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**CONFRONTING NEW ZEALAND'S "WORKABLE"
ABORTION LAWS**

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Abstract

Abortion is illegal in New Zealand except in limited circumstances. In spite of this, it has been claimed that our abortion laws are “workable”. This paper confronts this claim and looks at whether it is justifiable from four different perspectives including the legal, pro-and-anti-abortion, and political perspectives. This discussion sheds light on important issues that arise when it comes to law reform in the context of the contentious and polarising issue that is abortion law in New Zealand. The subjectivity that surrounds the concept “workable” has material implications on the conclusions under each perspective. Nevertheless, it is found that overall, the claim that New Zealand’s abortion laws are workable is misconceived. Therefore, this paper goes on to consider whether the abortion system could be made better through law reform. Again subjectivity permeates this issue as we are confronted with the question “better for whom?”.

It is acknowledged that Parliament is never going to be able to please everyone when it comes to New Zealand’s abortion laws. However, this paper argues that Parliament should attempt to make the laws better for the majority of the population and ensure that they uphold fundamental legal principles such as the rule of law. Three options are proposed but based on the favoured perspectives, it is found that law reform involving the decriminalisation of abortion would be the most effective solution. This seems like a constructive conclusion, but the next question that arises is “is it going to be politically feasible?”.

Key Words:

Abortion, Contraception, Sterilisation, and Abortion Act 1977, Crimes Act 1961, Decriminalisation, Law Reform.

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I Introduction

It has been claimed that while New Zealand's abortion laws are outdated they are "workable".¹ This paper focuses on understanding whether this claim is justified and its implications on attempts to reform New Zealand's abortion laws. This is important because the perception that the current laws are workable is identified as being a significant barrier to convincing people, and in particular politicians, that reform is necessary and justifiable. This paper undertakes to challenge this perception and in order to do so, it must first confront the meaning of "workable" in the context of abortion laws. The subjectivity surrounding the issue makes it necessary to look at whether the laws are workable from four different perspectives including the legal, pro-and-anti-abortion, and political perspectives.

By way of background, this paper first looks at the situation before the laws were reformed in 1977 and outlines how the old laws were conceivably unworkable. It then considers the reform which occurred in order to ascertain what the current laws were intended to achieve. The main issue of whether the current laws are workable is then addressed and it is assessed from the four chosen perspectives. These perspective shed light on important issues that arise when approaching abortion law reform in New Zealand and it is found that the laws are unworkable from three out of the four perspectives. However, this finding only goes part of the way towards showing that abortion law reform is justified.

The next challenge is to show that reforming the law would actually make the current abortion system "better". Again this is a subjective concept and it is noted that because of the conflicting perspectives, Parliament is never going to be able to make the laws better for everyone. Nevertheless, this paper goes on to look at whether the laws could at least be made more workable from the pro-abortion and legal perspectives. Three alternative solutions are proposed, but it is found that law reform involving the decriminalisation of abortion would be the most effective solution from both the pro-abortion and legal perspectives. The difficulty with this conclusion is that *prima facie*, such law reform does not seem to be politically feasible. However, again this view is challenged and it is suggested that there are some potential ways in which this type of reform could be achieved.

¹ Stacey Kirk "Forty-year abortion law, described as 'offensive', in fact still good, says Government" *Stuff* (online ed, New Zealand, 13 March 17).

II "Workable" Laws

The purpose of reform is to make faulty laws better.² Therefore, in order to show that New Zealand's abortion laws need to be reformed it must first be shown that they are "faulty" and second, that reform would make the laws "better". The Oxford dictionary defines the term "faulty" as meaning "not working".³ This means that laws which are workable cannot be described as "faulty" meaning that reform would be prima facie unjustifiable. Thus, the perception that New Zealand's abortion laws are workable is a significant barrier to showing that reform is necessary and justifiable. In order to determine whether this perception is true, we must first establish what the term "workable" actually means in the abortion law context. The Oxford Dictionary defines "workable" as "capable of producing the desired effect or result".⁴ This highlights how inherently subjective the concept is because the "desired effect or result" will differ depending on the perspective that is taken. Though the concept of "workable" abortion laws could be examined from a number of different perspectives, this paper will focus on what it means from four key perspectives. These include the legal, pro-and-anti-abortion, and political perspectives. It is noted that a number of general assumptions are made in relation to each of these perspectives.

From a legal perspective, it is assumed that laws will be workable if they uphold the rule of law, and function as they were intended to apply and as administrative principles require them to apply. When it comes to people's perceptions of workable laws however, the meaning varies considerably. From a pro-abortion perspective, it is assumed that the laws will only be workable if they facilitate equitable access to safe, legal abortions, which does not require women to go through an arduous and demeaning process. Access to abortions also should not be vulnerable to threats through the courts. By contrast, it is assumed that from the anti-abortion perspective, the laws will only be workable if they are applied and enforced strictly so that abortion is treated as the crime it is deemed to be at law and only allowed in truly exceptional cases. Thus, the pro- and-anti-abortion perspectives directly clash. Then, from a very simplified political perspective, it is assumed that the laws will be workable if they are convenient for

² Sir Geoffrey Palmer "The Law Reform Enterprise: Evaluating the Past and Charting the Future" (2015) 131 LQR 402 at 404.

³ Oxford Dictionary "Definition of Faulty" (2017) English Oxford Living Dictionary <<https://en.oxforddictionaries.com>>.

⁴ Oxford Dictionary "Definition of Workable" (2017) English Oxford Living Dictionary <<https://en.oxforddictionaries.com>>.

politicians and if they work better than other laws which might need reform. The laws will also be likely to be perceived as workable from this perspective if there is not strong pressure from the public to change them.

Therefore, the assessment of whether New Zealand's abortion laws are "workable" depends very heavily on the values and beliefs of the spectator. It is also notable that this definition of "workable", which looks at whether the laws achieve the "desired effect" from each perspective, creates a relatively high threshold. It is acknowledged that sometimes in ordinary usage "workable" may be used in the sense that equates it with "tolerable". This could have material implications on the conclusions reached under each perspective as "tolerable" conceivably invokes a lower threshold than "desirable". Thus, though this paper favours the former definition, it makes a note of when the conclusion may be different if "workable" was to be used in this different sense.

III How We Got Here and Is It Workable?

A Pre 1977 – An Unworkable Abortion Law System

Before the 19th century, abortion was permissible under common law if it was carried out before quickening.⁵ The United Kingdom then passed the Ellenborough's Act in 1803 making abortion a crime whatever the stage of the pregnancy.⁶ This crime was retained in the UK Offences Against the Person Act 1861 which was adopted by New Zealand in 1866.⁷ This made it an offence for a woman to procure her own an abortion and for anyone else to attempt to procure an abortion.⁸ There was only a very limited right to abortion when a woman's life was in danger.⁹ In 1893 New Zealand passed the Criminal Code Act, which reduced the penalty for the woman to a maximum of seven years' imprisonment and to life for others. The crime was retained in the Crimes Act 1908, but s 182 protected an obstetrician who may have to sacrifice the child to save the mother.¹⁰

⁵ Abortion Services "A Brief History of Abortion Laws in New Zealand" (21 November 2014) <<http://abortionsservices.org.nz>>. For clarity "quickening" is fetal movements which occur between 18 – 20 weeks' gestation.

⁶ Abortion Services, above n 5.

⁷ Abortion Services, above n 5.

⁸ Abortion Services, above n 5.

⁹ Megan Cook "Abortion" Te Ara - the Encyclopedia of New Zealand (5 May 2011) <<http://www.TeAra.govt.nz/en/abortion>>.

¹⁰ Crimes Act 1908, ss 220 – 223.

During the 1920s and 1930s these laws were noticeably unworkable from all four perspectives. This was first evidenced by the rise in the number of women dying from septicemia caused by illegal abortions.¹¹ In 1927, abortion related deaths were found to account for just over 10% of maternal deaths, rising to 22% in 1930 and then to 36% in 1934.¹² The restrictive laws, coupled with the stigma of illegitimate children, and the lack of contraception and abortion services was a "lethal mix" for women in 19th century New Zealand.¹³ Thus, this situation was noticeably unworkable from a pro-abortion perspective because women did not have access to safe and legal abortion services and this led to fatal consequences. This dissatisfaction with the old laws was evidenced by the growth of pro-abortion groups such as the Abortion Law Reform Association of New Zealand (ALRANZ) which was established in 1971.¹⁴ The Women's National Abortion Action Campaign (WONAAC) also emerged as a more radical group which split from ALRANZ in 1973. ALRANZ argued that abortion was a decision for a woman and her doctor while WONAAC argued that abortion was a woman's right and her decision alone.¹⁵ Both of these groups ensured that their views that old laws were not working gained public recognition through protests and demonstrations.¹⁶ This made it harder for politicians to ignore the problems indicating that the laws were becoming unworkable from a political perspective too.

The situation under the past laws was also unworkable from an anti-abortion perspective. Despite the restrictive laws, abortions were still taking place and the laws appeared to be difficult to enforce. This was evidenced by the highly publicised trial of the Hastings 'abortionist', Isabel Annie Aves in 1938. Aves had been brought to trial on four separate occasions for the murder of at least 22 fetuses found in her backyard.¹⁷ However, each trial failed to gain a conviction as the juries could not agree whether she was responsible for the

¹¹ Barbara Brookes "Reproductive Rights: The Debate over Abortion and Birth Control in the 1930s" in Barbara Brookes, Charlotte Macdonald and Margaret Tennant (eds) *Women in History: Essays on European Women in New Zealand* (Wellington, 1986) 122 at 125.

¹² Barbara Brookes "The Committee of Inquiry into Abortion in New Zealand 1936-37" (BA (Hons) Thesis, University of Otago, 1976) at 88.

¹³ Alison McCulloch and Ann Weatherall "The fragility of de facto abortion on demand in New Zealand Aotearoa" (2017) 27(1) *Feminism and Psychology* 92 at 94.

¹⁴ Megan Cook "Abortion - Opposition and support from the 1960s" (5 May 2011) Te Ara - the Encyclopedia of New Zealand <<http://www.teara.govt.nz>>.

¹⁵ Megan Cook "Abortion - Opposition and support from the 1960s", above n 14.

¹⁶ See Raewyn Stone "Group Struggle in a Value Field: The Comparative Performance of New Zealand Pressure Groups on the Question of Abortion, 1970-1975" (1977) 29 *Political Science* 139 at 139.

¹⁷ Barbara Brookes "Aves, Isabel Annie" (1998) Te Ara - the Encyclopedia of New Zealand <<http://www.TeAra.govt.nz>>.

abortions and consequently she escaped conviction.¹⁸ This demonstrates the ongoing difficulty of proving that someone has actually procured an illegal abortion.¹⁹ The concerns of the anti-abortionists were evidenced by the emergence of the Society for the Protection of the Unborn Child (SPUC) established in 1970.²⁰ SPUC's aim was to prevent an increase in the number of abortions occurring either through a liberalisation of the criminal law or through a liberalisation in the interpretation of the law.²¹ They also ensured that their views maintained strong publicity indicating to the Government that the laws were not working for either side of the pro-and-anti-abortion debate.

The difficulty of enforcing the old abortion laws demonstrated that they were also unworkable from a legal perspective. While people who performed abortions may not have been held accountable at law this did not mean that they were not held accountable at all. When the law fails, it is not uncommon for other people such as vigilantes to step in to achieve what they believe to be justice.²² This was also illustrated in the case of Aves when soon after her trial she was killed by the fiancé of a woman who had allegedly received an abortion from her and had become seriously ill following receiving her services.²³ Such a consequence is much harsher than that which would have occurred under the law. The difficulty of enforcing the law also meant that people could not predict how it was going to apply and consequently the rule of law was not being effectively upheld.²⁴

Moreover, there was evidence to suggest that the law was being misused. This was demonstrated by the events which occurred following the establishment of New Zealand's first abortion clinic, the Auckland Medical Aid Centre (the Centre), which opened in 1974.²⁵ This centre provided women who met the legal criteria with counselling and pregnancy termination for \$80.²⁶ This was a positive step from a pro-abortion perspective. However, the Centre was

¹⁸ Brooks, "Aves, Isabel Annie", above n 17.

¹⁹ Gideon Haigh, *The Racket: How Abortion Became Legal in Australia* (Melbourne University Press, 2008) at 23, quoting a 'distinguished medico Dr Herbert Moran', writing in 1910.

²⁰ Megan Cook "Abortion - Opposition and support from the 1960s", above n 14.

²¹ Stone, above n 16, at 141.

²² See generally Thomas Giddens *Intersections of Comics and Law* (Routledge, New York, 2015); and Paul Hoffman "Vigilantism: The Last Resort of the Unprotected (19 November 2012) World Justice Project <<https://worldjusticeproject.org>>.

²³ NZ Territory "Annie Aves" <www.nzterritory.com/>.

²⁴ Lord Tom Bingham *The Rule of Law* (Allen Lane, London, 2010) at 37.

²⁵ Megan Cook "Abortion - Controversy: 1974 to 1980s" (5 May 2011) Te Ara – The Encyclopedia of New Zealand <<https://www.teara.govt.nz/>>.

²⁶ Raewyn Stone, 'The Political Response to the Question of Abortion in New Zealand from 1970 – 1975' (Masters Thesis, University of Auckland, 1977) at 77.

raided by the police shortly after opening and subjected to an investigation by Auckland's Criminal Investigation Branch.²⁷ The police claimed to have a warrant on the basis of complaints that the Centre was performing illegal abortions.²⁸ It has now been reported that the pretext for the raid was flimsy and was essentially a "fishing expedition".²⁹

These events demonstrated the vulnerability of solutions which arise outside of the law and how the restrictive laws can be used to undermine such initiatives. However, the upside was that they led to a public outcry, not only from the pro-choice groups but also from the establishment bodies, including the Medical Association, the Council of the New Zealand Obstetrical and Gynecological Society, and the General Practitioners Society.³⁰ This suggests that sometimes it takes the misuse of the law and public threats to current practice to galvanise people to demand change to outdated laws. It was also a public demonstration that the laws were perceived to be unworkable from more than just the pro-abortion perspective.

The strong indications from the public that the laws were not working became even more pronounced in the 1970s as there was growing medical and public support for more liberal abortion laws.³¹ The pressure for Government action was coming from a number of different sources. Firstly, there was more research and publicity that showed that the incidence of illegal abortions was still a growing problem.³² Secondly, the increasing number of abortions showed that the laws were being stretched to allow for more liberal interpretations and by 1975, prominent medical professionals were expressing support for abortion law reform.³³ Thirdly, National Research Bureau surveys commissioned by ALRANZ in 1972 and 1974 showed that there was majority (over 60%) support for abortions being allowed on several grounds not provided for within the then current laws.³⁴ These strong and widespread public indications that laws were perceived to be unworkable by the majority of the population made it more difficult for politicians to ignore that public sentiment. In turn, this made it less convenient to

²⁷ Alison McCulloch *Fighting to choose: the abortion rights struggle in New Zealand* (Victoria University Press, Wellington, 2013) at 84.

²⁸ Transcript of the testimony of Detective. Sgt. Garry Lambert in *R v Woolnough* [1977] 2 NZLR 508 (CA) cited in McCulloch, above n 27, at 84.

²⁹ McCulloch, above n 27, at 87.

³⁰ At 83.

³¹ Stone, above n 16, at 148.

³² At 140.

³³ At 140.

³⁴ At 140.

leave the old laws place suggesting that the laws had also become unworkable from a political perspective.

Therefore, the pre-1977 abortion law system was noticeably unworkable from the four noted perspectives. As a consequence, the Government appointed the Royal Commission of Inquiry into Contraception, Sterilisation and Abortion (the Commission) in 1975, which reported in 1977.³⁵ A Royal Commission of Inquiry is a type of investigating body that is used by the Government when it wishes to investigate certain matters outside normal parliamentary or political agencies.³⁶ This shows that abortion has always been treated as an issue outside the normal business of politics and is one that the Government intentionally distances itself from. The Report confirmed that the old laws were not working and this led to the 1977 reforms which were intended to make the laws relating to abortion in New Zealand better.

B The Reform in 1977

The reforms that took place in 1977 resulted in our current abortion laws which include ss 182–187A of the Crimes Act 1961 (the Crimes Act) and ss 10–46 of the Contraception, Sterilisation and Abortion Act 1977 (the Act). It is necessary to establish how these laws were intended to apply for the purposes of comparing that intention to how they are now being interpreted and applied. This can be deduced from looking at the Report of the Royal Commission which forms the basis of our current abortion laws.³⁷ In that report, the Commission recommended that the Government adopt what has become known as our “middle-ground” legal position which was aimed at striking a compromise for both the sides of the pro-ant-anti-abortion debate.³⁸ The Report provided that abortion is not to be available “on request”,³⁹ or for reasons of “social convenience”,⁴⁰ but it may be available in limited circumstances when the continuation of the

³⁵ See Royal Commission on Contraception Sterilisation and Abortion *Contraception, Sterilisation and Abortion in New Zealand: Report of the Royal Commission of Inquiry* (Government Printer, 1977); *Right to Life New Zealand Inc v The Abortion Supervisory Committee* [2008] NZHC 865; [2008] 2 NZLR 825 (*Right to Life HC*) at [9].

³⁶ Alexander McIntock “Royal Commission” (1966) Te Ara – The Encyclopedia of New Zealand <<https://teara.govt.nz>>.

³⁷ See Margaret Sparrow *Abortion Then & Now: New Zealand Abortion Stories from 1940 to 1980* (Victoria University Press, Wellington, 2010) at 149; and Contraception, Sterilisation and Abortion Bill 1977 (57-2) Explanatory Note.

³⁸ Hugo Farmer “An Analysis of New Zealand’s Abortion Law System and a Guide to Reform” (2013) 1 Public Interest Law Journal of New Zealand 147 at 161; and *Right to Life New Zealand Inc v The Abortion Supervisory Committee* [2008] 2 NZLR 825 at 826.

³⁹ Royal Commission on Contraception Sterilisation and Abortion, above n 35, at 273.

⁴⁰ At 200.

pregnancy would put the life, physical or mental health of the woman at risk.⁴¹ The basis for this position was the Commission's view that "it is wrong, except for good reasons, to terminate unborn life" and that an unborn child is entitled to "a measure of protection by the law".⁴² However, they recognised that in some exceptional instances that protection "should yield in the face of compelling competing interests" in the form of serious danger to the mother's life or physical health.⁴³ Therefore, abortion was intended to be the *exception* not the norm.

These recommendations and viewpoints are reflected in our current laws whereby it is a criminal offence to "unlawfully" attempt to perform an abortion,⁴⁴ or supply materials for the purpose of procuring an abortion.⁴⁵ This offence carries a maximum penalty of 14 years in prison.⁴⁶ Therefore, *prima facie*, abortion is a serious crime under New Zealand law. However, a number of exceptions are set out in s 187A of the Crimes Act. The most common exception is s 187A(1)(a) (the mental health ground) under which 97% of abortion requests are granted⁴⁷ This section states that abortion will not not be unlawful if:⁴⁸

in the case of a pregnancy of not more than 20 weeks' gestation, the person doing the act believes... that the continuance of the pregnancy would result in serious danger to the life, or to the physical or mental health, of the woman or girl.

The Commission was also concerned about the risk that doctors may be biased in applying the s 187A exceptions.⁴⁹ Therefore, it recommended that Parliament should establish a panel to make decisions in individual cases.⁵⁰ In the alternative, it recommended 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".⁵¹ Parliament opted for the later "two doctors" model, placing the decision to authorise abortions solely with the medical profession. In order to guard against the risks noted by the Commission, it adopted the further recommendation to set up a

⁴¹ Royal Commission on Contraception Sterilisation and Abortion, above n 35, at 200; See also *Right to Life HC*, above n 35, at [1].

⁴² At 274.

⁴³ At 270 – 272; See also *Right to Life HC*, above n 35, at [1].

⁴⁴ Crimes Act 1961, s 183.

⁴⁵ Section 186.

⁴⁶ Section 183(1).

⁴⁷ Abortion Supervisory Committee *Report of the Abortion Supervisory Committee* (2016) at 23; see also *Right to Life HC*, above n 35, at [56].

⁴⁸ Crimes Act 1961, s 187A(1)(a)

⁴⁹ Royal Commission on Contraception Sterilisation and Abortion, above n 35, at 294 – 297.

⁵⁰ At 297.

⁵¹ At 297.

statutory committee “to have general oversight of the administration of abortion law ... and give general supervision to the working of the abortion law”.⁵² Thus the Act established the Abortion Supervisory Committee (the Supervisory Committee),⁵³ which has the following functions:⁵⁴

- (a) To keep under review all the provisions of the abortion law, and the operations and effect of those provisions in practice:
...
 - (i) To take all reasonable and practicable steps to ensure that the administration of the abortion law is consistent throughout New Zealand, and to ensure the effective operation of this Act and the procedures thereunder:
... and;
- (k) To report annually to Parliament on the operation of the abortion law.

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”. The Committee also appoints the certifying consultants who are empowered to authorise abortions. When doing so, it must be satisfied that such consultants’ assessment of cases will not be “coloured by views in relation to abortion generally that are incompatible with the tenor of this Act”.⁵⁵ The express purpose of this provision is therefore to avoid determinations by consultants that may be influenced by bias or predetermination based on some strong subjective attitude for or against abortion.⁵⁶ Thus, it appears that Parliament intended the Supervisory Committee to have a broad and extensive role in supervising the functioning of New Zealand’s abortion laws and a wide discretion in deciding how best to fulfill its functions.

The Act further imposes procedural requirements before a woman can be granted an abortion under one of the exceptions in the Crimes Act.⁵⁷ Firstly, the woman must go to a General Practitioner (GP) or a Family Planning clinic to receive an initial assessment, including confirmation of the pregnancy.⁵⁸ That doctor also decides whether to refer the case to one (if

⁵² Royal Commission on Contraception Sterilisation and Abortion, above n 35, at 25.

⁵³ Contraception, Sterilisation and Abortion Act 1977, s 10.

⁵⁴ Section 14(1)(a), (i) and (k).

⁵⁵ Section 30(5).

⁵⁶ *Wall v Livingston* [1982] 1 NZLR 734 (CA), at 738.

⁵⁷ Contraception, Sterilisation and Abortion Act, ss 32 – 33.

⁵⁸ Martha Silva, Toni Ashton and Rob McNeill “Improving termination of pregnancy services in New Zealand” (2011) 124 NZMJ 83 at 84.

he or she is a certifying consultant),⁵⁹ or two of the certifying consultant(s), if they consider that one of the s 187A exceptions “may apply” to the case at hand.⁶⁰ Importantly, “no abortion shall be performed unless and until it is authorised by two certifying consultants”.⁶¹ Consultants may then authorise abortions if they are of the opinion that the woman's case does come within one of the exceptions under s 187A.⁶² Only once two certified consultants issue a certificate authorising the abortion, will the doctor who performs the abortion be immune from conviction under the Crimes Act.⁶³ The abortion must also take place in a licensed institution, except in cases where they believe there is immediate danger to the woman's life.⁶⁴

Thus, there are considerable legal hoops which women must go through in order to receive an abortion under the current laws in New Zealand. Even then, there is still a small risk that doctors could be guilty of a crime, for example if it can be proved that at the time when they performed an abortion, they did not believe it to be lawful.⁶⁵ These requirements reflect the overriding purpose of the laws that abortions should only be available in exceptional circumstances.

C Post 1977 – A Workable Solution?

1 The Legal Perspective

First and foremost, laws will be workable from a legal perspective if they uphold the rule of law. The rule of law is a foundational doctrine of New Zealand's constitution and is regarded as a “guiding light of constitutional property”.⁶⁶ When a country has outdated laws which are at odds with current practice, the rule of law suffers.⁶⁷ The first principle of Lord Bingham's famous formulation of the rule of law is that “the law must be accessible and so far as possible intelligible, clear and predictable”.⁶⁸ A key clarity issue that arises under the current abortion laws relates to the proper interpretation of “mental health” in s 187A(1)(a), which was left undefined by Parliament. This is concerning because it has been reported that 97% of abortion

⁵⁹ Contraception, Sterilisation and Abortion Act, s 32(2)(b)(i).

⁶⁰ Section 32(b)(ii).

⁶¹ Section 29.

⁶² Section 33.

⁶³ Crimes Act 1961, s 187A(4).

⁶⁴ Contraception, Sterilisation and Abortion Act, s 37(1).

⁶⁵ Crimes Act 1961, s 187A(4).

⁶⁶ Matthew Palmer “Accessing the Strength of the Rule of Law in New Zealand” (paper presented to the New Zealand Centre for Public Law Conference on “Unearthing New Zealand's Constitutional Traditions”, Wellington, 30 August 2013).

⁶⁷ See Suthichai Yoon “Rule of law undermined by too many outdated laws” *The Nation* (online ed, Thailand, 2 June 2016).

⁶⁸ Lord Bingham, above n 24, at 37.

requests were granted under this ground in 2016.⁶⁹ "Mental health" could either be given a wide, positive definition or a narrow, negative definition. The wide, positive definition centres around wellbeing and is consistent with the World Health Organisation (WHO)'s definition of "mental health" as:⁷⁰

a state of wellbeing in which the individual realises his or her own abilities, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to his or her community.

By contrast, the narrow, negative definition of "mental health" means the absence of a recognised mental illness.⁷¹ Thus, the different interpretations of mental health can conceivably have significant implications on how the exception is applied. The positive definition allows for a more flexible finding of a serious danger to a woman's mental health under s 187A(1)(a). For example, the ground could potentially be satisfied by simply showing that the woman would not be able to cope with the normal stresses of life. Research suggests that medical practitioners generally apply the wide definition of mental health in the abortion context as it shows that they do not often use diagnostic processes when assessing mental health.⁷² However, we cannot assume that all consultants are interpreting "mental health" in such a way, especially since a number of women are still told that their abortions are "not justified".⁷³

Therefore, access to abortions in New Zealand is largely dependent on health practitioners' interpretation and application of the mental health ground. This creates an ambiguous and changeable standard of when access to abortions is available.⁷⁴ As a consequence, it is contended that the laws are unclear and unpredictable meaning they fail to uphold Lord Bingham's first principle of the rule of law. The fact that some women miss out on abortions while others, who may be in similar circumstances, get them indicates that the current laws

⁶⁹ Abortion Supervisory Committee (2016), above n 47, at 23; see also *Right to Life HC*, above n 35, at [56].

⁷⁰ World Health Organisation *Strengthening Mental Health Promotion* (Geneva, 2001).

⁷¹ Amy Dixon "Authorisation of Abortion for a "Serious Danger to Mental Health": Would the Practice Stand Up to the Judicial Test?" (2012) 43 VUWLR 289 at 301; and *Right to Life HC*, above n 35, at [6].

⁷² See Steven Lillis, Graham Melsop and Gaele Dutu "General Practitioners' View on the Malor Psychiatric Classification Systems" (2008) 121 *Journal of the New Zealand Medical Association* 3373.

⁷³ Henry Cooke "Hundreds of Kiwi women told their abortions were 'not justified'" *Stuff* (13 March 2017) <<http://www.stuff.co.nz/>>, based on numbers received from the Abortion Supervisory Committee under the Official Information Act.

⁷⁴ Ronli Sifris *Reproductive Freedom, Torture and International Human Rights: Challenging the Masculinisation of Torture* (Routledge, Abingdon, 2014) at 51.

also fail to satisfy Lord Bingham's third principle, that "the laws of the land should apply equally to all".⁷⁵ This further fuels uncertainty in relation to the application of the law because women cannot be sure whether or not their abortions will be authorised.

A serious disadvantage of having laws that are uncertain is that it means people cannot form expectations which they can rely on, therefore limiting their freedom and autonomy. It has been suggested that securing an atmosphere conducive to freedom is a matter of dignity and "respecting human dignity entails treating humans as persons capable of planning and plotting their future".⁷⁶ Our current abortion laws can thus be seen to undermine women's dignity and capability to plan their own future. Women seeking abortions in New Zealand appear to be at the mercy of consultants' unpredictable interpretation and application of the unclear laws. Therefore, the rule of law is being undermined in a number of ways by the current abortion laws and this is a powerful indicator that they are unworkable from a legal perspective.

Moreover, the laws also do not appear to be functioning as they were intended to apply. Despite the intention of Parliament in 1977 that abortion should not be available on request, it is arguable that today we do essentially have "de facto abortion on request" in New Zealand.⁷⁷ Induced abortion is one of the most commonly performed gynaecological procedures in New Zealand and it affects about one in four women in their reproductive lives.⁷⁸ It has been suggested that some consultants approve every request and in 2008, 99% of abortions requested were said to be authorised.⁷⁹ The Abortion Supervisory Committee has repeatedly drawn Parliament's attention to its concerns that the laws are operating more liberally in practice than they were intended to. In a *Sunday Star-Times* article, a previous Chair of the Supervisory Committee, Dr Christine Forster, was quoted as saying:⁸⁰

"We do essentially have abortion on demand or request... our view is that over the years of listening to people, it's time perhaps to be more honest about it. Certainly in the main centres, in Auckland, Wellington and Christchurch, if a woman wants an abortion I think she'll get one..."

⁷⁵ Lord Bingham, above n 24, At 37.

⁷⁶ Joseph Raz "The Rule of Law and its Virtue" (1977) in Joseph Raz *The Authority of Law* (Oxford University Press, Oxford, 1979).

⁷⁷ See Farmer, above n 38, at 161; and *Right to Life HC*, above n 35, at [56].

⁷⁸ See Women's Health "Abortion/ Termination of Pregnancy" < <https://www.womens-health.org.nz> >.

⁷⁹ *Right to Life HC*, above n 35, at [56].

⁸⁰ Cited in *Right to Life HC*, above n 35, at [53].

While this paper does not make a definite conclusion as to whether or not we have de facto abortion on request, it takes the view it is at least plausible. If we do have abortion on request, then this is directly inconsistent with the way in which the abortion laws were intended to apply when they were introduced in 1977. Even if we do not necessarily have abortion on request, the fact that most abortions are approved means it is the norm, not the exception. Again this is inconsistent with how the the laws were intended to apply.⁸¹

Furthermore, the way the laws are being applied by consultants gives rise to concerns as to the lawfulness of many of the abortions approved in New Zealand. One certified consultant has honestly admitted that when a woman comes to her seeking an abortion she simply requires that the woman sign a piece of paper saying they have a mental illness and that her only requirement is to see that the woman does want to have an abortion.⁸² Women have also admitted that to get the outcome they need, they have to be prepared to lie.⁸³ Thus, it is conceivable that consultants are authorising abortions which they do not honestly believe to be lawful. This has led to numerous attacks through the courts, mainly from pro-life groups, who want stricter enforcement of the current laws. A key issue which arises when determining such cases is whether the courts or the Supervisory Committee have the power to review individual consultants' decisions. The following cases have dealt with this issue.

(a) *Wall v Livingston*

In this case, Dr Wall, a pediatrician, sought judicial review of two consultants' decision to authorise an abortion.⁸⁴ Dr Wall believed there were no grounds under s 187A of the Crimes Act to authorise the abortion and he alleged bad faith on the part of the two consultants.⁸⁵ This was an attempt to review the lawfulness of the consultants' authorisation prior to the abortion being performed and the applicant had sought an order from the High Court that would prevent

⁸¹ Royal Commission on Contraception Sterilisation and Abortion, above n 35, at 200; See also *Right to Life HC*, above n 35, at [1].

⁸² Newshub "Dunedin doctor champions 'controversial' abortion stance" (online ed, New Zealand, 4 July 2017) < <http://www.newshub.co.nz> >.

⁸³ Francis Cook "The Big Read: Real stories of women who've had an abortion in New Zealand" *The New Zealand Herald* (online ed, New Zealand, 16 March 2017).

⁸⁴ *Wall v Livingston*, above n 56, at 735.

⁸⁵ At 735.

it taking place.⁸⁶ At first instance, the application was refused and the abortion took place.⁸⁷ However, the applicant subsequently appealed to the Court of Appeal. The Court of Appeal dismissed the idea that the decisions of consultants could be challenged on the basis of enforcing the legal rights of the unborn child.⁸⁸ It emphasised that while the Supervisory Committee has a responsibility for the general oversight of certifying consultants throughout New Zealand, it is given no control, authority or oversight in respect of the individual decisions of consultants.⁸⁹ The Court also declined to decide whether consultants' decisions are subject to judicial review but they suggested that this would only be available in all but the rarest of circumstances.⁹⁰

Thus, this judgment has been taken to support a narrow reading of the Supervisory Committee's functions.⁹¹ It is necessary to note however, that the Court did not intend to provide a comprehensive analysis of the Supervisory Committee's role under the Act. Rather it limited its discussion to a consideration of the Committee's role before the authorised termination took place.⁹² It therefore left some confusion as to whether the Court's discussion could extend to after the event inquiries of consultants' decisions.

(b) *Right to Life New Zealand Inc v The Abortion Supervisory Committee*

The *Right to Life New Zealand Inc v The Abortion Supervisory Committee (Right to Life)* decisions demonstrate the markedly different approaches that can be taken by the courts when approaching our current abortion laws.⁹³ This case involved a claim from Right to Life, that the Supervisory Committee was failing to exercise its statutory functions because it was not ensuring that the consultants were properly applying the grounds for abortion.⁹⁴ They also alleged that the Supervisory Committee had duties to inquire into the circumstances in which

⁸⁶ *Right to Life New Zealand Inc v The Abortion Supervisory Committee* [2012] NZSC 68, [2012] 3 NZLR 762 [*Right to Life SC*] at [79].

⁸⁷ *Wall v Livingston HC* New Plymouth A1/82, 19 January 1982 (*Wall v Livingston HC*).

⁸⁸ *Wall v Livingston*, above n 56, at 740.

⁸⁹ At 738.

⁹⁰ At 741.

⁹¹ See *Right to Life SC*, above n 86, at [40].

⁹² At [80].

⁹³ *Right to Life HC*, above n 35; *The Abortion Supervisory Committee v Right to Life New Zealand Inc* [2011] NZCA 246, [2012] 1 NZLR 176 (*Right to Life CA*); and *Right to Life SC*, above n 86.

⁹⁴ *Right to Life HC*, above n 35, at [36].

certifying consultants are authorising the performance of abortions on the mental health ground and to seek proper information on mental health grounds from certifying consultants.⁹⁵

In the High Court, Miller J's approach differed from that taken by the Court of Appeal in *Wall v Livingston*. He held that the Supervisory Committee can review or scrutinise the individual decisions of certifying consultants and form its own opinion on the lawfulness of these decisions.⁹⁶ He also found that under s 36 of the Act it could require consultants "to keep records and report on cases they have considered, for the purpose of performing its statutory functions".⁹⁷ Moreover, Miller J appeared to adopt the narrow interpretation of "mental health" assuming that "serious danger...to...mental health" could only be lawful if it rested on a "real risk of a recognised diagnosis of mental illness".⁹⁸ As a result, he doubted that so many women would be able to establish the lawfulness of their abortions under this ground.⁹⁹ Though he made no final conclusion on the point, Miller J took the view that the statistics and the Committee's comments over the years confirm that New Zealand does essentially have abortion on request.¹⁰⁰ Therefore, this decision suggested that the laws have not been being applied as they were intended to apply and this has allowed for unlawful practices to occur. This would indicate that the laws are wholly unworkable from a legal perspective.

However, the Court of Appeal and Supreme Court again took a markedly different approach to the issue.¹⁰¹ The majority of the Supreme Court upheld *Wall v Livingston* and confirmed that the Supervisory Committee cannot question or inquire into the decision-making of consultants in individual cases even after the event.¹⁰² It held that the Act treats the legality of abortions as a question falling solely in the domain of consultants due to the omission of any provision expressly equipping the Committee with the investigative powers needed to review consultants' decisions.¹⁰³ A key argument of the majority was that if Parliament had intended the power of review to be anything more than a general power, it would have made an express provision to that effect and included appropriate safeguards for consultants.¹⁰⁴

⁹⁵ *Right to Life HC*, above n 35, at [37].

⁹⁶ At [5].

⁹⁷ At [5].

⁹⁸ At [56] and [125].

⁹⁹ At [56] and [125].

¹⁰⁰ At [56].

¹⁰¹ *Right to Life CA*, above n 93; and *Right to Life SC*, above n 86.

¹⁰² *Right to Life SC*, above n 86, at [40].

¹⁰³ At [40].

¹⁰⁴ At [44].

It is questionable whether Parliament's intent in relation to the Supervisory Committee's powers can be deduced as simply as was done so by the majority in the Supreme Court. The minority judgment of McGrath and William Young JJ arguably presented a closer reading of the statute and this led to a different interpretation as to the true scope of the Supervisory Committee's functions. Their approach found that these functions are much wider than the majority judgment recognised. They held that the Committee is empowered to seek information retrospectively from certifying consultants about their diagnoses in individual cases that led to their decisions on authorisation.¹⁰⁵ They placed greater emphasis on the fact that s 14(1)(i) of the Act requires positive action by the Supervisory Committee to take "all reasonable and practicable steps" to ensure that the administration of the abortion law is consistently and effectively applied throughout New Zealand.¹⁰⁶ They further went on to make the powerful statement that:¹⁰⁷

if the Supervisory Committee is not permitted to seek information from consultants about individual cases, its ability to exercise its functions will be severely curtailed, and the Parliamentary purposes of consistent administration of abortion law in accordance with the statutory criteria for lawful abortions will not be fulfilled.

This interpretation seems sensible, especially in light of the fact that our abortion law is being applied inconsistently by consultants throughout New Zealand suggesting that the Supervisory Committee's key function is being frustrated by not allowing them to review individual consultants' decisions. Thus this decision suggests that the majority's approach is inconsistent with the way in which laws were intended to apply. If this is true, then arguably the majority refused to apply the laws as they were intended to apply because this is out of touch with modern values and practice. In any case, the different approaches of the Courts highlight the uncertainty relating to the laws further showing how they are undermining the rule of law and indicating that they are unworkable from a legal perspective.

Moreover, the majority's approach, which disclaims the Supervisory Committee's power to review the lawfulness of consultants' individual decisions to authorise abortions, seems inconsistent with administrative principles. A fundamental constitutional principle is that the

¹⁰⁵ *Right to Life SC*, above n 86, at [56].

¹⁰⁶ At [65].

¹⁰⁷ At [96].

courts will be slow to conclude that Parliament intended that decision-makers should exclusively decide on questions of statutory decision-making.¹⁰⁸ In *Re Racal Communications Ltd*, Lord Diplock said that there is a:¹⁰⁹

presumption that where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined: and if there has been any doubt as to what that question is, this is a matter for courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity.

It therefore seems inappropriate that the courts and the Supervisory Committee are allowing consultants to decide exclusively whether a woman's abortion is lawful. This is especially so when there is doubt in relation to which definition of "mental health" should be used when applying s 187A(1)(a). This is effectively allowing the consultants, through their decision-making powers, to decide exclusively on the appropriate interpretation of this term. This approach is anomalous. If a decision maker misconstrues or misapplies its statutory power, such an error of law ought to be reviewable.¹¹⁰ As previously mentioned, there have been public suggestions that certifying consultants are misapplying the abortion laws by allowing for de facto abortion on request. Therefore, not allowing the Supervisory Committee the power to review the consultants' individual decisions indicates that the way the laws are functioning is at odds with administrative principles. Thus, there appears to be overwhelming evidence that the current abortion laws are unworkable from a legal perspective.

2 *The Pro-Abortion Perspective*

Prima facie, it may seem like the current abortion system is workable from a pro-abortion perspective. In general, women in New Zealand can access legal abortions safely and anonymously.¹¹¹ As shown in the previous discussion many people believe that we do effectively have abortion on request in New Zealand, despite this being inconsistent with how

¹⁰⁸ See, for example, *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 133; *Re Racal Communications Ltd* [1981] AC 374 (HL) at 382-383 per Lord Diplock; and Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 835.

¹⁰⁹ *Re Racal Communications Ltd*, above n 108, at 382 – 383.

¹¹⁰ Joseph, above n 108, at 919.

¹¹¹ See Hart Reynolds "Cross Examination: New Zealand's Ancient Abortion Laws" (2017) Equal Justice Project < <http://equaljusticeproject.co.nz/2017/05/ancient-abortion-law/>>.

the laws were intended to apply. Thus this situation appears to be tolerable from a pro-abortion perspective, especially when we take into account the reality that this may be the best outcome we can hope for. However, as previously stated, this paper's definition of "workable" looks at whether the laws have achieved the "desired effect" from a pro-abortion perspective. Access to abortions for most but not all women is not the desired effect of the laws from the pro-abortion perspective. This perspective requires that the laws facilitate equitable access to safe, legal abortions for *all* women.

Though on a whole, most women have access to abortions, there are still hundreds of women being told that their abortions would not be justified. In 2016, 252 "not justified abortion" certificates were issued to pregnant women and close to 1,500 have been issued this decade.¹¹² Though we do not know the grounds on which these women were refused an abortion, we know that unlike most women seeking abortions, the s 187A(1)(a) mental health exception was not applied for their benefit. One could speculate that this may be due to the consultants they saw applying the mental health ground more narrowly than other consultants. If this is so, then it is inconsistent with the general approach of other consultants who have been suggested to apply the wide definition of mental health.¹¹³ The fact that access to abortions in New Zealand is largely dependent on health practitioners' interpretation and application of the mental health ground means that the laws are not being applied equally to all women. As a consequence, some women may be arbitrarily refused access to abortions. Thus, in so far as the law facilitates this inequitable treatment, it is unworkable from a pro-abortion perspective.

The first legal hoop whereby a woman must get referred by a GP before she can see a certified consultant can also obstruct access to abortions.¹¹⁴ Unlike certified consultants, there is no requirement that GPs must have neutral attitudes on abortion. Rather, on the contrary, no doctor, nurse or other person who has a conscientious objection to abortion, is obliged to assist in the performance of an abortion.¹¹⁵ Thus, it is possible that they might refuse to refer a woman to a certified consultant based on a decision which is coloured by their own personal views on abortion. While conscientious objection is outside the scope of this paper, it is noted to show how this provision, coupled with the law requiring referral, adds to the arduous and demeaning

¹¹² Cooke, above n 73.

¹¹³ See Lillis, Melsop and Dutu, above n 72.

¹¹⁴ Contraception, Sterilisation and Abortion Act, s 32

¹¹⁵ Section 46.

process that women have to go through when seeking abortions. In a story by the New Zealand Herald on "women who've had abortions in New Zealand" it was reported that many women who were interviewed felt dismissed and complained about having been "lectured" by doctors about the moral implications of their decision.¹¹⁶ One woman whose doctor refused to refer her for an abortion was told that abortion was a "terrible thing" and was left in tears after a 25 minute lecture from the doctor.¹¹⁷ This shows how the current laws are enabling some doctors to make the process for women seeking abortions much more mortifying and unpleasant than it needs to be.

Access to abortions is also dependent on the location a woman lives in, her ability to work the system and her finances. Stephanie Rodgers has been explained that abortions in New Zealand are:¹¹⁸

difficult to access, especially if you aren't bureaucracy-savvy or don't live in a major centre. A pregnant person on the West Coast will have to travel to Christchurch, at least twice, to a clinic which is only open a few days each week, in order to terminate a pregnancy. They'll need to take time off work or find last-minute childcare and god forbid they're in a vulnerable situation where they have to keep it all a secret.

Thus, it is likely to be women from rural parts of New Zealand, who do not have the finances or resources to afford to make the multiple visits to the major centres, that suffer the most as a result of our current laws. Despite the legal requirement that all District Health Boards (DHBs) in New Zealand must provide publicly funded abortion services, some subcontract these services to other DHBs.¹¹⁹ Research has shown that this subcontracting means some women have to travel large distances to obtain services and this restricts access for those women who do not live in major centres.¹²⁰

¹¹⁶ Francis Cook, above n 83.

¹¹⁷ Francis Cook, above n 83.

¹¹⁸ Cited in Bryce Edwards "Political Roundup: The uncomfortable abortion reform challenge" *The New Zealand Herald* (online ed, New Zealand, 17 March 2017).

¹¹⁹ See District Health Boards of New Zealand Inc *Services for terminations of pregnancy: discussion paper* (Wellington, May 2008); and Report of a Standards Committee to the Abortion Supervisory Committee *Standards of Care for Women Requesting Induced Abortion in New Zealand* (October, 2008) at [6]; and Silva, Ashton and McNeill "Improving termination of pregnancy services in New Zealand", above n 58, at 84.

¹²⁰ See Martha Silva, Toni Ashton and Rob McNeill "Geographic access to termination of pregnancy services in New Zealand" (2008) 32(6) *Australia New Zealand Journal of Public Health* 519.

Overall, the evidence suggests that the experiences of women seeking abortions in New Zealand are very varied.¹²¹ While some women obtain abortions with ease, others have harrowing experiences when trying to jump through the legal hoops.¹²² Some women have described that they suffered more trauma from the process they had to go through than they did from making the decision to have an abortion.¹²³ Women find the process demeaning as they are denied the right to decide for themselves on their own fertility. This promotes distrust with the legal system and as previously noted, some women have admitted that in order to get the outcome they need, they have to be prepared to lie.¹²⁴ This suggests that they do not respect the law or that they are so desperate that they feel like they have no choice but to disregard it. Moreover, the fact that abortion is a crime automatically attaches a certain stigma to it.¹²⁵ Such stigma has been shown to contribute to a woman's low self-esteem, and feelings of guilt or shame.¹²⁶ This is far from workable from a pro-abortion perspective.

Not only is our lengthily legal process for obtaining abortions demeaning for women but it also means that abortions are untimely. It has been found that, on average, women wait nearly four weeks between their visit to a referring doctor and the date of their abortion.¹²⁷ In 2015 only 71.1% of abortions were performed under 10 weeks gestation in New Zealand.¹²⁸ By comparison, New Zealand lags behind other countries like the United Kingdom and Australia in providing early pregnancy terminations.¹²⁹ For example, in 2015 80% of abortions were performed during this period in the UK,¹³⁰ and in 2012 90% of abortions occurred in the first 9 -11 weeks in Western Australia.¹³¹

¹²¹ Francis Cook, above n 83; and Sarah Batkin "Four women talk about their experiences of getting an abortion in New Zealand" *The Spinoff* (online ed, New Zealand, 12 January 2017) <<https://thespinoff.co.nz>>.

¹²² See Batkin, above n 121.

¹²³ Francis Cook, above n 83.

¹²⁴ Francis Cook, above n 83.

¹²⁵ McCulloch and Weatherall, above n 13, at 97.

¹²⁶ Ushma Upadhyay, Kate Cockrill and Lori Freedman "Informing abortion counseling: An examination of evidence-based practices used in emotional care for other stigmatized and sensitive health issues" 81 (2010) *Patient Education and Counseling* 415, at 416

¹²⁷ See Martha Silva, Toni Ashton and Rob McNeill "Ladies in Waiting: the timeliness of first trimester pregnancy termination services in New Zealand" (2010) 7 *Reproductive Health* 19.

¹²⁸ Abortion Supervisory Committee (2016), above n 47, at 21.

¹²⁹ Silva, Ashton and McNeill "Improving termination of pregnancy services in New Zealand", above n 58, at 83.

¹³⁰ Government of The United Kingdom Department of Health *Abortion Statistics, England and Wales: 2016* (2017) at 5.

¹³¹ Government of Western Australia Department of Health *Induced Abortion in Western Australia 1999-2004: Report of the WA Abortion Notification System* (2013) at 36.

As a result of abortions occurring later in New Zealand, there is limited availability of medical abortions. Medical abortion is a way to end pregnancy without surgery by taking two pills within the first nine weeks of pregnancy and it tends to be preferred method of abortion for women.¹³² The above statistics indicate that over 28.9% of New Zealand women who did not receive their abortions within 9 weeks gestation missed out on the choice to have a medical abortion. This is undesirable, not only because this is the preferred method of abortion, but also because pregnancy terminations which occur after the 10th week of pregnancy have a greater risk of complications.¹³³ Therefore, our laws appear to be hindering the use of newer and more favourable abortion methods, meaning the risks associated with abortions are greater than they need to be. Comparably, New Zealand's abortion system could be viewed as less workable than other countries from a pro-abortion perspective.

Moreover, the fact that access to abortions is largely based on consultants' liberal interpretation and application of s 187A(1)(a) means that such access is likely to remain vulnerable so long as the current laws remain in place. This is demonstrated by the challenges to current practice in the cases *Wall v Livingston* and *Right to Life*.¹³⁴ If these cases had held that the Supervisory Committee can review the lawfulness of consultants' individual decisions to authorise abortions, this could potentially have had a chilling effect on current liberal practice. Consultants may have been more inclined to apply the laws more strictly, due to a greater risk that the lawfulness of their decisions might be reviewed and this would hinder access to abortions in New Zealand. Justice Miller's judgment in the High Court and the strong minority judgment in the Supreme Court in the *Right to Life* case, showed that there was a real possibility of such a ruling, which arguably would have been more consistent with how the laws were intended to apply.¹³⁵

While the majority in the Supreme Court judgment *Right to Life* held that consultants' individual decisions to authorise abortions are beyond review, they said that the Supervisory Committee may still make generalised inquiries of consultants.¹³⁶ For example, the Committee

¹³² Abortion Services "Medical Abortion" (13 August 2014) Abortion Services in New Zealand <<http://www.abortionservices.org.nz>>.

¹³³ Silva, Ashton and McNeil "Improving termination of pregnancy services in New Zealand", above n 58, at 83.

¹³⁴ *Wall v Livingston*, above n 56; and *Right to Life SC*, above n 86.

¹³⁵ See *Right to Life HC*, above n 35; and the judgment of McGrath and William Young JJ *Right to Life SC*, above n 86; and the discussion.

¹³⁶ *Right to Life SC*, above n 86, at [45].

can “ask a consultant how he was approaching decision-making in general”.¹³⁷ If such “generalised inquiries” lead the Committee to believe that the consultant holds views on abortion which are inconsistent with the tenor of the Act, then they may reconsider or even revoke his or her appointment.¹³⁸ The majority further added that the Committee not only has a power to make these inquiries but also a duty to do so under s 14(1)(i) and it suggested that the Committee may have underestimated the breadth of its functions and powers in this respect.¹³⁹ Therefore, even the majority judgment in Supreme Court decision suggested that the Supervisory Committee should pay closer attention to the way consultants are approaching their decisions. These statements led Right to Life to argue that the ruling “places certifying consultants on notice”, and that it expected that the implementation of the Court’s decision would “place restraints on the abortion on demand regime that prevails in New Zealand”.¹⁴⁰

The variance in the approaches of the judges in the *Right to Life* judgments demonstrates that the case could have gone either way. Thus, this case was a powerful reminder of just how fragile the current practice is when it deviates so far from the intended purpose of the laws. It has been described that the case:¹⁴¹

took aim at a fault line running through the abortion regime in New Zealand, and until the underlying tension between a liberal abortion practice and a conservative abortion law is resolved, there will be more cases, more challenges, more threats to abortion access and New Zealand will fall farther behind than it already has in providing timely abortion care.

This warning that there would be more cases, challenges and threats to abortion access was correct. In June 2015, Right to Life challenged the granting of a licence by the Supervisory Committee to a Family Planning clinic in Tauranga to perform early medical abortions.¹⁴² This was going to be the first clinic in the country providing such services and it was intended to “meet an unmet need, reduce travel times for women and better integrate abortion into our other sexual and reproductive health services”.¹⁴³ Thus, this was a very positive initiative from

¹³⁷ *Right to Life SC*, above n 86, at [40].

¹³⁸ At [45].

¹³⁹ At [46].

¹⁴⁰ Right to Life “Supreme Court Confirms Abortion Supervisory Committee Duty” (press release, 10 August 2012).

¹⁴¹ Allison McCulloch “Abortion in the Dock” *Werewolf* (online ed, New Zealand, 5 September 2012).

¹⁴² *Right to Life HC*, above n 35.

¹⁴³ Jackie Edmond cited in “High Court Decision Delights” (1 October 2015) New Zealand Family Planning <www.familyplanning.org.nz>.

a pro-abortion perspective. Though this challenge was unsuccessful, it showed that anti-abortion groups are still attempting to frustrate solutions which arise outside of the law and that they use the restrictive language of the existing laws to do so. Again, it has been suggested that this decision could have gone either way.¹⁴⁴ Family Planning Chief Executive Jackie Edmond commented that:¹⁴⁵

As a provider of abortion services, Family Planning is keenly aware of the fragility of the current law. We know that groups, like Right to Life, will continue to try to poke holes in our failing and antiquated laws. What happens if next time they are successful?

Thus, it appears that the "fault line" running through New Zealand's abortion regime is conceivably becoming more and more strained as practice and the law continue to diverge. The situation is volatile and unsettling further showing how the current legal system is unworkable from the pro-abortion perspective.

However, again it is noted that if our definition of "workable" was not based on the "desired effect" of the laws but on a "tolerable effect", the conclusion might have been different. Though pro-life groups have threatened access to abortions in New Zealand, they have not actually succeeded in restricting that access nor in compelling consultants to take a stricter approach. Thus, it is acknowledged that even within the pro-abortion perspective, there are different views that could have been taken. This reflects the inherent subjectivity that surrounds the whole issue of whether our abortion laws are workable. Nevertheless, based on this paper's definition of "workable" and its interpretation of the pro-abortion perspective, the laws are manifestly unworkable on a number of levels.

3 *The Anti-Abortion Perspective*

This paper assumes that laws will only be workable from the anti-abortion perspective if they are applied and enforced strictly to uphold the intended purpose of those laws. This requires that abortion is only to be allowed as an exception not the norm, and misapplication of the laws must be treated as a crime. The preceding discussion showed that the criminal status of abortion seldom prevents the occurrence of it. While access to abortions is somewhat limited due to the

¹⁴⁴ Edmond, above n 143.

¹⁴⁵ Edmond, above n 143.

legal restrictions, the statistics whereby 99% of abortions are approved, suggests that abortions are the norm rather than the exception.¹⁴⁶ This is inconsistent with how the anti-abortion perspective desires the laws to apply. It also appears that the current laws are effectively unenforceable due to the fact that the Supervisory Committee has no power to review consultants' individual decisions to authorise abortions in individual cases. This has led pro-life groups to comment that the Supervisory Committee is allowing New Zealand's abortion laws to be "flouted in the name of "choice" and "best medical practice"". ¹⁴⁷ Thus, arguably the laws criminalising abortion provide no teeth to ensure that the practice is treated as a crime. This indicates that the laws are conceivably unworkable from an anti-abortion perspective.

However, if "workable" was taken to mean "tolerable" the conclusion under this perspective might also be different. The laws could be considered to be tolerable due to the fact that abortion remains a crime under the Crimes Act and is, at least ostensibly, condemned by society. This ensures that stigma attaches to abortion and makes access somewhat restricted. While this may be tolerable from the anti-abortion perspective however, it is far from desirable. In the abortion context, the fact that the laws formally criminalise abortion seems to offer little if any solace when the practical ineffectiveness of these laws is taken into account. Therefore, based on this paper's definition of "workable", the laws are most likely to be viewed as unworkable. Thus, while the pro-and-anti-abortion perspectives of what makes workable laws are in direct conflict with each other, they appear to reach the same conclusion that the current laws are unworkable.

4 *The Political Perspective*

The claim that New Zealand's abortion laws are "workable" came from a politician.¹⁴⁸ Therefore, this paper seeks to understand how, from a political perspective, the current laws can be perceived to be workable when the opposite conclusion has been reached by the three other perspectives addressed in this paper. It is noted that each politician's perspective on this matter is likely to differ, both within and across parties, and so it is not suggested that this perspective is shared by all politicians. However, from a simplified political perspective, it is

¹⁴⁶ See the discussion in Part III, C, 1.

¹⁴⁷ See Michelle Kaufman "Abortion Supervisory Committee Report 2013" (20 January 2014) A Culture of Life < <https://acultureoflife.wordpress.com>>; and The Life Resources Charitable Trust "The Abortion Supervisory Committee (ASC)" (2011) < <http://www.life.org.nz>>.

¹⁴⁸ Stacey Kirk, above n 1.

assumed that the laws will be workable if they are convenient for politicians and if they work better than other laws which might need reform.

It is certainly more convenient for politicians to avoid addressing the contentious and polarising issue of abortion law reform. The issue is inherently unattractive from a political point of view due to its tendency to evoke ideological and religious beliefs which cut across the socio-economic lines on which the major political parties are based.¹⁴⁹ It has been suggested that there is a preference from large political parties, in their "risk-minimising approach", to downplay the significance of important social legislation like abortion.¹⁵⁰ As a matter of survival, parties must avoid issues that could jeopardise internal party unity or divide the social basis of support upon which they depend for electoral success.¹⁵¹ Since this issue has significant potential to divide political parties and alienate sections of the public, it is understandable why politicians might desire to keep abortion off the parliamentary agenda. The claim that the current laws are workable therefore provides the perfect justification for not addressing the issue.

New Zealand's abortion laws also appear more workable when they are compared to other law reforms the Government could choose to undertake. Although in theory individual law reform issues should be considered based on their own merits, as a matter of practicality having regard to limited Parliamentary time and resources, this is rarely the case. Politics speaks the language of priorities and arguably abortion does not qualify as a priority in the political vocabulary.¹⁵² This has been implied by Amy Adams, who said that though the law might be outdated, the Government has higher priorities, including family and sexual violence, money laundering and vulnerable children.¹⁵³ When compared to issues like sexual violence and vulnerable children, the importance of abortion law reform becomes somewhat diluted as the practical harm being caused by the current laws is relatively minor.

Furthermore, there does not seem to be the same pressure from the public on the Government to change the law as there was in the past. The fact that most women have access to abortions

¹⁴⁹ Stone, above n 16, at 152.

¹⁵⁰ Ben Thomas "Time to stop being polite" *The National Business Review* (New Zealand, 13 June 2008) <<https://www.nbr.co.nz/comment/ben-thomas/time-stop-being-polite>>.

¹⁵¹ Ian McAllister, 'Immigration, Bipartisanship and Public Opinion' in James Jupp and Marie Kabala (eds) *The Politics of Australian Immigration* (Australian Government Publishing Service, 1993) at 162-163.

¹⁵² Palmer, above n 2, at 404.

¹⁵³ Kirk, above n 1.

means that a lot of people are not aware of how restrictive the laws are, nor the harm this causes.¹⁵⁴ There also have not been any recent public displays of how the laws are being misused, for example like the police raid of the Auckland Medical Aid Centre in 1974, which sparked protests and an outcry for change from the public. To a large extent, the law seems to operate in the shadows, and it is only the relatively small portion of people who have been personally affected or otherwise care about the issue, that are demanding change. The lack of public recognition that there is a problem makes it much easier for politicians to assume that the current laws are working fine as they are. Therefore, although some politicians might regard New Zealand's current abortion laws as deficient, it is understandable why others take the perspective that they are workable and why few regard abortion law reform as an immediate priority.

D What Can We Learn from The Different Perspectives When Approaching Abortion Law Reform?

The different perspectives highlight how difficult it is to determine whether laws are "workable" due to the inherent subjectivity that surrounds the issue. It is significant that the laws were found to be unworkable from three out of the four different perspectives analysed in this paper, including both the pro-and-anti-abortion perspectives which you would expect to conflict. This shows that despite Parliament's intentions to strike a "middle-ground", in reality they have not given either side what they wanted. However, we must bear in mind that these findings were shaped by the way in which the term "workable" was defined, as meaning "capable of producing the desired effect or result".¹⁵⁵ It is notable that while the laws may not be workable in the sense that they have not produced the desired effect from both a pro-and-anti-abortion perspective, they could still be conceived to be workable in the sense that they are "tolerable".

Nevertheless, it is difficult to see how laws that undermine the rule of law could ever be tolerable from a legal perspective. From the pro-abortion perspective at least, the laws are mainly viewed to be "tolerable" because they are ineffectual and affected parties are able to work around the Parliament's intent underlying those laws. This view lacks any legal

¹⁵⁴ International Socialist Organisation Editor "Fighting to Choose: The Abortion Rights Struggle in New Zealand" (21 April 2013) International Socialist Organisation of New Zealand < <https://iso.org.nz>>.

¹⁵⁵ Oxford Dictionary "Definition of Workable" (2017), above n 4.

credibility because the fact that the laws are “workable” by virtue of the fact that they are ineffective is unacceptable from a legal perspective. Moreover, the unpredictability of the laws and the inconsistency of their application with how they were intended to apply suggests that the laws are intolerable not just undesirable from a legal perspective.

The fact that the laws seem to be so unworkable from a legal perspective, even when a lower threshold is adopted, is concerning. This is the most objective of the four perspectives and thus should be given considerable weight when determining the overall workability of New Zealand's abortion law. Though the laws are conceivably workable from a political perspective, this finding was largely based on matters such as convenience, priority and a lack of pressure from the public to change the laws. Such matters seem less indicative of the overall workability of the laws. Generally, there seems to be a widespread lack of respect for the laws, from women receiving abortions, medical practitioners, and possibly even from the courts and the Supervisory Committee, who seem disinclined to apply the laws as they were intended to apply. Keeping such laws in place in these circumstances arguably erodes the dignity of our legal system. Thus, overall New Zealand's abortion laws appear to be unworkable. This means they can be described as “faulty” and therefore pass the first hurdle towards showing that reform would be justified.

The next challenge is to show that reform would actually make these laws better.¹⁵⁶ This leads us to another important question: “better for whom?”. Again the term “better” is a subjective concept which will change depending on the perspective which is taken. The fact that the pro-and-anti-abortion perspectives of what makes workable abortion laws are directly in conflict, means that any attempt to make the laws better for one side will inevitably make them worse for the other. Moreover, the failed attempt of the Government to strike a “middle ground” with the 1977 reform indicates that any attempt to make the laws better for everyone will almost certainly fall short of that goal.

So, we could ask: “why even try to make the laws better?”. Prima facie, it might seem like we will never overcome the second hurdle to proving that law reform of New Zealand's abortion laws is justified. However, this paper refuses to accept such a disheartening conclusion. This is not the only type of law reform where Parliament is never going to be able to please everyone.

¹⁵⁶ See Palmer, above n 2 at 404.

Parliament is always having to pass controversial law reforms and in many cases some people are made better off while others are not. This does not mean that these types of reform are never going to be justified. While Parliament cannot make the laws better for everyone, they can still make them better per se and potentially for the majority of New Zealanders. A recent poll commissioned by ALRANZ showed that a majority of New Zealanders support a woman's right to choose abortion in every circumstance.¹⁵⁷ This suggests that the majority of the population align themselves more closely with a pro-abortion perspective. Therefore, this paper will now look at how the laws could be made better from this perspective. It will also consider whether these changes would make the laws better from a legal perspective since that is the most objective perspective.

IV How Could the Laws Be Made Better from the Pro-Abortion and Legal Perspectives?

A Law Reform Involving Decriminalisation of Abortion

A lot of the issues with New Zealand's abortion laws from pro-abortion and legal perspectives centre around the fact that it is a crime under the Crimes Act 1961 and the limited "exceptions" for when it may be made legally available. Therefore, one way to make the laws more workable would be to remove abortion from the Crimes Act and thus abolish the arbitrary exceptions under s 187A. Abortion could instead be treated as a health issue and be regulated under the Health Act 1956. Consequentially, abortion would be legally available on request, at least during the early stages of the pregnancy. Abortion on request is where a pregnant woman is entitled to request an abortion for any reason whatsoever without having to show that she comes within a certain specified ground. This is the legal approach taken by 58 countries around the world, including Australia, Canada and the United States.¹⁵⁸

Removing abortion from the Crimes Act and allowing for abortion on request would be likely to make the abortion system more workable from a pro-abortion perspective for a number of reasons. The efficiency of New Zealand's abortion services is likely to significantly improve making the process less taxing and demeaning for women. This is because it would mean that,

¹⁵⁷ See Abortion Law Reform Association of New Zealand (ALRANZ) "Abortion Issues Poll – January 2017" (31 January 2017) <<http://alranz.org>>.

¹⁵⁸ Pew Research Center "Worldwide Abortion Policies" (5 October 2015) <<http://www.pewresearch.org>>.

in most cases, a woman would only have to see one, rather than two or three medical professionals in order to receive an abortion. It would also mean that women who live in rural areas will not have to travel large distances in order to see a certified consultant but could instead go to their local doctor. Even if they do have to make a trip, they would only have to make it once rather than multiple times. Therefore, abortions are likely to be less of an expense in terms of time, money and morale. This is supported by the certified consultant Helen Paterson who has said that reforming the law in such a way will make the currently "dysfunctional" process of having an abortion less time consuming and stressful for women.¹⁵⁹ The improved timeliness of abortion services is also likely to increase the availability of medical abortions to a larger number of women who would be more likely to receive their abortions within the first 9-weeks of pregnancy. As mentioned earlier, this is usually the preferred method of terminating pregnancy and it reduces the risk of complications which arise with later terminations. Thus these factors would all make the system more workable from a pro-abortion perspective.

Abolishing the arbitrary exceptions for when abortion can be made legally available would also mean that women would not have to claim that continuing with their pregnancy would cause a serious danger to their mental health. Instead they would be able to be more honest with their reasons as to why they are seeking an abortion and would not have to be prepared to lie. Therefore, the system is likely to be more transparent and far less degrading for the women that go through it. The reasons for why doctors approve or deny abortions are also likely to be more genuine because doctors would not have to fit their reasons into the current legal grounds for abortion under s 187A. This is desirable not only from a pro-abortion perspective but also from a legal perspective because it would reduce the uncertainty that arises in relation to how different consultants are applying the current law.

Taking abortion out of the Crimes Act would also be a clear statement from Parliament that abortion is not supposed to be treated as a crime. This would further aid certainty and should put an end to the challenges by pro-life groups through the courts because they would not have the same legal basis for those challenges anymore. Again, this would be comforting from the pro-abortion perspective because ongoing access to abortions would be less vulnerable and less

¹⁵⁹ Susan Strongman "Antiquated abortion law a \$20 million 'box ticking exercise'" *The Wireless* (online ed, Auckland, 10 July 2017).

exposed to the fault line running through New Zealand's abortion regime. It would also be advantageous from a legal perspective because it would dissolve concerns that the current laws are not being applied as they were intended to apply. Moreover, removing a law which is unpredictable and discriminatory would eliminate the pressures which are currently undermining the rule of law.

Furthermore, the decriminalisation of abortion is likely to remove or at least reduce the stigma associated with abortion. While this stigma may come more from society and not necessarily the law, the law can be a vehicle through which social evolution can be brought about. It has been acknowledged that the law, through legislative and administrative responses to new social conditions and ideas not only articulates, but also sets the course for major social change.¹⁶⁰ The current criminal status of abortion suggests that abortion is viewed as unacceptable to society. Thus, decriminalising abortion would formally indicate that abortion is acceptable under the law and this would set the course for general social acceptance of abortion (if we do not have this already). This would be more workable from a pro-abortion perspective because it is likely to reduce the shame felt by some women who seek abortions. Alternatively, if there is already general social acceptance of abortion, reform would bring the formal laws into line with social norms. This would be more desirable from a legal perspective because it is not in the interests of the rule of law to have laws that are at odds with current practice and social norms.¹⁶¹

Therefore, it appears that decriminalising abortion would improve the overall workability of New Zealand's abortion system from both a pro-abortion and legal perspective. It is also worth noting that there is considerable support for this approach from doctors around the world. Amnesty International has recently published a letter signed by 838 Doctors and health professionals from 44 countries calling on governments to stop interfering with health professionals' ability to provide care and warning that criminalising abortion puts women and girls' health and lives at risk.¹⁶² They have argued that the criminalisation of abortion "prevents healthcare providers from delivering timely, medically indicated care in accordance with their

¹⁶⁰ American University of Kosovo "Law and Society, Chapter 7 Law and Social Change" <<https://sites.google.com/a/g.rit.edu/auknotes>>.

¹⁶¹ See Suthichai Yoon, above n 67.

¹⁶² Targeted News Service "Abortion is Not a Crime, Doctors Warn Governments" (Washington, DC, 20 November 2015).

patients' wishes".¹⁶³ The letter further contended that "making criminals of women for abortion violates their human rights and can endanger their lives".¹⁶⁴ Thus there are very strong arguments in favour of adopting this proposed type of reform.

However, it is doubtful whether this type of reform could feasibly be achieved in New Zealand. As suggested earlier, this issue is arguably incompatible with our current political system and Government. Therefore, it is necessary to consider whether there are any alternative options to decriminalisation which could make New Zealand's abortion system more workable from both a pro-abortion and legal perspective.

B Improve the Wording of the Current Laws

It is possible that the laws could also be made more workable by improving the wording of current laws. In its most recent report, the Abortion Supervisory Committee advised that the current wording in New Zealand's abortion law is "outdated and clumsy" and said that clearer wording would be of great assistance to medical and other health professionals working in the field.¹⁶⁵ It emphasised that it is important to ensure that legislation reflects the health sector and modern society as they are today, recognising that over the last four years, there have been significant changes to healthcare delivery as well as technological advancements in approaches to medicine.¹⁶⁶ Accordingly, the Committee advised the House of Representatives (the House) that changes to parts of the Act would maintain the integrity and the purpose for which the Act was originally written (which it suggested was adequate access to abortion services, safety, and robust consultation processes).¹⁶⁷ Such changes were mainly aimed at modernising the language of the legislation. For example, it recommended that the reference to medical practitioners as "he" in s 32 of the Act, should be changed to represent women as well.¹⁶⁸ It also acknowledged the term "mentally subnormal" in s 34 of the Act is outdated and derogatory and recommended that it should be changed to "patient lacks mental capacity to consent".¹⁶⁹

¹⁶³ Targeted News Service, above n 162.

¹⁶⁴ Targeted News Service, above n 162.

¹⁶⁵ Abortion Supervisory Committee Report 2016, above n 47, at 3.

¹⁶⁶ At 3.

¹⁶⁷ At 3.

¹⁶⁸ At 3.

¹⁶⁹ At 4.

It is true that clearer wording could materially improve the workability of the current laws, however, the Committee's recommendations fall short of achieving this. One of the main issues with the wording of the current laws relates to s 187A(1)(a) of the Crimes Act and in particular the lack of definition of "mental health". As discussed earlier, "mental health" could be interpreted to mean different things and this has the potential to have crucial implications on whether consultants approve women's abortions or not. Therefore, if Parliament defined mental health this would set the standard under which all abortions are to be approved so that it is less likely to be changeable based on different consultants' interpretations. This would improve certainty and consistency in relation to how the laws are applied making them more predictable. It would also better ensure that the rule of law is upheld and would thus mean the laws would be likely to be more workable from a legal perspective.

However, depending on how Parliament decides to define "mental health", this may or may not make the law more workable from a pro-abortion perspective. If Parliament adopted the wide, positive definition of "mental health", which looks at a woman's overall wellbeing, it is likely to be easier for more women to satisfy the ground. For example, they could satisfy the ground by simply showing that they would not be able to cope with the normal stresses of life, work productively nor be able to make a contribution to her community.¹⁷⁰ This would be more workable from a pro-abortion perspective. However, if Parliament adopted the narrow definition of mental health as favoured by Miller J in *Right to Life*, the laws could end up being less workable from a pro-abortion perspective.¹⁷¹ This is because less women would be likely to be able to satisfy doctors that they are at serious risk of a recognised mental illness. Therefore, if consultants applied the ground as defined by Parliament then fewer women would satisfy the ground and qualify for abortions. Thus access could end up being more restricted than before suggesting that there is the potential for this type of reform to backfire from a pro-abortion perspective.

Even if Parliament adopted the wide, positive definition of mental health, adverse effects could still result from a legal perspective. As discussed earlier, the laws were intended to make abortion the exception not the norm. Therefore, updating the law so that more abortions would satisfy the mental health ground would be departing even further from how the laws were

¹⁷⁰ See the World Health Organisation's definition of mental health, above n 70.

¹⁷¹ See *Right to Life HC*, above n 35, at [6].

intended to apply. This highlights a critical issue with updating the laws rather than repealing them when trying to make them more workable from a pro-abortion perspective: the pro-abortion perspective is fundamentally inconsistent with the way the current laws were intended to apply. However, arguably the reformed law would be so inconsistent with the purpose of the original law criminalising abortion, it could possibly be viewed that the earlier provision would be impliedly repealed by the latter provision. In *Kutner v Philips* it was said that:¹⁷²

[i]f ... the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together, the earlier is abrogated by the later".

In order to avoid confusion, a court would need to declare that the earlier provision has been repealed by the later. To do so would be a drastic step unless there are clear indications from Parliament that they intended the later provision to override the earlier one.¹⁷³ It is difficult to foresee whether there would be such indications from Parliament. The fact that they would have updated the law to allow more abortions to come within the legal exception could be taken to suggest that they do not intend abortion to be treated as a crime anymore. If this is true, then it could possibly be a more advantageous way of getting rid of the abortion crime as it would be subtler means of bringing the law into line with modern practice. It would avoid bringing the issue to the forefront of public attention as would be the case if Parliament were to expressly decriminalise abortion through legislation. Thus, this option may be more politically feasible and convenient.

However, allowing for the crime to be impliedly repealed by the courts could be viewed as less democratic especially when abortion is such a controversial social issue. The Parliamentary forum is quintessentially one which allows for and promotes involvement from constituents and lobby groups, who can have a substantial influence on the way politicians vote.¹⁷⁴ By contrast, the courts' processes are less transparent and inclusive of public views and values, meaning it may be less appropriate for them to hold that the abortion is no longer a crime. Moreover, if abortion is decriminalised, then there would still need to be some laws in place to

¹⁷² *Kutner v Philips* [1891] 2 QB 267 (QB) at 272, per A L Smith J.

¹⁷³ See Andrew Butler "Implied Repeal, Parliamentary Sovereignty and Human Rights in New Zealand" [2001] PL 586 at 594; and Rebecca Prebble "Constitutional Statutes and Implied Repeal: The Thoburn Decision and The Consequences for New Zealand" (2005) 36 VUWLR 291 at 292 and 293.

¹⁷⁴ Jenny Morgan "Abortion Law Reform: The Importance of Democratic Change" (2012) 35 UNSWLJ 142 at 153.

regulate it, for example in the Health Act. This is something Parliament would have to do and therefore it would make more sense for Parliament to legislate expressly if they intended to decriminalise abortion. It also means that the courts are unlikely to hold that the abortion crime has been impliedly repealed if there are no other regulations in place first. Thus, the effect of Parliament adopting the wide definition of "mental health" may lead to more uncertainty, meaning the laws would not be any better from a legal perspective. Therefore, it does not seem like this option would solve as many issues as decriminalisation when both the pro-abortion and legal perspectives are taken into account and it may even result in more issues.

C Improve the Organisational Structure of Abortion Clinics

Sir Geoffrey Palmer has said that reform is not the "exclusive province of the Law's Empire" and that improvement to the operation of law can come about in many ways.¹⁷⁵ Therefore, it is possible that a "workable" solution to New Zealand's outdated abortion laws could be achieved outside of the legal arena. One such solution could be improving the organisational structure of New Zealand's abortion clinics. As discussed earlier, a key issue with the current laws from a pro-abortion perspective, is that access to abortions is costly in terms of time, money and morale. This is largely due to the fact that women have to make multiple visits to doctors in order to first get their initial assessment and referral and then to get their abortion approved by two certified consultants. However, the process does not have to be as time consuming and inefficient, even under the current laws.

Evidence has shown that a private abortion clinic operating in Auckland provides significantly more timely services meaning their abortions are performed at much earlier gestational dates than public clinics.¹⁷⁶ A number of organisational arrangements have been identified as contributing to the more efficient services of this clinic. For example, the private clinic employs its own GP who can provide referrals meaning women do not have to visit their own GP first.¹⁷⁷ It also has a standing agreement with a nearby radiographer so that women can get a scan appointment relatively quickly. Multiple visits to the clinic are not generally required as they offer a single day service for surgical abortions, including counselling, clinical assessment and

¹⁷⁵ Palmer, above n 2, at 404.

¹⁷⁶ Silva, Ashton and McNeil, "Improving termination of pregnancy services in New Zealand", above n 58, at 85 and 88.

¹⁷⁷ At 85.

certification.¹⁷⁸ The clinic also has a specific policy providing that women should not wait more than 5 working days for an appointment and in times of high demand they will schedule additional clinics to support the flow of patients.¹⁷⁹

By comparison, research has shown that women seeking abortions through public clinics, which provide 90% of New Zealand's abortions, must wait an average of 10 days between the day their appointment was booked and their first appointment.¹⁸⁰ This is only after they have first received referral from their own GP or a Family Planning clinic. As noted earlier, women wait on average nearly four weeks between their visit to a referring doctor and the date of their abortion.¹⁸¹ Therefore, if the organisational arrangements of this private clinic are instituted in the public clinics around the country, the timeliness of New Zealand's abortion services is likely to improve considerably. This would reduce the expense for women seeking abortions and make the process less arduous. Timely access to abortions could also be improved by ensuring that the law, which requires all DHBs to provide publicly funded abortion services for women in their catchment areas, is better upheld.¹⁸² For example, it could be prescribed that DHBs cannot subcontract these services. This would be likely to reduce the distances some women have to travel in order to obtain abortion services making access more available to those women who do not live in major centres. This would further make the system more workable from a pro-abortion perspective.

This option may seem more appealing because it can occur without the need for significant reform of the law. As previously mentioned, abortion tends to be treated as an issue outside the normal business of politics and is one which the Government intentionally distances itself from.¹⁸³ Thus, the chances of the Government undertaking abortion law reform seem slim. However, while it may be desirable in some senses that this solution occurs without the need for law reform, it faces some notable limitations because of this. For example, this option would not remove any of the stigma that attaches to abortion because of its status as a crime. Women would also still have to claim that continuing their pregnancy would pose a serious threat to

¹⁷⁸ Silva, Ashton and McNeil, "Improving termination of pregnancy services in New Zealand", above n 58, at 88.

¹⁷⁹ At 88.

¹⁸⁰ At 88.

¹⁸¹ Silva, Ashton and McNeill "Ladies in Waiting: the timeliness of first trimester pregnancy termination services in New Zealand", above n 127.

¹⁸² See District Health Boards of New Zealand Inc, above n 119; and Report of a Standards Committee to the Abortion Supervisory Committee, above n 119, at [6].

¹⁸³ See the discussion in Part III, B.

their mental health, whether or not this is true. Moreover, leaving the outdated laws in place would mean that they are likely to continue to be applied in a way that is unpredictable and conceivably inconsistent with how Parliament intended them to apply. Thus, this option means that the abortion system would still have the potential to be demeaning towards women, inequitable and may continue to undermine the rule of law. Further, without the force of law, such an initiative may be vulnerable to threats. As shown in the past, leaving restrictive laws in place can lead to them being used to sabotage solutions which arise outside of the law.¹⁸⁴ The recent example where Right to Life challenged the Supervisory Committee's granting of a licence to perform medical abortions to a new Family Planning clinic in Tauranga shows that there is still a real risk of such threats eventuating.¹⁸⁵ Thus, a number of the workability issues that arise from both a pro-abortion and legal perspective would remain unaddressed by this option and it is unlikely to be as effective as one which comes about through law reform.

Therefore, while there are other options that could be pursued in order to make the laws more workable, law reform involving the decriminalisation of abortion appears to be the most attractive option from both the pro-abortion and legal perspectives. However, though this may seem like a constructive conclusion, it faces the discouraging reality that such a solution might be impossible given the current political landscape. Thus, the next section of this paper considers whether law reform involving the decriminalisation of abortion is ever going to be politically feasible

V Is Law Reform Involving the Decriminalisation of Abortion Feasible?

This section does not intend to forecast the likelihood of law reform involving the decriminalisation of abortion occurring. Rather it intends to challenge the idea that the issue will always be so politically incompatible that such reform is completely unfeasible and to briefly outline potential ways such reform could occur.

A Is the Abortion Issue Completely Politically Incompatible?

As mentioned earlier, abortion law reform is inherently unattractive to politicians and this lends support to the view that it may be politically incompatible. It certainly has the potential to

¹⁸⁴ See the discussion in Part III, A in relation to the police raid of New Zealand's first abortion clinic.

¹⁸⁵ See *Right to Life New Zealand Inc v Abortion Supervisory Committee* [2015], above n 142.

divide political parties and may pose a serious risk to a party's electoral wellbeing.¹⁸⁶ A bill to decriminalise abortion is one which proposes significant and contentious reform and thus it is likely to alienate a substantial portion of the electorate who are opposed to such changes. As suggested above, the abortion issue is all the more unattractive to politicians when it is considered against the range of policies a Government could choose to undertake. One might ask "why would a party pick up a controversial and risky issue like abortion?". It is an issue which only a fraction of the population care about and there are a number of safer and arguably more important issues which a much larger percentage of the population care about, for example like domestic violence and vulnerable children. The most likely answer is that they will not. Thus, it could be viewed that the abortion issue is "so unsettling for the normal business of politics" and "so disruptive for intra-party consensus" that it appears to have no hope of getting onto the parliamentary agenda.¹⁸⁷

However, this paper argues that the potential of modern parliaments in dealing with controversial issues like abortion should not be underestimated. Despite the unattractiveness of the issue, some notable MPs are starting to speak out in favour of abortion law reform suggesting that the issue is not as politically incompatible as first thought.¹⁸⁸ Even if no party is going to pick up the issue as a party policy, there are other ways that it could still get onto the political agenda. These are discussed below.

B Potential Ways Abortion Law Reform Could Occur

1 A Government Bill or a Members' Bill

A government bill is one prepared for Ministers to introduce to the House and the Government decides on the order in which the House will consider such bills.¹⁸⁹ The chances of such a bill arising under a National government are very slim. National Party leader, Bill English, has repeatedly said that New Zealand's abortion laws are working fine and should not be

¹⁸⁶ Law Commission *Review of Regulator Framework For The Sale And Supply Of Liquor, Part 1 Alcohol Legislation And The Conscience Vote* (NZLC R106, 2009) at [3.27].

¹⁸⁷ Marianne Githens and Dorothy McBride Stetson *Abortion Politics: Public Policy in Cross-Cultural Perspective* (Routledge, New York and London, 1996) at 161.

¹⁸⁸ Notably Labour Party leader Jacinda Ardern, National MP Nicola Wills, Maori Party MP Mei Reedy-Taare, Greens Co-leader Metiria Turei, and NZ First MP Tracey Martin, see Michelle Duff "What do NZ's female politicians think about abortion?" *Stuff* (online ed, New Zealand, 27 July 2017).

¹⁸⁹ New Zealand Parliament "Types of bills" < <https://www.parliament.nz> >.

changed.¹⁹⁰ However, the new Labour Party leader Jacinda Ardern is openly pro choice and has said that she would remove abortion from the Crimes Act if she becomes prime minister.¹⁹¹ This suggests that a government bill to decriminalise abortion would be more likely to arise under a Labour Government. Thus, the possibility of a government bill to decriminalise abortion succeeding is very dependent on the Government and MPs in office, who have considerable influence over what bills get introduced into the House. Given the current political uncertainty over which party will take office as New Zealand's next Government, this option cannot be relied upon with any confidence.

An alternative way in which abortion law reform could get onto the parliamentary agenda, irrespective of what party is successful in forming the next Government, is via a members' bill. A members' bill can be a powerful vehicle by which MPs can bring issues, which the Government refuses to prioritise, into the House. MPs can lodge a proposed members' bill at any time provided it meets the requirements of the Standing Orders.¹⁹² A ballot for members' bills is held on alternate Wednesdays that the House sits and a bill that is successfully pulled from the ballot is introduced in the House, usually on that same day. This was the vehicle which led to the legalisation of both gay marriage and the sex industry in New Zealand.¹⁹³ It was also used in 2010 when Labour MP Steve Chadwick put forward a Members Bill to make abortion legal on request for women up to 24 weeks into their pregnancy.¹⁹⁴ However, this bill did not have the chance to get onto the parliamentary agenda because it did not proceed past the ballot. Given that more politicians are speaking out in favour of abortion law reform, it could be more likely that another Members' Bill to decriminalise abortion will be put forward. Therefore, this could be a feasible way to get abortion officially onto Parliament's agenda. However, again it is dependent on the MPs of the day and whether such a bill is pulled from the ballot.

2 *Treated as a Conscience Vote*

If abortion does get onto the Parliamentary agenda, it is likely that it will be treated as a conscience issue. This will mean that MP's can cast their votes independently rather than along

¹⁹⁰ See Amy Wiggins "Ardern's pledge to decriminalise abortion sparks controversy" New Zealand Herald (online ed, New Zealand, 5 September 2017), and Jo Moir "Prime Minister Bill English won't 'liberalise' abortion law" *Stuff* (online ed, New Zealand, 12 March 2017).

¹⁹¹ Wiggins, above n 190.

¹⁹² New Zealand Parliament "What is a members' bills ballot?" < <https://www.parliament.nz> >.

¹⁹³ See the Marriage (Definition of Marriage) Amendment Bill 2012 (39-2) introduced by Labour MP Louisa Wall; and the Prostitution Reform Bill 2000 (66-1) introduced by Labour MP Tim Barnett.

¹⁹⁴ Wiggins, above n 190.

party lines.¹⁹⁵ Thus, some of the risks that abortion poses to party unity can be circumvented via a conscience vote as it removes the expectation (amongst MPs, the media and voters) that the party speaks with a single voice.¹⁹⁶ Therefore, the fact the abortion issue divides political parties does not matter as much because they do not need to be united when it is treated as a conscience vote. Conscience votes also limit the electoral risk to a party because it shifts the focus from the party onto the individual MPs.¹⁹⁷ Thus this seems like an appropriate mechanism through which a bill to decriminalise abortion could get passed.

However, while the conscience vote may address the politicians' concerns, it may not be as appealing to the ordinary population due to its potential to undermine democracy. If parties seek to absolve themselves of responsibility for significant legislative decision making, there is a consequential diminishing of the accountability link between parties and voters.¹⁹⁸ Usually, under the normal rules of party discipline, parties "structure" issues, by placing them in their array of policies allowing voters to respond to the issue on the basis of partisan identification.¹⁹⁹ By defining abortion as a non-party "conscience" issue, the major political parties have effectively "destructured" the issue and have thus negated the principle on which the party system is based.²⁰⁰ This is explained further by Birch who says that:²⁰¹

. . . mass democracy will give a meaningful influence to the electors only if they are presented with two or more alternative programmes of action between which they can choose, knowing that the party which wins will do its best to put its programme into effect during the next Parliament.

Therefore, allowing controversial legislation to be enacted via a conscience vote, for which parties take no responsibility, could be seen as undemocratic to some extent.

Nevertheless, a conscience vote may be the only way forward for an issue as polarising as abortion. Arguably, abortion is one of the few issues of morality where it would be wrong, or

¹⁹⁵ New Zealand Parliament "Types of bills" < <https://www.parliament.nz> >.

¹⁹⁶ Law Commission, above n 186, at [3.25]

¹⁹⁷ At [3.29].

¹⁹⁸ At [3.31].

¹⁹⁹ Stone, above n 16, at 152.

²⁰⁰ At 152.

²⁰¹ Anthony Birch *Representation* (Pall Mall Press and Macmillan, London, 1955) at 98.

even unconscionable, to force an MP to vote contrary to their own views.²⁰² If an MP honestly believes abortion is murder they should not be forced support it even if their party or the public supports it. Moreover, a conscience vote is not necessarily a case of no one being held accountable nor is it completely unpredictable how MPs will vote. When a conscience vote is held, media organisations will typically poll each MP and report how they intend to vote for the bill.²⁰³ The media has already done this to some extent for abortion as journalists are continuously asking MPs what their views are on abortion, so the public is likely to have a relatively good idea as to how key politicians will vote on the matter.²⁰⁴ This information was made known to the public before the most recent election meaning that in theory, voters could have taken MPs views on this issue into account when voting. After a conscience vote is held, the voting decisions of MPs are then likely to be listed in newspapers and on websites, invariably with some MPs singled out and identified as having being determinative of the result.²⁰⁵

Therefore, it may be still viewed as democratically appropriate for MPs to decide whether to decriminalise abortion through a conscience vote. Representation is at the heart of democracy, and voters pick MPs to stand in for them, weigh many competing demands, and act as best they can.²⁰⁶ In any case, both of the major political leaders have indicated that the only way a bill to decriminalise abortion would proceed through parliament (if it does so at all) is via a conscience vote.²⁰⁷ Ms Ardern has even suggested that though some within her Party would vote against it, she thinks that there would be a majority in Parliament if abortion law reform to decriminalise abortion is voted on a conscience issue.²⁰⁸ Thus, provided an abortion bill gets onto the Parliamentary agenda, this is the most likely way that it could be passed into law.

²⁰² See Graeme Edgeler "A Matter of Conscience" (10 May 2012) Public Address <<https://publicaddress.net>>.

²⁰³ Law Commission, 186, at [3.29].

²⁰⁴ See for example Martyn Bradbury "Politically, Abortion change rests with NZ First so what does that look like?" *The Daily Blog* (online ed, New Zealand, 16 March 2017); and Duff, above n 204.

²⁰⁵ Law Commission, above n 186, at [3.29].

²⁰⁶ The Dominion Post "'No' to binding referendums" *Stuff* (online ed, New Zealand, 23 July 2014).

²⁰⁷ See Wiggins, above n 191; and Emma Hurley "Ardern: Abortion 'shouldn't be in the crimes act'" *Newshub* (online ed, New Zealand, 4 September 2017).

²⁰⁸ Wiggins, above n 191.

VI Conclusion

To say New Zealand's current abortion laws are "workable" is to endorse a convenient political fiction that has been relied upon for too long. While it is understandable why the laws may be viewed to be workable from a political perspective, this view is not supported by the analysis of the legal, pro-abortion and anti-abortion perspectives addressed in this paper. This analysis indicates that the 1977 reforms enacted by Parliament failed to achieve an effective "middle ground" compromise because the current laws have not satisfied either side of the pro-and-anti-abortion debate. It is arguable though, that the laws achieve a "tolerable" situation from both the pro-and-anti-abortion perspectives and to this extent they may be viewed as "workable". However, the laws are still unlikely to meet this lower standard from the legal perspective. The inconsistency in relation to how the laws are applied and the multiple ways in which the rule of law is being undermined suggest that the current laws are not just undesirable, also but intolerable from a legal perspective. This and the general lack of respect for the laws by those affected by them means that any argument that the laws are tolerable lacks credibility from a legal perspective. Given that this paper places considerable weight on the legal perspective, and favours the definition of "workable" which focuses on the "desired effect" of the laws, it is contended that overall, the laws are unworkable.

However, even though the laws may be unworkable and in need of reform, it is still difficult to show that reform will make New Zealand's abortion regime better. The conflicting perspectives mean that Parliament is never going to be able to please everyone when it comes to abortion laws. This suggests that doing nothing would be the more convenient and appealing option, at least from the political perspective. However, as shown by the analysis in this paper, such an option would be insufficient from the legal perspective. This paper argues that Parliament should at least try to make the laws better for someone, and preferably for the majority. Since recent research indicates that the majority of New Zealanders align themselves more closely with the pro-abortion perspective, it is suggested that Parliament should attempt to make the laws better from this perspective.²⁰⁹ In doing so, they should endeavor to make the laws better from the legal perspective as well.

²⁰⁹ See ALRANZ "Abortion Issues Poll – January 2017", above n 157.

The most effective way to make New Zealand's abortion system better from the pro-abortion and legal perspectives would be through law reform involving the decriminalisation of abortion so that it is available on request and regulated under the Health Act. Though the chances of this type of reform occurring are limited, it is not impossible. The most feasible way that abortion law reform could potentially get onto the parliamentary agenda is through a members' bill, provided it is pulled from the ballot. Then it would be likely to be treated as a conscience issue, which removes some of the political risk associated with the issue. Thus, this type of reform is highly dependent on a number of variable factors falling into place. These include the vehicle through which it is pushed through Parliament, the political makeup of Parliament, timing, and possibly even luck. Therefore, such reform is a possibility but not necessarily a strong one. Though this conclusion is by no means ideal nor comforting, it is arguably the best prognosis for the contentious and polarising issue that is abortion law reform in New Zealand.

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