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THE FUNCTIONS AND FAILINGS OF THE ABORTION SUPERVISORY COMMITTEE

A Critique of the New Zealand Supreme Court Decision in *Right to Life New Zealand Inc v The Abortion Supervisory Committee*

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Abstract

In 2012 the Supreme Court of New Zealand ruled on *Right to Life New Zealand Inc v The Abortion Supervisory Committee*. The case was brought by way of application for judicial review, with Right to Life New Zealand Inc arguing that the Supervisory Committee had made an error of law in interpreting its functions under the Contraception, Sterilisation, and Abortion Act 1977. A majority of the Court held that the Supervisory Committee does not have the power to review decisions made by certifying consultants in individual cases. However, both the text and the purpose of the Act support the minority view, that the Supervisory Committee must seek information about individual cases in order to fulfil its functions under the Act. It appears that the majority judgment was motivated by policy concerns due to an arguable change in Parliamentary intent since 1977. The majority should have acknowledged the policy values that guided its decision or accorded with the minority view rather than straining the statutory wording. Either of those actions would have better prompted Parliament to reform the law to reflect modern circumstances.

Key Words

Abortion;
Ambulatory approach;
Contraception, Sterilisation, and Abortion Act 1977;
Judicial review;
Legal realism.

I Introduction

The Abortion Supervisory Committee has described New Zealand's abortion law as "outdated", "misleading", and "demeaning to women".[1] Yet, despite widespread criticism, Parliament has consistently avoided the issue of reform. In 2012 the Supreme Court had an opportunity to clarify the law when it heard an appeal regarding the Supervisory Committee's function of ensuring that the abortion law is applied consistently and according to the law throughout New Zealand.[2] It held by a 3-2 majority that the Committee is not required to seek information about individual cases in which an abortion is authorised in order to fulfil its functions under the Contraception, Sterilisation, and Abortion Act 1977 (the Act).

In this paper I criticise the majority of the Supreme Court for failing to follow orthodox administrative law principles. Instead the Court has delivered a decision that appears to be motivated by political concerns. It seems likely that New Zealand's abortion law will remain in its outdated form for the foreseeable future, as the decision failed to provide any much-needed clarity or impetus for law reform.

Part II of this paper explains the background and the legal issue arising in the case. The appellant, Right to Life NZ Inc, brought a judicial review claim against the Supervisory Committee, alleging that it was not fulfilling its statutory function. The legal issue related to the scope of its power to review the decisions of certifying consultants in individual cases. The appellant argued that the Supervisory Committee should scrutinise the reasons given for allowing an abortion in particular cases.[3]

In Part III I offer a critique of the majority decision. My argument is that the minority interpreted the text and purpose of the Act more accurately. In this

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1 Abortion Supervisory Committee *Report of the Abortion Supervisory Committee for 2000* (2000, Wellington) at 5.

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

3 *Right to Life New Zealand Inc v The Abortion Supervisory Committee* [2008] 2 NZLR 825 (HC) at [4].

section I also address the issue of the ambulatory approach to statutory interpretation. Although it is often said that the courts have a role in ensuring statutes are interpreted to reflect changing values, in cases such as the present it may be harmful for them to do so.

Next, I criticise the majority judgment from a legal realist perspective, arguing that when the courts are confronted by questions of statutory interpretation where the statute no longer reflects societal values they should not attempt to disguise a political decision by straining the meaning of the statute.

In Part V I explain why it is that the courts and administrative bodies may intervene in cases of clinical judgment by medical professionals. I draw an analogy with the dispensation of controlled drugs under the Misuse of Drugs Act 1975, and explain why the case law on which the majority relied does not preclude review of certifying consultants' decisions in all cases.

Finally, in Part VI I make a consequentialist critique about the majority's findings that the Supervisory Committee's current practice of making inquiries is inadequate;[4] and that the Health and Disability Commissioner has a role in ensuring that the law is adhered to.[5] I argue that neither of these findings sufficiently clarifies the law on abortion. Further, I argue that as a result of the majority judgment Parliament is unlikely to consider reform in the foreseeable future.

II Background

The case came to the Court by way of a judicial review application in which the appellant, Right to Life New Zealand Incorporated (Right to Life), argued that the Supervisory Committee was not fulfilling its statutory functions under the Act. Right to Life argued that the Supervisory Committee was required to scrutinise decisions made in individual cases,

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4 *Right to Life New Zealand Inc v The Abortion Supervisory Committee,* above n 2, at [40].

5 At [44].

whereas the Committee alleged that it had no such power.[6] In essence, Right to Life sought to establish that New Zealand has a de facto position of "abortion on demand", contrary to the position at law.[7] It argued that, because the Supervisory Committee is not fulfilling its statutory functions, abortions are approved in circumstances in which they should not be.[8] In this section I explain the statutory context for the decision and then give an overview of the judgments handed down by the lower courts.

A The Statutory Context

In 1977 sweeping changes were made to New Zealand's abortion law, as a result of a report of a Royal Commission of Inquiry established in 1975.[9] Since then, abortion has been governed by the Contraception, Sterilisation, and Abortion Act 1977, which largely adopted the recommendations made by the Royal Commission of Inquiry, and by ss 182 to 187A of the Crimes Act 1961.[10] Essentially, procuring an abortion is a crime, except in certain circumstances where there is a legal justification.

The Crimes Act 1961 provides that it is an offence to cause the death of any child that has not become a human being in such a manner that the offender would have been guilty of murder if the child had become a human being,[11] or to do certain unlawful actions with the intent to procure the miscarriage of any woman or girl.[12] Section 187A provides that such acts will not be unlawful in certain cases. The particular exception that is at issue in this case is if the person procuring the abortion believes:[13]

> that the continuance of the pregnancy would result in serious danger (not being danger normally attendant on childbirth) to the life, or to the physical or *mental health* of the woman or girl.

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6 At [1].
7 *Right to Life New Zealand Inc v The Abortion Supervisory Committee*, above n 3, at [4].
8 At [3]-[4].
9 New Zealand Royal Commission on Contraception, Sterilisation, and Abortion *Contraception, Sterilisation and Abortion in New Zealand: Report of the Royal Commission of Inquiry* (Government Printing Office, Wellington, 1977).
10 Contraception, Sterilisation, and Abortion Act 1977, s 2, definition of "abortion law".
11 Crimes Act 1961, s 182.
12 Section 183.
13 Section 187A(1)(a) (emphasis added).

In its report, the Royal Commission of Inquiry made a number of recommendations to ensure the consistent administration of abortion law throughout the country. Important among these were the recommendations to help reduce the risk of bias from doctors. There is a risk that doctors will misapply the law and authorise or perform abortions in situations that do not fit within one of the section 187A exceptions. The Commission's primary recommendation was that Parliament should establish a panel to make decisions in individual cases, and, as an alternative, that decisions as to whether to grant an abortion should be made by two doctors "under the general framework and supervision of the statutory committee".[14] Although the Commission acknowledged that there was still a risk that two doctors may be biased, and that decisions would be made inconsistently in different regions, it was this option that Parliament chose to implement.[15]

The Supervisory Committee was set up in order to oversee the decisions made by doctors. It is provided for in s 10 of the Act, which requires that at least two of its members must be medical professionals. Under s 30 of the Act, the Committee maintains a register of certifying consultants. Every time a certifying consultant grants an abortion they are required to report to the Committee, giving non-identifying information about the patient, the pregnancy history, and an indication of the ground(s) upon which the abortion is justified. Sections 32-33 of the Act govern the procedure to be undertaken when a woman seeks an abortion. Its key functions are delineated in s 14.

The appeal in question pertained to the correct interpretation of ss 14(1)(a), (i) and (k) of the Act. These require the Supervisory Committee:

> (a) To keep under review all the provisions of the abortion law, and the operations and effect of those provisions in practice:
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> ...
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> (i) To take all reasonable and practicable steps to ensure that the administration of the abortion law is consistent throughout New

[14] New Zealand Royal Commission on Contraception, Sterilisation, and Abortion, above n 9, at 297.

[15] At 294.

> Zealand, and to ensure the effective operation of this Act and the procedures thereunder:
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> ...
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> (k) To report annually to Parliament on the operation of the abortion law.

Section 36 of the Act is also relevant to the interpretation of the Supervisory Committee's functions. It provides that certifying consultants shall keep records and submit to the Supervisory Committee such reports as required, but that none of these reports is to give the name or address of any patient.

B Procedural History

In this section I outline the decisions handed down by the lower courts as well the reasons given by both the majority and the minority in the Supreme Court.

1 High Court

In the High Court, Miller J held that the Supervisory Committee had misinterpreted its powers and that it is empowered to look at decisions made in individual cases. He expressed concerns about "the lawfulness of many abortions authorised by certifying consultants" in New Zealand.[16] However he did not grant any relief, for the reasons that the Supervisory Committee must enjoy some kind of discretion in exercising its functions, and that with its role now clarified it could make the necessary changes itself, to ensure that it was conducting sufficient checks on certifying consultants.[17] The judge was also concerned that, if the court was to make orders, this might result in its being drawn into supervision of the Supervisory Committee in a way that is inconsistent with the Act.[18] His Honour considered that declaratory relief should be available, but the parties had agreed to consider the utility of any such declarations after the judgment had been given.[19]

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16 *Right to Life New Zealand Inc v The Abortion Supervisory Committee*, above n 3, at [5].
17 At [154]- [155].
18 At [154].
19 At [155].

2 Court of Appeal

On appeal the Supervisory Committee was successful, with a majority of the Court of Appeal (Chambers and Stevens JJ; Arnold J dissenting) holding that the Supervisory Committee did not have the power to review individual cases.[20] The majority of the Court also expressed the view that Miller J was wrong to pronounce the view that there is reason to doubt the lawfulness of many abortions.[21] The Court considered that it was not open to the Supervisory Committee to "form its own opinion about the lawfulness, including the clinical correctness, of the decisions of certifying consultants in particular cases. The Act characterised the decision of certifying consultants as a medical assessment pure and simple."[22] In the view of the majority, the power of review was provided for the Supervisory Committee to intervene only where certifying consultants were acting in bad faith.[23]

Arnold J, in dissent, "found it difficult to see how the Supervisory Committee could meet its review obligation under s 14(1)(a) without having regard to the way that certifying consultants performed their functions under the Act."[24] In his view, it was unlikely that Parliament would have intended the reporting obligation to be so limited in scope that the Supervisory Committee could not question the reasons of certifying consultants in individual cases.[25] Indeed, he reasoned, "one situation where the Supervisory Committee could properly revoke an appointment was where it became apparent that a certifying consultant was allowing his or her decisions about abortions to be influenced by an extreme view, whether liberal or conservative."[26] Parliament, in his Honour's view, had "decided that abortion was not a matter to be left simply to the affected woman and her doctor,"[27] and it is the role of the Supervisory Committee to ensure that abortion is allowed in practice only where it should be according to the law.

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20 *The Abortion Supervisory Committee v Right to Life New Zealand Inc* [2011] NZCA 246, [2012] 1 NZLR 176.
21 At [136]-[137].
22 At [101].
23 At [108].
24 At [163].
25 At [163].
26 At [172].
27 At [178]-[179].

3 Supreme Court

A majority of the Supreme Court (Elias CJ, Blanchard and Tipping JJ; McGrath and William Young JJ dissenting) upheld the Court of Appeal decision.

In the lower courts, Right to Life had also sought to establish that the law recognises an express right to life on the part of an unborn child and that s 8 of the New Zealand Bill of Rights Act 1990 guarantees the right of an unborn child to not be deprived of life. However, both the High Court and the Court of Appeal rejected this argument. The Supreme Court held that these grounds were untenable, and denied leave to appeal, because the Act is based on a common law principle which holds that various offences apply only to a child that has been born alive.[28]

(a) Majority decision

The majority of the Supreme Court held that the Supervisory Committee cannot "make any inquiry or investigation into the decision-making in an individual case, where that would tend to question a decision actually made in a particular case."[29] That means that the Supervisory Committee may not inquire as to how a certifying consultant came to a diagnosis in a particular case. The majority reasoned that if Parliament had intended the power of review to be anything more than a general power, it would have made express provision and included appropriate safeguards for consultants.[30]

Their Honours found it significant that s 36 of the Act distinguishes between "keeping" and "submitting" records: certifying consultants may keep more detailed records, but the section provides for them to submit only those records as the Supervisory Committee may from time to time require. To

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28 *Right to Life New Zealand Inc v The Abortion Supervisory Committee* [2011] NZSC 97 (Leave to Appeal).

29 *Right to Life New Zealand Inc v The Abortion Supervisory Committee*, above n 2, at [40], citing *Wall v Livingston* [1982] 1 NZLR 734 (CA).

30 *Right to Life New Zealand Inc v The Abortion Supervisory Committee*, above n 2, at [44].

inquire into individual decisions would also raise privacy concerns, as "it would usually not be possible to reach a properly informed judgment on an individual decision without full access to the medical records ... and also full access to the patient whose identity and confidentiality the Act sets out to protect."[31]

Further, the majority reasoned that since the Act does not expressly provide the Supervisory Committee with statutory functions of establishing or enforcing professional obligations, expansive review powers would be illogical. The Supervisory Committee is not empowered to act as an investigatory or disciplinary body; that task is left to the Health and Disability Commissioner and the Medical Council.[32]

The judgment endorsed the ruling in *Wall v Livingston*, where a paediatrician claimed that a girl should not have an abortion, even after two certifying consultants had permitted it.[33] In that case the Court of Appeal held that the Supervisory Committee cannot make any inquiry into the decision-making in a particular case because to do so would be to question the correctness of a clinical judgment.[34] The Court observed that the power of the Supervisory Committee is cast in very general terms, and that the "substitution of one set of medical opinions for others, as the result of some generally available process of review or appeal," is not permitted.[35] This, it considered, would amount to second-guessing the clinical judgment of a consultant. That is not contemplated by the Act, as the Supervisory Committee does not have any express power to look into the propriety of a consultant's assessment in a particular case.

Notably, although the majority essentially upheld the status quo as regards the Committee's information-gathering function, the majority concluded its judgment by "recognising that each side has had some success".[36] It expressed a concern that the Supervisory Committee does not currently

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31 At [40].
32 At [44].
33 *Wall v Livingston*, above n 29, at 735.
34 At 741.
35 At 738-739.
36 At [54].

make inquiries as to how individual certifying consultants go about making decisions, and held that it ought to do so in order to fulfil its function of reviewing the law under section 14(1)(a).[37] Implicit in this is the notion that the Supervisory Committee has not been correctly interpreting and applying its functions under the abortion law.

(b) Minority decision

The minority emphasised the fact that section 14(1)(i) requires positive action by requiring the Supervisory Committee to take "all reasonable and practicable steps" to ensure that the policy goals are achieved. It is a key function of the Supervisory Committee to give certainty and uniformity to the operation of the Act: the Supervisory Committee is "statutorily entrusted with the supervision of the provisions of abortion law, particularly the decision-making under ss 32 and 33, and its role in this respect should not be read down."[38] Their Honours noted that s 14(1)(h) provides specifically for the Supervisory Committee to scrutinise the procedure by which consultants make decisions in individual cases, arguing that the Act's emphasis on the importance of scrutiny "reflects the concern of the Royal Commission over the risk of intrusion of personal views into decisions of two doctors."[39]

Their Honours pointed out that the Supervisory Committee has the power to revoke appointments of certifying consultants, and so it follows that it must be able to find out whether consultants are practising or expressing views in a way that is inconsistent with the Act.[40] The judges confined *Wall v Livingston* to situations where review of an abortion is attempted prior to the abortion being performed, arguing that the case "did not analyse comprehensively the role of the Supervisory Committee under the Act."[41] Moreover, the minority was able to find support in that case for the view that sometimes "some investigation of particular decision-making may be

37 At [46].
38 At [97].
39 At [81].
40 Contraception, Sterilisation, and Abortion Act 1977, s 30(5).
41 *Right to Life New Zealand Inc v The Abortion Supervisory Committee*, above n 2, at [80].

required" when the Supervisory Committee is exercising its function of appointing consultants under s 30(5).[42]

Further, the minority reasoned that s 36 actually supports the view that certifying consultants should report on individual decisions, because "the stipulation 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."[43] The fact that Parliament has chosen not to specify the content of reports is merely a reflection of the fact that the Supervisory Committee is an expert body, being made up of two medical professionals according to s 10 of the Act, and would know better than Parliament what types of information it would need in order to fulfil its functions.[44]

III Critique: The Majority Failed to Follow Orthodox Administrative Law Principles

The standard of review to which a decision-maker is susceptible will depend on "the nature of the public body, the particular function being performed, the context within which that function is being performed and what it is said has gone wrong."[45] In some recent cases the courts have applied a more deferential standard of review. For example in a commercial context the decision-makers have greater discretion and judicial review will often be limited to serious situations of fraud or bad faith.[46] However, it is a fundamental part of the constitutional arrangements of New Zealand that allow for judicial review that "Parliament cannot be taken to have intended that decision-makers should determine exclusively questions of statutory decision-making."[47] In this case the Court was called on to deal with the

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42 *Wall v Livingston*, above n 29, at 738.

43 *Right to Life New Zealand Inc v The Abortion Supervisory Committee*, above n 2, at [85].

44 At [85].

45 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [85].

46 See, for example, *Mercury Energy v Electricity Corporation of NZ* [1994] 2 NZLR 385 (PC).

47 See, for example, *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 133; *Re Racel Communictaions Ltd* [1981] AC 374 (HL) at 382-383 per Lord

Supervisory Committee's exercise of a function that has a "significant impact on individuals", that as such is clearly a public decision, making it the type of case for which a high standard of review is appropriate.[48]

The decision-maker must "understand correctly and give effect to the law that regulates its decision-making power."[49] If the decision-making authority misconstrues its statutory power it commits a reviewable error of law.[50] Important in this case is the principle that if a public body such as the Supervisory Committee has failed to act in circumstances where, under the empowering legislation, it ought to have, that is an "unlawful abdication of power, whether or not the authority's inaction was deliberate, or based on an erroneous belief that it lacked jurisdiction to proceed."[51]

The Supervisory Committee finds its authority in the Contraception, Sterilisation, and Abortion Act 1977. The Act must be interpreted in light of its text and purpose.[52] In this section I argue that the majority's interpretation of the legislative provisions is flawed because it frustrates the text and purpose of the abortion law.

A Text

According to s 14 of the Act, the Supervisory Committee is required to "keep under review all the provisions of the abortion law, and the operation and effect of those provisions in practice"; "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"; and "to report annually to

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Diplock; Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 835.

48 *Lab Tests Auckland Ltd v Auckland District Health Board*, above n 47, at [28].

49 Joseph, above n 49, at 885; *CCSU v Minister of Civil Service* [1985] AC 374 (HL) at 410.

50 Joseph, above n 49, at 919; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL) per Lord Reid.

51 Joseph, above n 49, at 909; See also *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL); *Hammond v Hutt Valley and Bays Metropolitan Milk Board* [1958] NZLR 720 (CA).

52 Interpretation Act 1999, s 5.

Parliament on the operation of the abortion law."[53] It has the power to require consultants to "keep records and report on cases they have considered, for the purpose of performing its statutory functions."[54]

While the Act is fairly prescriptive as to how the Supervisory Committee must perform its function of licensing institutions,[55] it does not prescribe a form of reporting.[56] Section 14 specifies the functions of the Supervisory Committee, but it does so in a way that is more a description of the Supervisory Committee's purpose than an exhaustive list of activities that the Committee is required to undertake. Paragraph (i) recognises that the section does not contain every duty of the Committee - it is worded as a catch-all, giving the Supervisory Committee the function to "take all reasonable and practicable steps to ensure the effective operation of this Act".[57] Section 14(2) adds to this, providing that the Supervisory Committee has "all such reasonable powers, rights, and authorities as may be necessary to enable it to carry out its functions."

Parliament has given the Supervisory Committee a wide discretion to decide how its functions can best be fulfilled. The majority argued that if Parliament had intended for the Supervisory Committee to be able to require reports on individual cases it would have included some express provision.[58] However, I argue that the wide powers granted do allow for such a reporting requirement. The fact that Parliament has left the specific details of reporting up to the Supervisory Committee does not mean that it can use its wide discretion to circumvent its functions under the Act.[59] It is important to note that, while the Supervisory Committee has discretion as to how it performs its functions, it does not have discretion as to whether or not it acts to perform them at all. The Supreme Court has recently held that even a broadly framed discretion must "always be exercised to promote the policy and objects of the Act … The exercise of the power will be invalid if the

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53 Contraception, Sterilisation, and Abortion Act 1977, s 14.
54 Section 36; *Right to Life New Zealand Inc v The Abortion Supervisory Committee*, above n 3, at [5].
55 Sections 19-25.
56 *Right to Life v The Abortion Supervisory Committee*, above n 2, at [23].
57 Contraception, Sterilisation, and Abortion Act 1977, s 14(1)(i) (emphasis added).
58 *Right to Life v The Abortion Supervisory Committee*, above n 2, at [44].
59 *Padfield v Minister of Agriculture, Fisheries and Food* , above n 53, at 1030

decision-maker 'so uses his discretion to thwart or run counter to the policy and objects of the Act.'"[60] There will often be cases where a public body with expertise in a particular area is given a broadly expressed power, but the courts will intervene if it exercises that power in a way that "cannot rationally be regarded as coming within the statutory purpose," or if it fails to perform its functions under the empowering legislation.[61]

The policy of the Act must be ascertained from reading the Act as a whole.[62] The role of the Supervisory Committee is to deal with licensing of certifying consultants,[63] in order to ensure that the consultants on the register are following the correct statutory procedure for when an abortion is sought.[64] It is tasked with maintaining a register of certifying consultants and has the power to revoke appointments where necessary.[65] This power of revocation implies that the Supervisory Committee should be checking the performance of certifying consultants more frequently than only when their term ends. Inherent in this task is the function of determining whether consultants are making decisions that are inconsistent with the tenor of the Act.[66] Thus the Supervisory Committee should be required to make inquiries into specific cases in order to understand exactly how diagnoses are made. Its function is systemic, but in order to understand "how the system is operating in practice for the purpose of reporting to Parliament, the Committee must ... be prepared to utilise its powers to consider the basis of individual decision-making by certifying consultants."[67]

Section 36 of the Act supports this reading, as it provides that no identifying information about any woman shall be provided in reports to the Supervisory Committee. As the minority of the Supreme Court pointed out, this express stipulation "indicates that Parliament envisaged reports could

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60 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53]. See also *Mercury Energy v Electricity Corporation of NZ,* above n 48, at 5; *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223; *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1031.

61 *Unison Networks Ltd v Commerce Commission*, above n 62, at [55].

62 At [53]; Joseph, above n 49, at 885.

63 Contraception, Sterilisation, and Abortion Act 1977, s 30.

64 See sections 32-33.

65 Section 14(1)(h).

66 Section 30(5).

67 *The Abortion Supervisory Committee v Right to Life New Zealand Inc* , above n 20, at [182].

and would include details of particular cases."[68] In other words, if Parliament had not intended there to be reports about individual women then it would not have needed to include this stipulation, as it would be highly unlikely that consultants would give details about individual women in general reports.

B Purpose

I argue that the purpose of the abortion law is frustrated under the majority approach. Although it is arguable that Parliament's intent today is different to that at the time of drafting, I argue that this is not an appropriate case for the Court to use the ambulatory approach to interpreting the Act.

1 Purpose at the time of drafting

The Act was introduced following a report of a Royal Commission of Inquiry that made several recommendations for reforming the law on abortion, and it largely followed the recommendations made in the report.[69] The Commission reported that "it is wrong, except for good reasons, to terminate unborn life,"[70] and recognised that although an unborn child is not given the full set of rights that other human beings are, abortion extinguishes a potential life and so must be regarded seriously, and not merely left to the woman and her doctor to determine.[71] This reflects the view of that era that abortion on demand is unsatisfactory.[72] The fact that abortion is a criminal act except in certain circumstances reinforces this view.

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68 *Right to Life v The Abortion Supervisory Committee*, above n 2, at [85].

69 New Zealand Royal Commission on Contraception, Sterilisation, and Abortion, above n 9.

70 At 198-199; *Right to Life New Zealand Inc v The Abortion Supervisory Committee*, above n 3, at [1].

71 New Zealand Royal Commission on Contraception, Sterilisation, and Abortion, above n 9, at 274, 289; *Right to Life New Zealand Inc v The Abortion Supervisory Committee*, above n 3, at [1].

72 See, for example, WAP Facer *Legal Abortion in New Zealand* (New Zealand Rationalist Association, Auckland, 1977) at 7; Jocelyn Brooks and others *Ill Conceived: Law and Abortion in Practice in New Zealand* (Caveman Press, Dunedin, 1981) at 66.

The purpose of the Act is to "provide for the circumstances and procedures under which abortions may be authorised, after having full regard to the rights of the unborn child" and it must be read in conjunction with ss 182 to 187A of the Crimes Act 1961.[73] Overall, the purpose is to make sure that certifying consultants do not authorise abortions in circumstances that are clearly not contemplated by the justifications in s 187A of the Crimes Act. Thus it follows that the Supervisory Committee must require consultants to report in more detail on individual cases, to ensure that every abortion performed is in fact within the scope of s 187A.

Accordingly, the Commission recommended that a committee be set up "to have general oversight of the administration of abortion law ... and give general supervision to the working of the abortion law."[74] The model that Parliament chose to implement, the "two doctors" model, was not the Commission's primary recommendation as it recognised that there was a risk that doctors would give effect to their own personal views,[75] but it considered that the risk was mitigated by "the supervision and oversight which the statutory committee would give."[76] This suggests that its oversight role is important in the context of the abortion law as a whole, and supports the view that the Supervisory Committee should have the power to make detailed inquiries about the decisions made in particular cases.

2 Purpose today

The Supervisory Committee has consistently drawn Parliament's attention to its concerns that the Act is operating more liberally in practice than it legally ought to, expressing a concern that consultants were relying too frequently on dubious mental health diagnoses.[77] In its 2005 report acknowledged that although "the law was written with precision, and enacted by careful lawmakers ... the wording has come to have a de facto

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73 Contraception, Sterilisation, and Abortion Act 1977, long title.
74 New Zealand Royal Commission on Contraception, Sterilisation, and Abortion, above n 9, at 25.
75 At 294.
76 At 294.
77 Abortion Supervisory Committee *Report of the Abortion Supervisory Committee for 1996* (1996).

liberal interpretation. Case law does not refute the understanding. The Supervisory Committee has therefore no choice but to accept that this is the intent."[78] Parliament has consistently failed to act on any of the concerns reported by the Committee, so it would appear that it is not troubled by the high number of abortions being granted on the mental health ground. This suggests that Parliament's intent is now that the law should operate in practice so as to provide women in New Zealand with the right to abortion on demand.

3 Why an ambulatory approach is not appropriate in this case

An ambulatory approach to interpreting the role of the Supervisory Committee may support the majority decision in this case. It may be said that since Parliament is less concerned about the legality of abortions under the Crimes Act than it was at the time of setting up the Supervisory Committee, the Supervisory Committee's role has changed and the legislation should be interpreted in a way that reflects this. [79]

Often an ambulatory approach is useful where the courts need to reinterpret words that do not reflect modern circumstances. For example, in *Re Application by AMM and KJO*, the Court had to interpret the outdated Adoption Act 1955.[80] The Act only allowed a joint application for adoption to be made by a "spouse"; the couple that applied in this case were in a long-term de facto relationship. The Court reasoned that Parliament's intent in using the word "spouse" was to ensure that adopted children could grow up in stable, committed families. That intention did not change over time, nor would it be frustrated if the Court adopted a wider definition of the word "spouse", as society now acknowledges that other forms of relationships can provide stable and committed environments for children.

However, here the Court is not merely interpreting a word or words in order to give effect to the purpose of the Act; the "real complaint here is simply

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78 Abortion Supervisory Committee *Report of the Abortion Supervisory Committee for 2005* (2005).

79 See Interpretation Act 1999, s 6.

80 *Re Application by AMM and KJO to adopt a* child [2010] NZFLR 629 (HC).

that the original meaning of [the] Act has become inappropriate. This is a matter for the legislature."[81] Dynamic statutory interpretation is not appropriate where the courts "are not appropriate representatives or are not accountable for their mistakes."[82] The Court should not assume that society as a whole accepts abortion on request. The courts are limited in their ability to determine whether a point of view is widely held in the community, "since the community does not normally participate in litigation."[83] Moreover, the difficulty in identifying community values is greater where society is "clearly divided on the particular issue: where there are different sets of values ... which are strongly, even tenaciously, held."[84]

This attitude is reflected in such controversial cases as *R v Hines*, and *Quilter v Attorney-General*, where the judgments handed down demonstrate that all judges were influenced by an assessment of whether the court of the legislature was the more appropriate law-making body and a concern that the Court should not go beyond interpretation and give a strained meaning to the statutory provisions.[85] However in this case both the majority and minority judgments are written as questions of basic statutory interpretation, with the court ostensibly trying to give effect to Parliament's intent as expressed through the wording of the Act.[86] There is no discussion of whether the Court is overreaching or giving the wording a meaning that it is not realistically able to bear. This is problematic because the "judicial updating of statutes will usually raise issues appropriate for legislative resolution, as there will be scope for different views on the desirability, or at least the proper form, of updating."[87]

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81 Mark Bradley "The Ambulatory Approach at the Bottom of the Cliff: Can the Courts Correct Parliament's Failure to Update Legislation?" (2003) 9 Canterbury L. Rev. 1 at 14.

82 William Eskridge "Dynamic Statutory Interpretation" (1987) 135 Univ. Penn. Law Rev. 1479 at 1529.

83 Bruce Harris "Judicial Activism and New Zealand's Appellate Courts" in Brice Dickson (ed) *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, New York, 2007) 273 at 301. See also Sir Ivor Richardson "The Role of Judges as Policy Makers" (1985) 15 VUWLR 46 at 49.

84 Sir Ivor Richardson "The Role of Judges as Policy Makers, above n 85, at 52.

85 *R v Hines* [1997] 3 NZLR 529 (CA); *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA); Harris, above n 85, at 320.

86 See, for example, *Right to Life v The Abortion Supervisory Committee*, above n 2, at [44], [86], [96].

87 Bradley, above n 83, at 17.

Although there may be evidence that Parliament does not intend the abortion law to be applied strictly in the modern context, where the legislature's language "fail[s] to capture its practical choice" it is not open to the courts to permit themselves "a strained or perverse interpretation of the words of a statute," in order to avoid an outcome that they view as undesirable.[88] While the legislature may have particular hopes or expectations, those must be distinguished from the legislative purpose as embodied in the enactment.[89] Moreover, although the use of extrinsic material to aid in statutory interpretation is now widely accepted, it should be "rarely the case that parliamentary materials will provide the central reason for choosing an interpretation, and it is extremely rare that such evidence would trump an interpretation based on the face of the text itself."[90] This must be especially so in this case, where, rather than the Court relying on contemporary statements from the time the Act was passed, any parliamentary material that might justify the majority decision can only be inferred from its inaction.

IV Critique: Legal Realism

In this section I argue that judges should acknowledge the personal and political views that "colour their legal decisions."[91] This is especially so when the Court is called on to deal with a politically-charged issue. In such cases, judges should confront the reality of what they are doing and acknowledge that they are, at least in part, making their decisions on the basis of the current social climate rather than seeking to "clothe their personal judgment with the imprint of an impersonal law."[92]

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88 D F Dugdale "Framing Statutes in an Age of Judicial Supremacy" (2000) 9 Otago L. Rev. 603 at 607.

89 Richard Ekins "The Relevance of the Rule of Recognition" (2006) 31 Australian Journal of Legal Philosophy 95, at 116.

90 Catherine Iorns Magallanes "The Just Do It Approach to Using Parliamentary History Materials in Statutory Interpretation" (2009) 15 Canterbury L Rev 205 at 205.

91 Brian Tamanaha "The Several Meanings of Politics in Judicial Politics Studies: Why Ideological Influence is not Partisanship" (2012) 61 Emory Law Journal 759 at 762.

92 E W Thomas "A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy" (1993) VUWLR Monograph 5 at 51.

If judges acknowledge the political or moral basis for controversial decisions, they will also be forced to justify those views.[93] Thomas J has argued that if judges took a more principle-oriented approach, the "importance of providing reasons [would] be accentuated ... [the judge would] be required to expound the considerations which have instructed them in reaching their conclusion. In many cases this [would] mean articulating, as best as possible, the reasons and considerations which led to the value judgment on which the decision is based," making judges more directly responsible for their decisions.[94] For example, in *Re Application by AMM and KJO*, the High Court undertook an analysis of how exactly societal values had changed and acknowledged this was the main reason for giving a wide scope to the word "spouse".[95]

The majority decision in this case appears to be based on a perception, also reflected in the lower courts, that Parliament and society as a whole are more accepting of abortion on demand.[96] However the Court did not acknowledge this, beyond making reference to the fact that Parliament does not appear to be troubled by the high number of abortions being granted on the mental health ground and that the Supervisory Committee's calls for reform of the law have gone unheeded.[97] This suggests that the majority saw Parliament's intent as being that the law should operate in practice so as to provide women in New Zealand with the right to abortion on demand. The majority should have made it clear that this was central to its decision, rather than feeling compelled to cloak its reasoning in administrative law arguments. This would have forced the majority to undertake a more robust analysis of its views, and so would have allowed Parliament to make it clear whether or not it agreed.

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93 See Dr James A Farmer QC "Lord Cooke and Judicial Decision-Making - A perspective from the Commercial Bar" in Paul Rishworth (ed) *The Struggle for Simplicity: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) at 54; Robin Cooke "The New Zealand National Legal Identity" (1987) 3 Canterbury L Rev 171.

94 At 59.

95 *Re Application by AMM and KJO to adopt a child*, above n 82, at [34]-[37].

96 See *Right to Life New Zealand Inc v The Abortion Supervisory Committee*, above n 2, at [25]; The Abortion Supervisory Committee v Right to Life New Zealand Inc, above n 20, at [120]; *Right to Life New Zealand Inc v The Abortion Supervisory Committee*, above n 3, at [58].

97 *Right to Life New Zealand Inc v The Abortion Supervisory Committee*, above n 2, at [25].

V The Role of the Law in Scrutinising the Clinical Decisions of Medical Professionals

Many of the Supervisory Committee's arguments related to the notion that certifying consultants are professional people who must be given freedom to exercise their clinical judgment, without fear of the "judge over their shoulder".[98] However, it is misleading to suggest that just because abortion is a medical procedure, the decision of whether or not to perform an abortion in any given case should be left entirely to the judgment of a medical professional. In this section I compare the functioning of the abortion law with the Misuse of Drugs Act 1975 in order to demonstrate that the courts can review clinical decisions made by medical practitioners, and explain why Wall v Livingston is not of as wide application as the majority held.

There are many instances where clinical decisions are susceptible to review. For example, High Court judges have the power to make orders discharging from hospital patients that have been "illegally" detained under the Mental Health (Compulsory Assessment and Treatment) Act 1992.[99] That is a clear instance of a legal test being applied to review a medical decision and it has been described as an important supervisory function of the Court.[100] Similarly, in cases of persons who are not able to manage their own affairs the Courts have jurisdiction to determine whether medical procedures satisfy the relevant legal test, of the "least restrictive intervention possible".[101]

A Analogy with the Misuse of Drugs Act 1975

The Contraception, Sterilisation, and Abortion Act defines "abortion law" as including the relevant provisions of the Crimes Act, so the function of the Committee in supervising the abortion law must be read in conjunction with

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98 See Joseph, above n 49, at 832.
99 Section 84(3).
100 *Re M* [1992] 1 NZLR 29 (HC).
101 Protection of Personal and Property Rights Act 1988, ss 6-10.

the criminal provisions. It is significant that procuring an abortion in a situation that is not justified under s 187A is a criminal act. Parliament cannot have intended that the Supervisory Committee be tasked with ensuring the abortion law is applied consistently and accordance with the law, rather than in situations where to procure an abortion would be a criminal offence, whilst also intending that it does not have the power to investigate whether criminal actions are being carried out in individual cases. The Supervisory Committee's information-gathering function is critical to this role.

The Misuse of Drugs Act provides a pertinent analogy. The Misuse of Drugs Regulations 1977 provide for dispensing practitioners to distribute certain controlled drugs, such as methadone.[102] A practitioner's decision to dispense those drugs can be likened to the decision to allow a woman to proceed with an abortion, as it involves a degree of clinical judgment. Dispensing practitioners are required to keep records including the surname, initials, and address of the person who prescribed the drugs, and to whom the drugs were prescribed, as well as the date and the amount of the drug.[103]

Using or dispensing controlled drugs is, like abortion, prima facie a criminal offence, unless it can be justified by a narrowly defined set of circumstances.[104] A key purpose of the record-keeping requirement is to ensure that licensed pharmacists and practitioners are not prescribing controlled drugs in situations not contemplated by the law.[105] Thus the underlying purpose is the same as that of the abortion law. Without record-keeping and auditing "there would be no way in which offences would come to light."[106]

B Critique of the Majority's Reliance on Wall v Livingston

The majority relied heavily on *Wall v Livingston* in which the Court of Appeal held that the Supervisory Committee cannot interfere with the

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102 Misuse of Drugs Act 1975, s 8(1), Sch 1-3.
103 Misuse of Drugs Regulations 1977, reg 37.
104 Editorial "Supervision of Abortion" [2012] 8 NZLJ at 257.
105 At 257; Misuse of Drugs Act 1975, ss 6, 8.
106 At 257.

medical judgment of certifying consultants.[107] The case is cited as having settled the position that the Supervisory Committee cannot interfere with the medical judgment of certifying consultants. However, I argue that the ratio decidendi of *Wall v Livingston* is not of general application and should not be seen to preclude review of certifying consultants' decisions after the abortion has taken place.

The Court of Appeal in that case cited three reasons for the absence of any review process in the Act itself:[108]

> First, special attention has been given in the Act to the preservation of anonymity of the woman patient. Secondly, the whole process of authorisation appears designed to place fairly and squarely upon the medical profession as represented in any particular case by the certifying consultants a responsibility to make decisions which will depend so very much upon a medical assessment pure and simple. And thirdly, there are the adverse medical implications which could arise from the passage of time should such a determination be easily open to review.

However, none of these observations supports the majority view. First, requiring consultants to report on specific cases does not necessarily constitute a breach of the patient's privacy or anonymity. Indeed, the Act explicitly provides that reports shall not contain identifying information about individual women.[109] To the extent that privacy is a concern, the fact that Parliament has decided that abortion is not a matter to be left simply to the woman and her doctor demonstrates a Parliamentary intent "to interfere with the privacy interests of women seeking abortions and with their professional relationships with their medical advisers."[110]

Secondly, while the process does rely on the clinical judgment of two consultants, the fact that Parliament has chosen to create a statutory body to oversee the functioning of abortion law and to manage the appointments of those consultants, demonstrates that the consultants are accountable for their

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107 *Wall v Livingston*, above n 29; *Right to Life v The Abortion Supervisory Committee*, above n 2, at [36]-[40], [44].

108 *Wall v Livingston*, above n 29, at 738-739.

109 Contraception, Sterilisation, and Abortion Act 1977, s 36(2).

110 *The Abortion Supervisory Committee v Right to Life New Zealand Inc*, above n 20, at [178].

decisions. While the Supervisory Committee is not able to interfere with medical assessments made in specific cases, an after-the-fact power of review as to whether consultants are making those assessments in accordance with the Act is entirely consistent with its function under s 14(1)(h).

Thirdly, the "adverse medical implications" that the Court contemplated would only arise if a review were permitted before an abortion was carried out, as Dr Wall attempted in that case. Where the abortion has been performed, a review of the certifying consultant's decision will have no effect on the woman involved. The Supervisory Committee is required "to make revocation/re-appointment decisions."[111] Part of that role requires the Supervisory Committee to review the work of consultants to determine whether or not they are making assessments in a neutral fashion and in accordance with the criminal law.

Thus it is clear that the concerns articulated in *Wall v Livingston* are valid in the circumstances of that case, but they are not of general application. It is the Supervisory Committee's role to scrutinise individual decisions to check that the abortion law, in the context of the criminal law, is being followed in practice.

VI The Practical Effect of the Majority Decision

The Committee has frequently suggested that certifying consultants are applying s 187A more liberally than Parliament intended, but expressed the view that it could do nothing about the situation.[112] This indicates that the current reporting practice is inadequate. In response to these concerns, the majority held that the Supervisory Committee is required to question individual practitioners about how they come to such a conclusion, [113] and that it is for the Health and Disability Commissioner to address concerns

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111 At [179].

112 *Right to Life New Zealand Inc v The Abortion Supervisory Committee*, above n 3, at [50]; Abortion Supervisory Committee *Report of the Abortion Supervisory Committee for 2005* (2005).

113 *Right to Life v The Abortion Supervisory Committee*, above n 2, at [40].

about certifying consultants who are misapplying the law. In this section I argue that neither of these will make much practical difference and that the better approach would have been for the majority to interpret the law in line with the minority approach, thus putting pressure on Parliament to consider reforming the law.

A Requiring the Supervisory Committee to Make Inquiries of Individual Certifying Consultants

To hold that the Supervisory Committee needs to make more robust inquiries of individual certifying consultants, in order to give effect to the purpose of the abortion law, is arguably inconsistent with the majority's view that the law is operating as intended. It is also unlikely to have much practical effect as no changes have been made to the form which certifying consultants are required to fill out as a result of the decision.[114] The standard form requires consultants to provide information about the patient's date of birth, socio-economic group and pregnancy history. It also requires the consultant to specify the ground, or grounds, on which the abortion is justified. There is only one line provided for the consultant to give more information about the particular ground, but given the small space provided this information is minimal in scope. Moreover, the current reporting process is one form per abortion request, rather than reports being grouped by consultant. It is difficult to see how the Committee could use information gathered in this way to check up on individual certifying consultants.

B The Role of the Health and Disability Commissioner

The majority also held that it was the role of the Health and Disability Commissioner to address concerns about certifying consultants who were misapplying the law. However, even if this is correct, it is not inconsistent for the Supervisory Committee to also have extensive review powers.[115] Its role is limited to supervision and oversight, but with a power and

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[114] Letter from Rachael Cole (Secretary of the Abortion Supervisory Committee) to Emma Smith regarding an Official Information Act Request (16 May 2013).

[115] *Right to Life New Zealand Inc v The Abortion Supervisory Committee*, above n 2, at [93].

requirement to make any complaints to the Commissioner, who is responsible for taking disciplinary action. This kind of overlap is managed in other contexts where a specific body exercises a role in relation to standards of professional conduct, but the police have the power to investigate possible breaches of criminal law. This enables each body to adequately perform its role.[116]

The Supervisory Committee does not make a practice of reporting any concerns to the Commissioner. Some patients have made complaints about individual certifying consultants and other professionals, such as counsellors, involved in the abortion process,[117] but the office of the Health and Disability Commissioner has no record of ever having received a referral from the Committee.[118] The Supervisory Committee has reported some cases to the police, but not in the numbers one would expect in light of its concerns as reported to Parliament; in 2004 the Supervisory Committee referred only four cases the police.[119] Moreover, while a process reliant on complaints to the Health and Disability Commissioner is likely to be effective in cases where a woman complains that a consultant has not given her sufficient information or denied her application for an abortion unreasonably, it seems unlikely that patients will complain about a certifying consultant who authorises abortions in situations not contemplated by the law.

C Is Reform of the Abortion Law Likely As a Result of This Case?

The majority decision has effectively rendered the Supervisory Committee's role redundant. It may continue to draw Parliament's attention to the fact that the abortion law is being applied more liberally than the wording of the statute permits, but Parliament will likely continue to do nothing. The law

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116 At [93].
117 *The Abortion Supervisory Committee v Right to Life New Zealand Inc*, above n 20, at [126].
118 Letter from Rachael Cole, above n 114.
119 *The Abortion Supervisory Committee v Right to Life New Zealand Inc*, above n 20, at [127].

has thus lost the "ability to respond to new conditions and attitudes".[120] Although the courts can provide "a window of opportunity" for issues that are "temporarily blocked in the political arena",[121] I argue that in the case of abortion, this decision has removed any Parliamentary impetus to reform the law and is an example of the courts overstepping their constitutional role.

If the Court had correctly interpreted the law according to the text and purpose as embodied in that text, Parliament would have been forced to confront the fact that abortion law in New Zealand is outdated and no longer in accordance with the views of the general public. While it is possible that in such a case Parliament would have retained the more conservative position embodied in the Act, that seems unlikely given its lack of action in response to the Supervisory Committee's frequently noted concerns, and given its lack of response to the decision in this case. In either case, such a chain of events would have better given effect to the Court's constitutional role and to the idea of dialogue between the Courts and Parliament leading to strong law-making.[122]

VII Conclusion

Although the majority of the Supreme Court recognised that "each side has had some success" in the final appeal of the case of *Right to Life New Zealand Inc v The Abortion Supervisory Committee*, this does not appear to be the case. Many welcomed the decision, as it appeared to effectively uphold the status quo of de facto abortion on demand in New Zealand.

This paper has demonstrated that there is reason to doubt the conclusions of the majority. The issue before the Court was one of statutory interpretation, and this essay has argued that, in light of the text and purpose of the Contraception, Sterilisation, and Abortion Act, the Supervisory Committee necessarily has the power to scrutinise individual decisions. The functions

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120 Brooks, above n 74, at 99.

121 Carol Harlow and Richard Rawlings *PressureThrough Law* (Routledge, London, 1992) at 173.

122 See Philip Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 KCLJ 321 at 330.

of the Supervisory Committee are described in very broad terms and it has wide powers to do anything that is reasonably necessary to fulfil its functions under the Act. Its key function is to ensure that abortions are performed consistently throughout New Zealand in circumstances where they are justified under s 187A of the Crimes Act. Central to this is the ability to check that certifying consultants are not expressing views that are either too liberal or too conservative for the tenor of the legislation. This was what the Royal Commission had in mind when it reported on the state of abortion law and recommended the changes that were enacted.

Although abortion is a matter that requires some degree of discretion and clinical judgment, the Supervisory Committee has a role in checking that medical professionals are in fact exercising their clinical judgment in line with the abortion law, and not just expressing their personal moral views. If the Supervisory Committee does not seek information about the reasons for granting an abortion in particular cases, "its ability to exercise its functions will be severely curtailed, and the Parliamentary purposes of consistent administration of the abortion law in accordance with the statutory criteria for lawful abortions will not be fulfilled."[123]

Underlying the majority decision is a set of policy values about the desired state of the abortion law. It may well be argued that Parliament's intent in modern circumstances, as opposed to when the Act was passed in 1977, is that we should have abortion on demand. Nevertheless, that is contrary to the statutory text and purpose. This paper has criticised the majority judgment for misinterpreting the statute, a decision that reflects theories of politics in judging. While it may be desirable in certain cases for the judiciary to ascertain the public mood and deliver judgments that reflect the social attitudes of the times, such practice undermines the constitutional role of the judiciary and the principle of the separation of powers. Abortion law is governed by statute and any real change should come from Parliament, not from the Courts. Although the parliamentary process can be slow, it "allows wider consultation and debate, and is likely to produce better law

[123] *Right to Life v The Abortion Supervisory Committee*, above n 2, at [96].

because the legislature is not constrained by the existing statutory text."[124] Now that the Courts have strained the statutory wording, Parliament is unlikely to view reform with any urgency.

[124] Bradley, above n 83, at 17; J F Burrows and R I Carter *Statute Law in New Zealand* (4th ed, Lexis Nexis, Wellington, 2009).

VIII Bibliography

A Cases

1 New Zealand

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

Re Application by AMM and KJO to adopt a child [2010] NZFLR 629 (HC).

Attorney- General v Ireland [2002] 2 NZLR 220 (CA).

Bayer v Police [1994] 2 NZLR 48 (CA).

Bulk Gas Users Group v Attorney-General [1983] NZLR 129 (CA).

Cashel Street Hotel Ltd v Casino Control Authority [1993] BCL 10 (HC).

CCSU v Minister of Civil Service [1985] AC 374 (HL).

Electoral Commission v Tate [1999] 3 NZLR 174 (CA).

Hammond v Hutt Valley and Bays Metropolitan Milk Board [1958] NZLR 720 (CA).

Lab Tests Auckland Ltd v Auckland District Health Board [2008] NZCA 385, [2009] 1 NZLR 776.

Re M [1992] 1 NZLR 29 (HC).

Marvin v Attorney-General HC Wellington A168/8, 17 April 1989.

Mercury Energy v Electricity Corporation of NZ [1994] 2 NZLR 385 (PC).

Northland Milk Vendors Association v Northern Milk Ltd [1988] 1 NZLR 530 (CA).

The Power Co Ltd v Gore District Council [1997] 1 NZLR 537 (CA).

Quilter v Attorney-General [1998] 1 NZLR 52 (CA).

R v Hines [1997] 3 NZLR 529 (CA).

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

Right to Life New Zealand Inc v The Abortion Supervisory Committee [2011] NZSC 97 (Leave to Appeal).

Right to Life New Zealand Inc v The Abortion Supervisory Committee HC Wellington CIV-2005-485-999, 9 September 2009 *(Costs).*

Right to Life New Zealand Inc v The Abortion Supervisory Committee (No 2) HC Wellington CIV-2005-485-999, 2 August 2009 *(Declarations).*

Right to Life New Zealand Inc v The Abortion Supervisory Committee [2008] 2 NZLR 825 (HC).

Unison Networks Ltd v Commerce Commission [2008] 1 NZLR 42 (SC).

Wall v Livingston HC New Plymouth A1/82, 19 January 1982.

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

2 England

Home Office v Dorset Yacht Co Ltd [1970] AC 1004 (HL).

Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997 (HL).

Re Racal Communications Ltd [1981] AC 374 (HL).

B Legislation

Contraception, Sterilisation, and Abortion Act 1977.

Crimes Act 1961.

Interpretation Act 1999.

Mental Health (Compulsory Assessment and Treatment) Act 1992.

Misuse of Drugs Act 1975.

Misuse of Drugs Regulations 1977.

Protection of Personal and Property Rights Act 1988.

C Books and Chapters in Books

Jocelyn Brooks and others *Ill Conceived: Law and Abortion in Practice in New Zealand* (Caveman Press, Dunedin, 1981).

W A P Facer *Legal Abortion in New Zealand* (New Zealand Rationalist Association, Auckland, 1977).

Dr James A Farmer, QC "Lord Cooke and Judicial Decision-Making - A perspective from the Commercial Bar" in Paul Rishworth (ed) *The Struggle for Simplicity: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997).

Bruce Harris "Judicial Activism and New Zealand's Appellate Courts" in Brice Dickson (ed) *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, New York, 2007) 273.

Carol Harlow and Richard Rawlings *Pressure Through Law* (Routledge, London, 1992).

Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007).

Marilyn Pryor *The Right to Live: The Abortion Battle of New Zealand* (Harlen Publishing, Auckland, 1977).

Janet Sceats *Induced Abortion in New Zealand 1976-1983* (Government Printing Office, Wellington, 1985).

D Journal Articles

Mark Bradley "The Ambulatory Approach at the Bottom of the Cliff: Can the Courts Correct Parliament's Failure to Update Legislation?" (2003) 9 Canterbury L. Rev. 1.

Robin Cooke "The New Zealand National Legal Identity" (1987) 3 Canterbury L. Rev. 171.

Editorial "Supervision of Abortion" [2012] 8 NZLJ 257.

Amy Dixon "Authorisation of abortion for a "serious danger to mental health": would practice stand up to the judicial test?" (2011) 43 VUWLR 289.

D F Dugdale “Framing Statutes in an Age of Judicial Supremacism” (2000) 9 Otago L. Rev. 604.

Richard Ekins “The Relevance of the Rule of Recognition” (2006) 31 Australian Journal of Legal Philosophy 95.

Dame Sian Elias “Transition, Stability and the New Zealand Legal System” (2003) 10 Otago L. Rev. 475.

William Eskridge “Dynamic Statutory Interpretation” (1987) 135 Univ. Penn. Law Rev. 1479.

Jeffery Goldsworthy “Is Parliament Sovereign?: Recent Challenges to the Doctrine of Parliamentary Sovereignty” (2005) 3 NZJPIL 7.

Catherine Iorns Magallanes “The Just Do It Approach to Using Parliamentary History Materials in Statutory Interpretation” (2009) 15 Canterbury L. Rev. 205.

Philip Joseph “Parliament, the Courts, and the Collaborative Enterprise” (2004) 15 KCLJ 321.

Mae Quinn “Feminist Legal Realism” (2012) 35 Harv. J.L. & Gender 1.

Sir Ivor Richardson “The Role of Judges as Policy Makers” (1985) 15 VUWLR 46.

John Smillie “Who Wants Juristocracy?” (2006) 11 Otago L. Rev. 183.

Brian Tamanaha “The Realism of Judges Past and Present” (2009) 57 Cleveland State Law Review 77.

Brian Tamanaha “The Several Meanings of Politics in Judicial Politics Studies: Why Ideological Influence is not Partisanship” (2012) 61 Emory L. J. 759.

Brian Tamanaha “Understanding Legal Realism” (2009) 87 Texas Law Review 731.

E W Thomas "A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy" (1993) VUWLR Monograph 5.

E Reports

Abortion Supervisory Committee *Report of the Abortion Supervisory Committee for 1979* (1979).

Abortion Supervisory Committee *Report of the Abortion Supervisory Committee for 1996* (1996).

Abortion Supervisory Committee *Report of the Abortion Supervisory Committee for 1998* (1998).

Abortion Supervisory Committee *Report of the Abortion Supervisory Committee for 1999* (1999).

Abortion Supervisory Committee *Report of the Abortion Supervisory Committee for 2000* (2000).

Abortion Supervisory Committee *Report of the Abortion Supervisory Committee for 2005* (2005).

Abortion Supervisory Committee *Report of the Abortion Supervisory Committee for 2007* (2007).

Abortion Supervisory Committee *Report of the Abortion Supervisory Committee for 2008* (2008).

Abortion Supervisory Committee *Report of the Abortion Supervisory Committee for 2009* (2009).

Abortion Supervisory Committee *Report of the Abortion Supervisory Committee for 2010* (2010).

Abortion Supervisory Committee *Report of the Abortion Supervisory Committee for 2011* (2011).

Abortion Supervisory Committee *Supplementary Report of the Abortion Supervisory Committee for 2011* (2011).

Abortion Supervisory Committee *Report of the Abortion Supervisory Committee for 2012* (2012).

New Zealand Medical Association NZMA Code of Ethics (2008).

New Zealand Royal Commission on Contraception, Sterilisation, and *Abortion Contraception, Sterilisation and Abortion in New Zealand: Report of the Royal Commission of Inquiry* (Government Printing Office, Wellington, 1977).

F Dissertations

Natasha Kusel "The Abortion Stalemate: A Failure of Legal Structure" (LLB(Hons) Dissertation, Victoria University of Wellington, 2010).

G Other Resources

Letter from Rachael Cole (Secretary of the Abortion Supervisory Committee) to Emma Smith regarding an Official Information Act Request (16 May 2013).

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