding burden, which her medical specialist has advised her not to assume. According to the amendment proposed by Sir Basil Arthur, foetal abnormality (no matter how serious) is not justification for abortion. Thus there is no limit to the number of handicapped children a couple may be expected to cope with — even when the abnormality can be established long before birth.<sup>89</sup>

And in a scathing, mocking article titled 'Foetuses Are People Too', an outraged feminist implied disabled people were burdens to the state. She argued, satirically, there should be a tax to help

...finance those children born with the side effects of rubella, or who are mentally retarded or physically handicapped.... We should look at the proportion in economic terms, after all. Many handicapped people are capable of earning money, which means they could be taxed and repay the State for its initial investment. Others, incapable of earning money, may yet breed and thereby keep psychopaedic nurses and hospital staff occupied throughout their lives, thus reducing unemployment and saving the State from having to pay out dole.<sup>90</sup>

This spurred a response from a self-declared mother of 'five young children, one of them handicapped' who wrote it 'is really frightening to think that there are people who think' that way.<sup>91</sup>

In another letter, a member of the National Council of Women reminded readers that in 1975 the council conducted a survey of members that showed 'clear support from delegates for foetal abnormality as a ground for abortion in itself. It thus supported a situation which was the practice, if not the letter, of the old, vague law, framed before early diagnosis of foetal abnormality became technically feasible. Now, we have a law under which a woman carrying a defective foetus must convince selected consultants that her own mental health will be seriously and unavoidably endangered by the pregnancy.'<sup>92</sup> Tirikatene-Sullivan, speaking out after the law was passed, said the majority of New Zealanders did not want the new law, adding, 'A pregnant woman who is told by her doctor that her baby is likely to be severely handicapped will now be forced to carry it through to birth. I cannot think of a more cruel measure that could possibly be imposed on a woman. Only a bunch of middle-aged men, secure in the knowledge that they will never be placed in this position, could be capable of imposing this heartless shackle on women.'<sup>93</sup> Comments by feminists such as Brooks, Dawson and Tirikatene-Sullivan and others reflect strong sympathy and concern for women at a time when, as discussed above, the responsibility for the care of disabled children fell mainly to mothers.

A reporter examining public reaction to the Arthur amendment wrote it 'has shocked many women who already have seriously abnormal' children and 'has also angered doctors working in the field of genetic counselling and the detection of foetal abnormality'. Regarding the former, he quoted the president of the Spina Bifida Association, Graham Burkinshaw, who estimated between 80% and 90% of all parents of children with spina bifida 'feel that the mother should be entitled to an

abortion as [a] right if she found she was pregnant with another spina bifida foetus.' A survey done by the NZSIH 'showed that although individual parental reactions to mongol [sic] children varied greatly, 75% of parents would in retrospect have much preferred not to have had the child.' One mother said that while she loved her child she would have had an abortion if she had known the child would be born with spina bifida. Another mother who had a child with Down syndrome described with great anger at how she was not warned by her obstetrician about the risks of older women having children with genetic abnormalities or told of the availability of foetal testing. After her child was born she learned her obstetrician was a Roman Catholic. She felt 'very bitter' that he withheld this information and said if she ever saw him again 'I would want to kill him for what he did'.<sup>94</sup>

Among angry doctors, the most vocal was Dr. Ron Jones, a consultant specialist at National Women's Hospital and president of the Auckland Obstetrics and Gynaecology Society, who had made the front page of numerous newspapers in the days following the Bill's passage by making the defiant statement that if his tests determined that a pregnant woman 'would have a deformed baby' and she wanted an abortion, he would perform the procedure regardless of the law and 'call the Commissioner of Police to inform him what I am going to do.'<sup>95</sup> (Jones's statement is highly reminiscent of Dr Aleck Bourne's famous statement of 1938.<sup>96</sup>) Jones called the new legislation 'inhumane' and stated it 'denied New Zealand the benefit of world advances in detecting foetal abnormality.'<sup>97</sup> In April 1977 he was still adamant he would openly disobey the law. Dr. Arthur Veale, professor of human genetics at Auckland University Medical School, made a cold, economic case for eugenic abortion, saying 'overseas studies have shown that on a cost-benefit basis, a screening programme of this kind can be fully justified.... the cost of screening all mothers [over 38 years of age] is more than offset by the estimated subsequent cost to the state of keeping children in mental hospitals or other institutions, who would otherwise be born seriously abnormal.'<sup>98</sup>

But others were upset by the negative reaction to the Arthur amendment. A welfare officer of Club 64 for young disabled adults, who was a self-described handicapped person on an invalid's benefit, was 'roused by the attitude that we are burdens to the state or to our families'. In an opinion piece, she wrote that the argument for aborting a foetus to prevent the birth of a handicapped child 'could have a humiliating, even disastrous, effect on handicapped people who have to live on a social welfare benefit'.<sup>99</sup> Dr. William Liley, professor of perinatal physiology at National Women's Hospital and the first president of SPUC, said he strongly objected to the term 'deformed' foetus 'even when applied to a thalidomide baby born without arms or legs.' He saw no essential difference between the situation of a thalidomide baby and an adult who was permanently disabled by a car accident.<sup>100</sup> Immediately after the law was passed, the president of the NZSIH said 'Parliament must now, without delay, accept the consequences of the decision and enact legislation to provide the support and assistance to which the families concerned have a right. Parliament has now confirmed that the handicapped have the right to life, no matter what the cost in human and financial terms to the handicapped and their families.'<sup>101</sup>

To members of the medical profession the law was unhelpful at best at providing guidance and a disaster at worst. Many doctors perceived the new law as confusing, which meant it lacked the necessary, crystalclear protection they wanted; without it many were unwilling to perform abortions. Of particular concern was the so-called Wall amendment, moved by Labour MP Gerald Wall, which stipulated abortion would be lawful when 'the danger cannot be prevented by any other means'.<sup>102</sup> According to the newly appointed Abortion Supervisory Committee (ASC), created in accordance with the Contraception, Sterilisation and Abortion Act,<sup>103</sup> many doctors found the clause unclear and were 'scared of the phrase and are, therefore, reluctant to play a role under the

Act'.<sup>104</sup> Therefore, many refused to apply to be certifying consultants (required by the new law) in the months leading up to the law's activation, which in turn meant that women would be unable to secure safe abortions in a reasonable period of time. An important abortion clinic in Auckland closed immediately after the passage of the Act, claiming their work was no longer deemed legal, and SOS was formed to fly New Zealand women to Australia for abortions.

Facing this new, negative reality, in early 1978 the ASC recommended to Parliament amendments to the Act, which were intended to clarify the legal stance on abortion in ways that would reassure doctors. According to Justice Minister David Thomson, who tabled in Parliament in May 1978 the Contraception, Sterilisation, and Abortion Amendment Bill that contained the three amendments, the changes would 'remove certain frictions and doubts' in doctors' minds and make the law work properly. Two of the proposed amendments were called 'procedural', whereas the third, deemed 'substantive', was the removal of the Wall amendment. When introducing the Bill, Thomson tried to prevent another debate on abortion and downplay the controversy unleashed by passage of the law the previous year by saying the Bill was merely 'a practical measure to meet a practical situation'.<sup>105</sup>

But of course opponents of the 1977 abortion law refused to accept that the ongoing abortion controversy could be resolved by tinkering with such a fundamentally flawed piece of legislation; one MP said the issue was in fact 'running hot, mauling political parties, and scaring parliamentarians'.<sup>106</sup> Rowling, after pointing out that abortions were not being provided in medical districts around the country, called it 'an entirely unsatisfactory situation'.<sup>107</sup> Tirikatene-Sullivan said the new 'unworkable law' was an offence to women and that 'because these amendments make the law better for doctors and the committee, but not better for women', she would oppose the proposed amendment Bill.<sup>108</sup>

Moreover, although the intention of the amendment Bill was aimed at assuaging doctors, once it was introduced into Parliament MPs could make additional amendments, and those in favour of making foetal abnormality a lawful indication for abortion, including numerous members of the National Party itself, seized the opportunity to do so. During the second reading debate that took place on 30 May 1978, National MP George Gair announced he knew of and would support the Minister of Education Les Gandar's intention to propose a repeal of the Arthur amendment, thereby reinstating foetal abnormality as a legal ground for abortion.<sup>109</sup> Numerous other MPs also declared their desire to repeal the Arthur amendment.<sup>110</sup> National MP Mike Minogue told parliamentarians, 'A married woman rang me a few days ago. She had had an x-ray and had seen a specialist to find out whether the x-ray would have had an adverse effect upon the child she imagined she had been carrying for about eight weeks. If the x-ray did, in the specialist's opinion, offer some reasonable chance that the child she was carrying would be born deformed, she was of a mind not to continue to carry it.'<sup>111</sup> Statements such as these represented abortions procured because of potential foetal abnormality by respectable (note the use of the word 'married') women as reasonable and justifiable.

At the committee stage, Gandar moved to allow abortion for foetal abnormality up to 20 weeks. Demonstrating the government's unwillingness to bend on the matter, the committee chair declined to accept the motion, leading to a vote, and Gandar's amendment passed but just barely: there were 33 votes in favour and 31 against. (The original three proposed amendments also passed.) The Bill was then divided into two Bills, the Contraception, Sterilisation and Abortion Amendment Bill and the Crimes Amendment Bill, and both were passed on 5 July 1978. During the discussion leading up to the final vote, Tirikatene-Sullivan said that although she had lost her attempts during the committee to amend the law, she was pleased with the fact that 'in imploring Parliament to let the

decision as to whether a woman should carry to full term a foetus proven by amniocentesis to be abnormal, exception was at least made'.<sup>112</sup>

By 1978 the belief that abortion should be available in cases where fetuses were found or feared to be damaged was well on its way to becoming normative, even perceived as a right, in New Zealand. It appears this belief was by then commonsensical because of the sympathetic assumption that parents, mainly mothers, should be spared the hardship of caring for severely disabled children, and because medical scientific advancements in pre-natal testing now made it easier than ever before to detect foetal abnormalities. The decision to include the clause allowing abortion on the ground of foetal abnormality in the amended law also seems to have been interpreted by many as a sign that New Zealand was 'catching up' to the 'modern' way of thinking about foetal abnormality that already existed in Britain and elsewhere. But it deeply distressed some people with disabilities along with their parents and advocates because of what they feared its inclusion implied; namely, an aversion to people with disabilities and a devaluation of their right to exist. It also shows the tenacity and resiliency of the pre-existing, troubling tendency starting in the nineteenth century to assess people perceived as defective, mentally or physically, and find them wanting. Today the idea of allowing abortion in cases of foetal abnormality seemingly has widespread social acceptability, and is implicitly endorsed by the state that has continued to demonstrate reluctance to provide the kind of support and assistance that families require to make their lives easier. The latter, in particular, raises disturbing questions about society's attitude towards 'the anomalous body' and mind.<sup>113</sup>

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#### NOTES

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4 'An Act to Amend the Crimes Act 1961', *New Zealand Statutes*, 1978, Part 1, Section 5 and Part 8, Section 187A, <http://legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html> (accessed 12 May 2017).

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7 *Report of the Royal Commission*, p.143.

8 Brooks, *Ill-Conceived*, p.91.

9 *Report of the Royal Commission*, pp.192, 283.

10 *Report of the Royal Commission*, p.200.

11 *Report of the Royal Commission*, pp.200–11.

12 *Report of the Royal Commission*, p.211.

13 *Report of the Royal Commission*, p.330.

14 *Report of the Royal Commission*, p.211.

15 See, example, editions of ALRA's newsletter published in the mid-1960s, which included the sub-heading 'Eugenics'. SA/ALR/A11/3: ALRA – Newsletters, 1963–1971, Wellcome Trust Library and Archives, London.

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46 Submission to the RCCSA of the Committee for Life for the Handicapped, Item ID# R6786517, pp.1–2, ANZ, Wellington.

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- 81 Quote and statement that Arthur was a SPUC member found in Peter Trickett (staff writer), 'The Ethics of Abnormality', New Zealand Listener (hereafter Listener), 29 April 1978, p.16; NZPD, 1977, 416, pp.5328, 5330.
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- 91 Letter to editor, Listener, 4 March 1978, p.7.
- 92 Letter to the editor by Necia Hamilton of the National Council of Women, Listener, 18 March 1978, p.11.
- 93 'New Abortion Law "Won't Work, Must Be Repealed"', EP, 17 December 1977, p.2.
- 94 Trickett, 'The Ethics of Abnormality', pp.16–18.
- 95 For example, "'I'll Disobey Law and Tell Police," Warns Top Doctor', Auckland Star, 16 December 1977; 'After the Abortion Law — Open and Expert Defiance', EP, 17 December 1977, p.1.
- 96 See note 71.
- 97 Trickett, 'The Ethics of Abnormality', p.16; "'I'll Disobey Law and Tell Police," Warns Top Doctor', Auckland Star, 16 December 1977; 'After the Abortion Law — Open and Expert Defiance', EP, 17 December 1977, p.1.
- 98 Trickett, 'The Ethics of Abnormality', p.18.
- 99 Opinion piece, Herald, 29 December 1977, p.6.
- 100 Trickett, 'The Ethics of Abnormality', p.16.
- 101 EP, 17 December 1977, p.1.
- 102 Section 187A of the Crimes Act, see NZPD, 1978, 417, p.34.
- 103 The ASC has a number of statutory functions under the Act, including maintaining general oversight of the abortion law, ensuring consistent administration of the law, appointing and removing consultants, and reporting to Parliament on the law's operation.
- 104 Comment by Minister of Justice, David Thomson, NZPD, 1978, 417, p.34.
- 105 NZPD, 1978, 417, p.34.
- 106 Statement by G.F. Gair, NZPD, 1978, 417, p.49.
- 107 NZPD, 1978, 417, p.36.
- 108 NZPD, 1978, 417, pp.37, 38.
- 109 NZPD, 1978, 417, p.439.
- 110 NZPD, 1978, 417, pp.485, 496.
- 111 NZPD, 1978, 417, p.496.
- 112 NZPD, 1978, 417, p.1562.
- 113 Martin Sullivan, 'Regulating the Anomalous Body in Aotearoa/New Zealand', NZJDS, 1 (1995), pp.9–28.