IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2020-485-178
[2021] NZHC 2510

UNDER	the Declaratory Judgments Act 1908 and the New Zealand Bill of Rights Act 1990
IN THE MATTER	of Part 1 s 8 (regarding new ss 14(2) and 15(2)) and Part 2 s 15 of the Abortion Legislation Act 2020
BETWEEN	NEW ZEALAND HEALTH PROFESSIONALS ALLIANCE INCORPORATED Plaintiff
AND	THE ATTORNEY-GENERAL OF NEW ZEALAND Defendant

Hearing: 8–10 March 2021

Counsel: I C Bassett for Plaintiff
D J Perkins and G M Taylor for Defendant

Judgment: 23 September 2021

JUDGMENT OF ELLIS J

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[1] Over 30 years ago, Madam Justice Bertha Wilson said:[1]

> … I believe that the decision whether to terminate a pregnancy is essentially a moral decision, a matter of conscience. I do not think there is or can be any dispute about that. The question is: whose conscience?

[1] *R v Morgentaler* [1988] 1 SCR 30 at 175–176.

[2] Wilson J's answer was that abortion engaged the conscience of the woman concerned, not the conscience of the state. She held that legislation purporting to exercise state control over a woman's choice:[2]

> … is not, in my view, just a matter of interfering with her right to liberty in the sense … of her right to personal autonomy in decision-making, it is a direct interference with her physical "person" as well. She is truly being treated as a means to an end which she does not desire but over which she has no control. She is the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life. Can there be anything that comports less with dignity and self-respect?

[3] As I will later discuss, the nexus between the ability of women to access abortion services in a timely way and their fundamental rights is now widely recognised in a number of international human rights instruments.

[4] But there remain those such as the plaintiffs in these proceedings who want no part in the exercise by women of these rights.[3] They are health practitioners who, in the exercise of their own consciences, take issue with a law that requires them to give a patient who seeks an abortion the minimal information she needs to make contact with a health provider who can help her. They say to provide this information would make them complicit in the abortion process, which they say involves the taking of human life and is contrary to their most fundamental beliefs.

[5] The plaintiffs also take issue with a law that permits employers to prefer an employee or candidate who is willing to assist in the abortion process over those who conscientiously object to doing so, in order to meet the employer's legal obligation to provide abortion services.

[6] The statutory provisions challenged by the plaintiffs were inserted into the Contraception Sterilisation and Abortion Act 1977 (the CSAA) by the Abortion Legislation Act 2020 (the ALA). The plaintiffs say these new provisions unjustifiably limit various of their rights confirmed in the New Zealand Bill of Rights Act 1990 (NZBORA). They seek declarations of inconsistency.

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2 At 173.

3 The plaintiff in these proceedings is an incorporated body of health professionals whose members are united in their religious and/or moral opposition to abortion. In this judgment I refer to the members of the plaintiff collectively as "the plaintiffs".

[7] It is necessary to begin with the wider legal context.

Domestic context: abortion law in New Zealand between 1977 and 2020

[8] Prior to the 2020 amendment, the CSAA controlled women's access to abortion by reference to the criminal law. Abortion (doing acts with intent to procure a miscarriage) was unlawful,[4] subject only to the exceptions contained in s 187A of the Crimes Act 1961 (the CA). Section 187A provided that, in the case of a pregnancy of not more than 20 weeks' gestation, abortion was not unlawful if the person doing the relevant act believed:

> (a) that the continuance of the pregnancy would result in serious danger (not being danger normally attendant upon childbirth) to the life, or to the physical or mental health, of the woman or girl …; or
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> (b) that there is a substantial risk that the child, if born, would be so physically or mentally abnormal as to be seriously handicapped; or
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> (c) that the pregnancy is the result of incest (as defined); or
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> (d) that the pregnancy is the result of sexual intercourse with a "dependent family member" (as defined); or
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> (e) that the woman or girl was "severely subnormal" within the meaning of section 138(2) of this Act.

[9] In the case of a pregnancy of more than 20 weeks' gestation, s 187A(3) provided that procuring an abortion was not unlawful only if the person doing the relevant act believed that "the miscarriage is necessary to save the life of the woman or girl or to prevent serious permanent injury to her physical or mental health".

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[4] In particular, s 186 of the Crimes Act 1961 provided:
> Every one is liable to imprisonment for a term not exceeding 7 years who unlawfully supplies or procures any poison or any drug or any noxious thing, or any instrument or other thing, whether of a like nature or not, believing that it is intended to be unlawfully used to procure miscarriage.

[10] In terms of the process for obtaining an abortion, s 32 of the CSAA relevantly provided:

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

[11] The combined effect of s 32 and of s 33 of the CSAA was that an abortion could be authorised by two "certifying consultants" issuing a certificate in the prescribed form after satisfying themselves that the case fell within one of the s 187A exceptions.

[12] Conscientious objection was permitted by s 46(1) of the CSAA, which relevantly provided:

> (1) Notwithstanding anything in any other enactment, or any rule of law, or the terms of any oath or of any contract (whether of employment or otherwise), no medical practitioner, nurse, or other person shall be under any obligation—
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> (a) to perform or assist in the performance of an abortion … :
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> …
>
> if he objects to doing so on grounds of conscience.

[13] Section 46(2) prohibited any employer from discriminating against a conscientious objector.

[14] As well, s 174 of the Health Practitioners Competence Assurance Act 2003 (the HPCAA) provided that in cases engaging a health practitioner's conscientious objection:

> … the health practitioner must inform the person who requests the service that he or she can obtain the service from another health practitioner or from family planning clinic.

Judicial decisions

[15] Between 1977 and 2020 aspects of abortion law came before the Courts on a number of occasions. The leading authority is *Wall v Livingston*, where the Court of Appeal relevantly held that the provisions of the CSAA itself do not confer any enforceable rights on a foetus.[5] It said:

> … nowhere in the Act but in the long title is there any mention of the phrase "the unborn child" or of its rights. Nor is anybody assigned a responsibility for protecting those rights in the form, for example, of an independent advocate (something rejected by the Royal Commission – see p 294 of the Report). The matter is handled indirectly. It is done by surrounding the lawful termination of a pregnancy with the precautionary process of prior medical authorisation by two certifying consultants which must be obtained (except in certain situations of emergency) if an offence is to be avoided.

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5 *Wall v Livingston* [1982] 1 NZLR 734 (CA). Dr Wall sought judicial review of two consultants' decision to authorise an abortion for a teenage girl. The girl had been referred to a public hospital for investigation of a suspected complication arising from a heart complaint. Dr Wall, a paediatrician, saw the girl as part of the hospital medical team's examination of her. When Dr Wall subsequently became aware that the two consultants had certified that an abortion was justified, he sought judicial review, alleging that there were no grounds under the Act on which an abortion could properly be undertaken (and that the consultants' certificate was accordingly invalid).

> … it is important not to lose sight of what must have been a deliberate Parliamentary decision: the avoidance of any attempt to spell out what were to be regarded as the legal rights in an unborn child; with the consequential absence of any statutory means by which rights (whatever their nature) could be enforced.

[16] Those dicta were confirmed more recently in *Abortion Supervisory Committee v Right to Life New Zealand Inc*.[6] The Court held that "there is no basis either from the Long Title to the CSAA or the abortion law to derive generally an express right to life in the unborn child."[7] In the absence of any statutory recognition of such a right, the common law "born alive" rule applies in New Zealand, under which a foetus has no legal rights prior to birth. The Supreme Court declined to hear an appeal on this issue, saying "it is plain that the [CSAA] was based on the premise of the "born alive" rule".[8]

[17] More notable for present purposes, however, are the judicial review proceedings brought in 2010 by the plaintiff association together with one of its members, Dr Catherine Hallagan.[9] Those proceedings challenged the proposed promulgation of a statement by the Medical Council of New Zealand (the Medical Council) entitled *Beliefs and Medical Practice*. Dr Hallagan contended that the statement involved a misinterpretation of the law and would impose obligations on conscientiously objecting medical practitioners to act inconsistently with their personal values and beliefs about abortion.

[18] In essence, the Medical Council's position (as reflected in the proposed statement) was that:

(a) when a doctor with a conscientious objection is consulted by a patient seeking an abortion, the doctor was under a statutory obligation, under s 32(1) of the CSAA, to determine whether the case was one to which one of the s 187A exceptions might apply and, if so, to arrange for the case to be considered and dealt with by another doctor (by reference to

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

7 At [59].

8 *Right to Life New Zealand Inc v The Abortion Supervisory Committee* [2011] NZSC 97 at [1].

9 *Hallagan v Medical Council of New Zealand* [2010] NZHC 2124.

the proper professional standards applying to referrals) in accordance with s 32(2)(a);

(b) s 46 of the CSAA did not permit the doctor, on grounds of conscience, to decline to do so, because arranging for the case to be considered by another doctor did not amount to assisting in the performance of an abortion; and

(c) that position was unaffected by s 174 of the HPCAA because:

(i) s 174 did not confer a right of conscientious objection that overrode the mandatory provisions of s 32; and

(ii) s 174 could have no application in a case where s 46 was not engaged.

[19] Mackenzie J agreed with the Medical Council that s 46 did not exempt the doctor from the s 32(1) obligation because arranging for the case to be considered and dealt with in accordance with the succeeding provisions did not constitute assisting in the performance of an abortion. But he disagreed with the Medical Council that the reach of s 174 was confined by s 46. He said:

> [17] If Ms Scholtens' submission on this point is correct, then Parliament has imposed a mandatory requirement on a woman's own doctor to whom a request is made to arrange for the case to be considered and dealt with, with a view to an abortion. That obligation is imposed even where the doctor has an objection, on grounds of conscience, to making that arrangement. I do not attribute to Parliament an intention to impose such a requirement. It might be that some doctors with a conscientious objection to abortion would not consider it a violation of their principles to arrange for the case to be considered by making a referral, in accordance with proper medical practice, to another doctor. In that case, the doctor could perform the s 32(1) obligation, without offending his or her conscience, by arranging for the case to be considered and dealt with by another doctor. However, some doctors might regard even the step of making a formal referral as violating their conscience. Matters of conscience are intensely personal. The question is: has Parliament legislated in s 32(1) to require a doctor to arrange for a case to be considered by another doctor, even if taking that step offends the conscience of the doctor? Clear words would be needed to impose such a requirement. That would have been so when the CSA Act was passed. It is more obviously so today, in the light of the right to freedom of conscience enshrined in s 13 of

> the New Zealand Bill of Rights Act 1990, and the requirement in s 6 of that Act to prefer a meaning that is consistent with that right.
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> …
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> [19] I consider that the reference in s 174(1)(b) to an objection on grounds of conscience is not confined to a right of conscientious objection conferred by Parliament in s 46, or specifically recognised in some other way. The reference extends to any conscientious objection held by a doctor to providing some service relating to abortion, and the section does not limit or confine the extent of such a conscientious objection. For these reasons, I consider that the answer to the question posed in [17] is no. I consider that Parliament has provided, in s 174, that a doctor who has such a conscientious objection may, instead of arranging for the case to be considered, give the information required by s 174(2).

[20] And later, the Judge explained the balance he had struck:

> [23] … I consider that the conclusions which I have reached, based essentially on ordinary principles of statutory interpretation, are supported by a rights-focused analysis. At the stage of the initial doctor/patient consultation envisaged by s 32, before there has been an involvement of a medical character in respect of that consultation, I consider that a focus on the rights of the doctor under ss 13 and 15 of BORA is appropriate. That focus supports the view that a right of conscientious objection at that stage is recognised and provided for in s 174. At the later stage, if the doctor has undertaken the task of considering the case, there is a medical involvement in which the focus is properly on the rights of the patient, as protected by the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996. That focus supports the view that, having embarked upon that medical involvement, the doctor may not thereafter subordinate the patient's rights to the doctor's rights. On that view, the doctor's rights are appropriately recognised and protected, but the patient's rights impose a limitation on the manner and timing of the exercise of the doctor's rights.

[21] The upshot was that—notwithstanding the limited scope of objections under s 46—s 174 permitted conscientious objectors who were faced with a woman seeking an abortion to decline to engage in the ss 32 and 33 process at all. All they were required to do was inform the woman that she could obtain the "service" from another (unspecified) health practitioner or from a family planning clinic. No referral was required and nor was the conscientious objector required to assist the woman by providing any other information about how she could access the service she sought.

International context: human rights instruments and overseas cases

[22] As the passage just quoted from *Hallagan* makes clear, the Judge in that case was focused on striking a balance between the potentially conflicting rights of a conscientious objecting health practitioner and those of his or her patient. But it seems that the latter rights were considered only through a narrow "patient" lens, not through the wider lens of women's rights generally.[10] And as noted earlier in this judgment, it is clear that a woman's ability to access abortion services engages a number of fundamental rights and freedoms, including her right to health, to liberty and security of the person and to be free from discrimination.

International Covenant on Economic, Social and Cultural Rights

[23] First, the obligation to provide for "the enjoyment of the highest attainable standard of physical and mental health" imposed on states parties by art 12 of the International Covenant on Economic, Social and Cultural Rights (ICESC)[11] includes an obligation to provide safe abortion and post-abortion services.[12] Those services must be accessible, acceptable and of good quality.[13] This, in turn, is accepted to oblige states to ensure conscientious objections to abortion do not "inhibit anyone's access to sexual and reproductive health care, including by requiring referrals to an accessible provider capable of and willing to provide the services being sought".[14]

Convention on the Elimination of All Forms of Discrimination against Women

[24] Art 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) defines discrimination against women as including gender-based violence or violence that affects women disproportionately. And in its General Recommendation No 35, the United Nations Committee on the Elimination of Discrimination Against Women said:

> 18. Violations of women's sexual and reproductive health and rights, such as … criminalization of abortion, denial or delay of safe abortion and/or post-

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10 *Hallagan* appears to have been argued primarily as a case about statutory interpretation, rather than as a claim under the NZBORA.

11 New Zealand ratified the International Covenant on Economic, Social and Cultural Rights in 1978.

12 United Nations Committee on Economic, Social and Cultural Rights *General Comment No 22 on the right to sexual and reproductive health* E/C.12/GC/22 (2016) at [43].

13 At [62].

14 At [43].

> abortion care, forced continuation of pregnancy, … are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.

[25] Article 12 of the CEDAW requires states parties to eliminate discrimination against women specifically in the field of health care, including family planning. In General Recommendation No 24 the Committee recommended that States amend legislation that criminalises abortion and, further, that:[15]

> 11. … It is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women. For instance, if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers.

[26] And art 16 of the CEDAW provides that states parties must take appropriate measures to ensure that women have equal rights to decide freely and responsibly on the number and spacing of their children:[16]

> 21. The responsibilities that women have to bear and raise children affect their right of access to education, employment and other activities related to their personal development. They also impose inequitable burdens of work on women. The number and spacing of their children have a similar impact on women's lives and also affect their physical and mental health, as well as that of their children. For these reasons, women are entitled to decide on the number and spacing of their children.

The Canadian Charter

[27] I began this judgment by quoting from Wilson J's judgment in the seminal Canadian decision in this area: *R v Morgentaler*. There, the Canadian Supreme Court (by a majority that included Wilson J) held that the abortion provision in the Criminal Code was unconstitutional because it violated women's rights in the Canadian Charter of Rights and Freedoms (the Charter).[17]

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15 United Nations Committee on Convention on the Elimination of All Forms of Discrimination against Women *General recommendation No. 24: Article 12 of the Convention (Women and Health)* A/54/38/Rev.1, chap. I (1999).

16 United Nations Convention on the Elimination of All Forms of Discrimination against Women (opened for signature 18 December 1979, entered into force 3 September 1981).

17 *R v Morgentaler*, above n 1. At that time, s 251(1) of the Code criminalised the procurement of abortions, but s 251(4) provided a defence where the abortion was approved by a Therapeutic Abortion Committee.

[28] But it was only Wilson J who squarely considered whether, by limiting a woman's access to abortion, s 251 of the Criminal Code violated her right to life, liberty and security of the person contrary to s 7 of the Charter.[18] In finding that it did, Wilson J held that:

(a) it was enough for s 251 to simply expose a woman to a *threat* to her physical and psychological security—freedom from the threat is inherent to that right;[19]

(b) s 7 also encompassed a liberty right that was inextricably tied to the concept of human dignity: an individual's ability to pursue her own conception of a full and rewarding life, which, in turn, required that individuals be accorded autonomy in making decisions of fundamental personal importance—those decisions that intimately affect their private lives;[20] and

(c) the liberty and the security rights go to whether a pregnant woman had a protected right to decide for herself whether or not to have an abortion.

[29] Wilson J referred to cases from the United States including, in particular, *Roe v Wade* and *Doe v Bolton*, in which the US Supreme Court first concluded that the right to privacy in the Fourteenth Amendment's guarantee of liberty was broad enough to include a woman's decision to terminate her pregnancy.[21] The Judge noted, however, that the Court had not found the right to be absolute: "At some point the legitimate state interest in the protection of health, proper medical standards, and pre-natal life would justify qualification".[22]

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18 At 162. Section 7 provides: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

19 At 163.

20 At 166 and 171. Her Honour also noted at 167 that: "Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them."

21 At 169, citing *Roe v Wade* 410 US 113 (1973); *Doe v Bolton* 410 US 179 (1973).

22 At 169.

[30] Wilson J concluded that the respect for individual decision-making in matters of fundamental importance (reflected in the jurisprudence) also informed the Canadian Charter. And she had no doubt that a woman's decision to terminate her pregnancy was a protected decision of fundamental personal importance:[23]

> … This decision is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.

[31] The Judge found that s 251 breached the liberty right because it took the decision away from the woman and gave it to a committee—a committee that would then base its decision on criteria entirely unrelated to the woman's own priorities and aspirations.[24] She noted that the violation was no different than if a committee was to decide whether a woman should be allowed to *continue* her pregnancy.

[32] Wilson J found that a woman's right to have control over her own body engaged not only the liberty right but the security right. She observed that s 251 subjected pregnant woman to emotional stress as well as to unnecessary physical risk. Moreover, the provision "assert[ed] that the woman's capacity to reproduce is not to be subject to her own control", but rather "subject to the control of the state".[25] The Judge said:

> … it is a direct interference with her physical "person" as well. She is truly being treated as a means—a means to an end which she does not desire but over which she has no control. She is the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life. Can there be anything that comports less with human dignity and self-respect? How can a woman in this position has any sense of security with respect to her person?

[33] Wilson J therefore concluded that s 251 deprived the pregnant woman her right to security of the person as well as her right to liberty.

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23 At 171.
24 At 172.
25 At 173.

[34] Next, because the decision whether or not to terminate a pregnancy was a matter of conscience (of the individual, not the state), a woman's right to freedom of conscience and religion (s 2(a) of the Charter) was also engaged.[26] After observing that freedom of conscience and religion included conscientiously held beliefs grounded in both religious *and* secular morality, Wilson J concluded that:[27]

> Accordingly, for the state to take sides on the issue of abortion, as it does in the impugned legislation by making it a criminal offence for the pregnant woman to exercise one of her options, is *not only to endorse but also to enforce*, on pain of a further loss of liberty through actual imprisonment, *one conscientiously-held view at the expense of another*. It is to deny freedom of conscience to some, to treat them as means to an end, to deprive them… of their "essential humanity".
>
> Legislation which violates freedom of conscience in this manner cannot, in my view, be in accordance with the principle of fundamental justice within the meaning of s 7.

[35] In terms of whether the s 7 deprivation could constitute a reasonable limit under s 1 of the Charter and be justified in a free and democratic society Wilson J noted that the purpose of s 251 must primarily be the protection of the foetus. While she accepted that as a perfectly valid legislative objective, she said:[28]

> … The question is: at what point in the pregnancy does the protection of the foetus become such a pressing and substantial concern as to outweigh the fundamental right of the woman to decide whether or not to carry the foetus to term? At what point does the state's interest in the protection of the foetus become "compelling" and justify state intervention in what is otherwise a matter of purely personal and private concern?

[36] Wilson J noted that in *Roe v Wade*, the US Supreme Court had found that the state's interest became compelling when the foetus became viable—when it could exist outside the mother's body. She observed that while a foetus is "potential life" from the moment of conception, "greater weight should be given to the state's interest in the later stages of pregnancy than in the earlier".[29] So in the early stages of pregnancy the woman's autonomy would be absolute, but in the later stages her reasons for having an abortion would be the proper subject of inquiry, when the state's

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26 Section 2(a) simply provides: "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion…"

27 At 179–180 (emphases added).

28 At 181.

29 At 182.

compelling interest in protecting the foetus would justify the prescription of conditions.[30]

[37] The effect of s 251, however, was to take the decision away from the woman at *all* stages of her pregnancy. Wilson J concluded:[31]

> [Section 251] is a complete denial of the woman's constitutionally protected right under s 7, not merely a limitation on it. It cannot, in my opinion, meet the proportionality test in *Oakes*. It is not sufficiently tailored to the legislative objective and does not impair the woman's right "as little as possible". It cannot be saved under s 1. Accordingly, even if the section were to be amended to remedy the purely procedural defects… it would, in my opinion, still not be constitutionally valid.

The move for reform

International criticism

[38] In 2012, the United Nations Committee published its seventh periodic review of New Zealand's compliance with CEDAW. In its conclusions the Committee stated:[32]

> The Committee notes with concern, however, the convoluted abortion laws which require women to get certificates from two certified consultants before an abortion can be performed, thus making women dependent on the benevolent interpretation of a rule which nullifies their autonomy. The Committee is also concerned that abortion remains criminalized in [New Zealand], which leads women to seek illegal abortions, which are often unsafe.
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> …
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> The Committee urges [New Zealand]:
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> (a) To review the abortion law and practice with a view to simplifying it and to ensure women's autonomy to choose;
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> (b) To prevent women from having to resort to unsafe abortions and remove punitive provisions imposed on women who undergo an abortion.

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30 At 183.

31 At 183–184.

32 United Nations Committee on the Elimination of Discrimination Against Women *Concluding Observations of the Committee on the Elimination of Discrimination against Women: New Zealand* CEDAW/C/NZL/CO/7 (2012) at [33]–[34]. These concerns and recommendations were repeated by the Committee in 2018, in the context of its eighth review of New Zealand: United Nations Committee on the Elimination of Discrimination Against Women *Concluding Observations on the Eighth Periodic Report of New Zealand* CEDAW/C/NZL/CO/8 (2018) at [39]–[40].

The Law Commission is instructed

[39] Following a request in late 2017 from the Prime Minister, the Minister of Health referred the question of abortion law reform to the Law Commission. That reference culminated in the Law Commission's lengthy (over 200-page) ministerial briefing paper, presented in October 2018.[33] The paper records that the Commission received some 3,419 submissions, with 61 of those coming from organisations such as government bodies, professional organisations, academic groups, religious organisations, and interest groups. The Commission's instructions from government were effectively that the legal framework governing abortions should reflect the policy that abortion was "a health issue that is a reproductive choice for women, rather than a criminal issue". This required the Commission not only to review the criminal aspects of abortion law—including the s 187A grounds on which abortions could be performed and the related CSAA processes—but also to consider any other impediments to women accessing abortion services. In turn, this necessitated analysis of both the geographical availability of such services and the issue of delay.

[40] To understand what a health approach to abortion might look like, the Commission examined how the law deals with other health services. It noted that the general laws and professional standards relating to such services aim to:

(a) prioritise the health and wellbeing of the individual patient and their autonomy to make an informed decision;

(b) ensure effective, timely and equitable access to health services; and

(c) enable continuous improvement of the quality of services.

[41] In terms of delay, the Commission's starting point was that abortions are considerably safer, quicker, cheaper and less distressing (for both the woman and health practitioners concerned) when performed at an earlier stage of gestation. In that regard, the Commission noted:[34]

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33 Law Commission *Alternative approaches to abortion law* (NZLC MB4, 2018).

34 Emphases added.

2.11 In New Zealand most abortions occur during the first trimester (the first 12 weeks) of pregnancy. This accounted for 89.4 per cent of abortions in 2017. A further 8.3 per cent of abortions occurred in weeks 13–16. Only 1.7 per cent occurred between 17–20 weeks and 0.5 per cent after 20 weeks.

2.12 However, first trimester abortions are performed significantly later than in countries New Zealand often compares itself to. For example, in England and Wales in 2017, 77 per cent of abortions were carried out before 10 weeks. By contrast, only 59 per cent of abortions in New Zealand were performed before 10 weeks. While the reasons for this are not conclusively known, *many health practitioners the Commission spoke to considered the authorisation process required under the current law prevents abortions from being performed as early as would otherwise be possible.*

2.13 *Many submitters were concerned about the extent of the delay experienced by women seeking an abortion. Some women who had been through the process said they had to wait a number of weeks due to the legal authorisation process and/or a lack of doctors in their area who would perform abortions. For some, this delay meant they lost the opportunity to have an early medical abortion (EMA).* Others experienced significant pregnancy symptoms or found the delay traumatic. Some submitters also considered that performing abortions as early as possible is more ethical, as the fetus is less developed.

[42] The causes of delay were discussed in the context of a discussion of the process of obtaining an abortion itself:[35]

2.26 The process begins with a woman approaching a health practitioner, either after a positive home pregnancy test or when she thinks she may be pregnant. Usually at the first appointment the pregnancy will be confirmed. The health practitioner may also discuss the options available to the woman, such as continuing the pregnancy, adoption or referral to an abortion service provider.

2.27 If the woman expresses a wish to have, or to consider having, an abortion, several things then occur. First, the woman may need to make another appointment to see a general practitioner (GP) or Family Planning doctor. This may be the case where:

- the health practitioner first consulted is not a doctor. A woman may, for example, see a midwife (particularly if she already has children and has an existing relationship with a midwife) or a Family Planning nurse. If this happens, the woman will usually need to make another appointment to see a GP or Family Planning doctor, as only doctors can refer a woman's case to be considered by certifying consultants;

- the doctor whom the woman first consults declines to refer her to an abortion service provider because the doctor has a

[35] Footnotes omitted.

conscientious objection.[50] Again, this will usually mean that the woman needs to see a different GP or Family Planning doctor to get a referral.

2.28 Health practitioners reported that in some areas it can take two to three weeks for a woman to get an appointment with a doctor who will refer her to an abortion service provider, particularly if she is not already enrolled with a GP or her GP has a conscientious objection.

2.29 Second, the referring doctor will usually carry out a routine blood test, genital swab (to test for sexually transmitted infections) and smear test (if required), and arrange an ultrasound scan to confirm gestational age. In some cases, some or all of these tests may be done by a different health practitioner (such as a midwife, nurse or ultrasound technician), either through a community health service or at the abortion clinic.

2.30 Third, the referring doctor may arrange for the woman to see a counsellor before she is referred to an abortion service provider. While counselling is available through abortion service providers, the Commission understands it is also offered at an earlier stage in some cases.

2.31 Fourth, the referring doctor may encourage the woman to take some time to think about her options and come back for a second appointment before she is referred to an abortion service provider. This appears to be reasonably common, although it is discouraged by the ASC *Standards of Care*.

[43] So, in the result:

2.32 Depending on the circumstances, a woman may therefore have anywhere from one to four or more appointments before she is referred to an abortion service provider. This process can take several weeks.

[44] The Law Commission described the abortion services then available in different DHB districts. It noted, for example, that there were no services available in the West Coast or Whanganui DHB areas, and services were only available in the Hutt Valley and South Canterbury in cases of foetal abnormality. The whole Auckland region, including Counties-Manukau and Waitematā, was served by one publicly funded provider of first trimester abortions (in Epsom). Many other DHB areas only provided abortions up to nine weeks (early medical) or 14 weeks (surgical), meaning that many women seeking an abortion after the first trimester had to travel a significant distance.

[45] The questions of access and delay also informed the Commission's approach to conscientious objection. While the Commission did not suggest that the existing right of health practitioners to refuse to provide abortion services on the grounds of conscience should be removed, it suggested that:

> … the Government could consider changing the law to ensure that conscientious objection does not unduly delay women's access to abortion services. Health practitioners with an objection could be required to refer a woman seeking an abortion to someone who can provide the service as soon as reasonably practicable.

[46] The Commission explained that it had come up with three alternative reform models and assessed the extent to which each was likely to align with the proposed policy of treating abortion as a health issue. No particular model was recommended because it was for the Government—and ultimately Parliament—to decide what, if any, changes should be made to the law.

[47] All three of the models put forward by the Commission were aimed at giving greater priority to the health and wellbeing of the woman seeking an abortion than did the existing law. By way of summary, these were:

(a) Model A, which contemplated no specific abortion legislation and so involved repealing the abortion provisions in the Crimes Act 1961 and the CSAA.[36] There would be no statutory test required to be satisfied before an abortion could be performed and the decision whether to have an abortion would be made by a woman in consultation with her health practitioner.

(b) Model B, under which the health practitioner who intends to perform an abortion would need reasonably to believe the abortion is appropriate in the circumstances, having regard to the woman's physical and mental health and wellbeing. This statutory test would be contained in health legislation rather than the Crimes Act.

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[36] As the Commission noted, treating abortion as a health issue calls into question the need for any specific abortion legislation, because the existing health regulatory framework already applies to all health services. Most health services are not subject to their own legislative regime and are instead governed by this general health regulatory framework.

(c) Model C, which was a combination of Models A and B. Thus:

(i) Model A would apply to pregnancies of not more than 22 weeks gestation (there would be no statutory test that must be satisfied before an abortion could be performed); and

(ii) Model B would apply to pregnancies of more than 22 weeks gestation (the health practitioner intending to perform the abortion would need to reasonably believe the abortion is appropriate in the circumstances, having regard to the woman's physical and mental health and wellbeing).

Evidence for the Attorney-General

[48] The Law Commission's assessment of the variable access and timeliness problems across the country is confirmed by the evidence filed on behalf of the Attorney-General in this case. The evidence records that, before the 2020 reforms, one study concluded there was an average wait of 25 days between a woman's first appointment and having an abortion. As well, abortions in New Zealand were performed significantly later than in comparable jurisdictions.[37] And in some areas, it could take up to two to three weeks for a woman to get an appointment with a doctor who was able then to refer them to an abortion services provider—particularly if the woman's GP has a conscientious objection.

[49] The evidence also confirms that although DHBs are contractually obliged (and funded) to provide abortion services, not all such services are available consistently across all DHBs. For example, early abortions are generally more readily available, and can be obtained from a wider range of practitioners in a wider range of centres.

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[37] As mentioned earlier in the Commission's report, only 59 per cent of abortions in New Zealand were performed before 10 weeks' gestation, compared to 77 per cent in England and Wales.

By contrast, second trimester abortions are provided by only a small number of practitioners in selected parts of New Zealand.[38] Thus:

(a) Women from Wairarapa, Mid-Central, Tairāwhiti Gisborne, Hawkes Bay, Whanganui, and Nelson-Marlborough DHBs who seek abortions after 14 weeks' gestation are required to come to the Te Mahoe clinic in Wellington.

(b) Whangārei Hospital—which is the only provider of abortion services in Northland—provides those services only up to 14 weeks' gestation.

The 2020 Amendment

[50] The Law Commission's review led to the introduction and passage of the Abortion Legislation Act 2020 (the ALA). Ultimately, a slightly more conservative form of the Commission's "Model C" was adopted. Under the amended scheme, a pregnant woman can seek termination of her pregnancy for up to 20 weeks of pregnancy without being required to satisfy any statutory test. After 20 weeks, abortion is permitted only if a health practitioner has deemed it "clinically appropriate in the circumstances"[39] and has consulted with at least one other health practitioner.

[51] It may be noted in passing that this approach is broadly consistent with that taken by the US Supreme Court in *Roe* and endorsed by Wilson J in *Morgentaler*.

[52] Sections 182 to 187A of the CA were, variously, amended or repealed, and ss 10 to 46 of the CSAA were repealed and replaced. It is the new ss 14 and 15 that are relevant for present purposes.

[53] Section 14 is the new conscientious objection provision. It states:

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[38] The evidence records that the Abortion Supervisory Committee has reported there are only 61 health practitioners in New Zealand qualified to provide abortion services, and only eight doctors able to provide second trimester abortions. This led the Committee to observe that "[d]espite the woman and her health practitioner deciding an abortion is warranted, there may be access issues around obtaining the procedure if operators are unwilling to perform an abortion at that gestation".

[39] The health practitioner must have regard to all relevant legal, professional and ethical standards, the woman's health and wellbeing, and the gestational age of the foetus. These mandatory considerations and the need to consult another practitioner do not apply in medical emergencies.

14 Conscientious objection

(1) This section applies to a person (**A**) who is requested by another person (**B**) to provide, or assist with providing, any of the following services:

…

(c) abortion services:

(d) information or advisory services about whether to continue or terminate a pregnancy.

(2) If A has a conscientious objection to providing, or to assisting with providing, to B the service requested, A must tell B at the earliest opportunity—

(a) of their conscientious objection; and

(b) how to access the contact details of another person who is the closest provider of the service requested.

(3) In subsection (2)(b), the closest provider is to be determined taking into account—

(a) the physical distance between the providers; and

(b) the date and time that B makes the request under subsection (1); and

(c) the operating hours of the provider of the service requested.

(4) This section does not override a health practitioner's professional and legal duty to provide prompt and appropriate medical assistance to any person in a medical emergency.

[54] And the new s 15 requires relevant employers to accommodate conscientious objection of employees or applicants for employment unless it would cause unreasonable disruption to do so. More specifically, it provides:

15 Employer providing certain services must accommodate conscientious objection of applicant or employee unless it would cause unreasonable disruption

(1) An employer that provides any of the services specified in section 14(1) may not take any of the following actions on the basis that an applicant for employment, or an employee, who is qualified for work in connection with the provision of those services, has a conscientious objection:

(a) refuse or omit to employ the applicant for work that is available; or

(b) offer or afford the applicant or the employee less favourable terms of employment, conditions of work, superannuation or other fringe benefits, and opportunities for training, promotion, and transfer than are made available to applicants or employees of the same or substantially similar capabilities employed in the same or substantially similar work; or

(c) terminate the employment of the employee in circumstances in which the employment of other employees employed in the same or substantially similar work would not be terminated; or

(d) subject the employee to any detriment in circumstances in which other employees employed in the same or substantially similar work would not be subjected to such detriment; or

(e) retire the employee, or to require or cause the employee to retire or resign.

(2) However, if accommodating an applicant's or employee's conscientious objection would unreasonably disrupt the employer's provision of health services, the employer may take any of the actions described in subsection (1).

(3) Accommodating an applicant's or employee's conscientious objection may include arranging for the duties in respect of which the applicant or employee has an objection to be carried out by an existing employee.

…

[55] Also relevant is the new s 18, which provides:

18 Duty of Director-General to compile, maintain, and make available list of abortion service providers

(1) The Director-General must compile and maintain a list of the names and contact details of abortion service providers in New Zealand.

(2) The Director-General may not include in the list the name and contact details of any abortion service provider who advises the Director-General that they do not want their name and contact details included in the list.

(3) The Director-General must ensure that the list, or the information on the list, is accessible to any person on request.

[56] Section 174 of the HPCAA was also amended by the ALA; it now mirrors the new s 14 of the CSAA and relevantly states:

> **174 Duty of health practitioners in respect of reproductive health services**
>
> (1) This section applies whenever—
>
> (a) a person requests a health practitioner to provide a service (including, without limitation, advice) with respect to … abortion …; and
>
> (b) the health practitioner has an objection on the ground of conscience to providing the service (a conscientious objection).
>
> (2) When this section applies, the health practitioner must tell the person requesting the service at the earliest opportunity—
>
> (a) of their conscientious objection; and
>
> (b) how to access the contact details of another person who is the closest provider of the service requested.
>
> (3) In subsection (2)(b), the closest provider is to be determined taking into account—
>
> (a) the physical distance between the providers; and
>
> (b) the date and time that the person has requested the service; and
>
> (c) the operating hours of the provider of the service requested.

The plaintiff's claim and my proposed approach to it

[57] The plaintiffs say that:

(a) The new s 14 of the CSAA requires them, despite their conscientious objections, to be complicit in the abortion process. They say that this limits their rights under the New Zealand Bill of Rights Act 1990 (NZBORA) in a way that cannot demonstrably and reasonably be justified in a free and democratic society. They contend that the amendment infringes:

(i) their freedom of thought, conscience and religion (s 13);

(ii) their freedom of expression (s 14);

(iii) their freedom to manifest their religion and beliefs (s 15); and

(iv) their freedom of association (s 17).

(b) The new s 15 of the CSAA infringes:

(i) their freedom of expression (s 14);

(ii) their right to be free from discrimination (s 19); and

(iii) the rights of minorities (s 20).

[58] The Crown acknowledges that freedom of expression (s 14) and the freedom to manifest religion or belief (s 15) are engaged but says that any inconsistency with, or limit on, those freedoms resulting from the CSAA provisions is demonstrably justified in a free and democratic society. The Crown denies that ss 13, 17, 19 or 20 are engaged at all.

[59] The Court is therefore required to determine:

(a) whether each pleaded right or freedom is engaged by either or both of the CSAA provisions;

(b) if so, whether either the relevant CSAA provision has the effect of limiting or interfering with the right or freedom so engaged; and

(c) if so, whether a limitation on the relevant right or freedom is capable of justification, in the sense of ever being permitted;[40] and

(d) if so, whether the relevant right or freedom is, in fact, demonstrably justified in a free and democratic society.

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[40] For reasons that will become evident, this question only arises in relation to the alleged breach of s 13 (freedom of religion and thought).

[60] Other than the last, I propose to address and answer these questions on a right by right basis. Because the s 5 question (whether any limitation on the pleaded NZBORA rights can be justified in a free and democratic society) potentially arises in relation to all of the claimed breaches, I leave that issue to be considered globally, at the end of this judgment.

Freedom of thought, conscience and religion: s 13

[61] In broad terms, the plaintiffs say that the requirement imposed by s 14 of the CSAA on conscientious objectors to tell patients how to access abortion services interferes with their freedom of conscience, religion and belief, contrary to s 13 of the NZBORA.[41]

The relationship between s 13 and s 15

[62] In order to determine whether s 13 is engaged here, there is a prior and important question about its relationship with s 15, which protects the *manifestation* of religion or belief. The two sections respectively state:

> **13. Freedom of thought, conscience, and religion**
>
> Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.
>
> **15. Manifestation of religion and belief**
>
> Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

[63] The White Paper that preceded the enactment of the NZBORA observed that the s 13 right is "essentially concerned with the internal, subjective element". By contrast, the rights confirmed in s 14 (freedom of expression) and s 15 are "concerned with the external manifestation of the freedoms included in [s 13]".

[64] The cognate rights under the International Covenant on Civil and Political Rights (ICCPR)—on which the NZBORA is based—and under the European Covenant on Human Rights (ECHR) are not quite so clearly differentiated. Thus:

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[41] The nature of the required act is discussed in more detail later.

(a) Article 18 of the ICCPR states:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

(b) Similarly, art 9 of the ECHR provides:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

[65] It may be observed that, in both these instruments, the right to "manifest" religion or belief is expressed as a subset of the wider freedom of religion and conscience. But the distinction between them is important because, as both art 18(3) and art 9(2) make clear, it is only the external, *manifestation*, aspect of the right that can be subject to "such limitations as are prescribed by law and are necessary in a democratic society …". A restriction on the internal freedom of thought cannot be justified; the right is absolute.

[66] This point was made clearly by the Human Rights Committee of the United Nations in its General Comment No 22 (1993) on art 18 of the ICCPR. The Committee said:[42]

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[42] Emphasis added.

> 3. Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. *It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice.* These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19.1. In accordance with articles 18.2 and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief.

[67] The Committee then went on to elaborate both on the extent of the external manifestation right and the extent of the internal thought right:[43]

> 4. The freedom to manifest religion or belief may be exercised "either individually or in community with others and in public or private". *The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts.* The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.
>
> 5. *The Committee observes that the freedom to "have or to adopt" a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief.* Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant, are similarly inconsistent with article 18.2. The same protection is enjoyed by holders of all beliefs of a non-religious nature.

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[43] Emphases added.

[68] And so, too, with art 9. For example, in *R (Williamson) v Secretary of State for Education* Lord Nicholls observed:[44]

> … under art 9 there is a difference between freedom to hold a belief and freedom to express or 'manifest' a belief. The former right, freedom of belief, is absolute. The latter right, freedom to manifest belief, is qualified.

[69] Importantly, Lord Nicholls went on to explain, in policy terms, the reason for the distinction:[45]

> … This is to be expected, *because the way a belief is expressed in practice may impact on others*. … So in a pluralist society a balance has to be held between freedom to practise one's own beliefs and the interests of others affected by those practices.

[70] Consistent with such statements, the Crown in this case agrees that, in terms of the NZBORA, the *internal* s 13 right is also absolute; restrictions on it are not capable of justification under s 5.[46] But, it says, s 13 is not engaged at all in this case. By contrast, Mr Bassett contends that s 14 of the CSAA limits not just the s 15 freedom to manifest, but also the internal freedom protected by s 13.

[71] So whether s 13 is engaged is the next question I must address.

Is s 13 engaged here?

[72] As just noted, the distinction between the internal and the external rights can, in theory, be found by examining whether the way in which the right or freedom is exercised affects others. In this case, the distinction is important because—as I have already explained—the Crown accepts that any limitation imposed on the internal right by the amendments to the CSAA would not be capable of justification under s 5.

[73] And in practice, the line between "internal" and "external" rights has not always proved so bright. In particular, because of the composite way in which art 18 of the ICCPR and art 9 of the ECHR are expressed, the international authorities are

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44 *R (Williamson) v Secretary of State for Education* [2005] UKHL 15, [2005] 2 AC 246 at [16].

45 At [17] (emphasis added). See also (by way of further example only) *Eweida v United Kingdom* [2013] ECHR 37 at [80].

46 As Mr Bassett points out, this position is different from the one taken by Crown Law in its advice to the Attorney-General on the consistency of the ALA with the NZBORA. In that advice, Crown Law advised that the s 13 freedom *was* engaged but opined that any limit on it was justified.

not always clear about which aspect of the right—the absolute freedom of conscience or the qualified freedom to manifest—is found to be engaged in any given case.[47]

[74] One example—particularly relied on by Mr Bassett here—is the Privy Council's decision in *Commodore of the Royal Bahamas Defence Force v Laramore*.[48] That case involved a challenge to the Defence Force of the Bahamas requiring that a Muslim army officer was to remain present for, and doff his cap during, Christian prayers at a ceremonial army parade. The Privy Council held that this requirement infringed art 22(1) of the Bahamas Constitution, which (like art 9 and art 18) combined the internal and external freedoms, as follows:

> Except with his consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this Article the said freedom includes freedom of thought and of religion, freedom to change his religion or belief and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.

[75] I acknowledge that on one reading, the Board's finding of breach seems focused on the internal rather than the external component of the right. That is evident from the Board's statements that:

> … in the present case the actual issue is whether Mr Laramore was hindered in the enjoyment of his freedom of conscience by being required to take part in a prayers ceremony which included a 'caps off' order. It is sufficient for the purposes of this appeal that the Board considers that this positive requirement constituted such a hindrance. …
>
> …
>
> Being made to stand on parade, even at ease, during the saying of Christian prayers would in these circumstances also appear to the Board as on its face a hindrance to Mr Laramore's freedom of enjoyment of his conscience. …
>
> …
>
> … Mr Laramore was hindered … in the enjoyment of his freedom of conscience during the regular colours parades during which prayers were said.

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47 See, for example, *Ivanova v Bulgaria* [2007] ECHR 270. Other relevant examples (where the ECtHR has been split on the issue) will be discussed shortly, below.

48 *Commodore of the Royal Bahamas Defence Force v Laramore* [2017] UKPC 13, [2017] 3 LRC 645.

[76] Thus, at first glance, these findings seem to blur the distinction between thoughts (internal) and acts (external); Mr Laramore was being required to *act* in a certain way, not to change his religious beliefs. As Mr Bassett would have it, that is because being required to *act* contrary to belief also *hinders* that belief. He submitted that the concept of "hindering" in art 22 finds its analogue in the concept of "interfering" in s 13 of the NZBORA.

[77] To the extent that submission was advanced as a general proposition—namely that any requirement to act contrary to belief engages the internal right—I am unable to accept it. The required act in question in *Laramore* was qualitatively different from the act required by s 14 of the CSAA. Mr Laramore was forced to participate in a *religion* (specifically, to take part in a religious ceremony) that differed from his own. That is much closer to a "brain washing" scenario of the kind that is commonly accepted as being prohibited by s 13. It is not too much of a stretch to say that Mr Laramore was being forced to "practise" Christianity in a way that hindered his freedom of thought as a Muslim.

[78] That analysis is supported by reference to the underlying policy distinction between the internal and external rights, as articulated by Lord Nicholls in *Williamson*. If the line is to be determined by reference to the potential impact of the exercise by Mr Laramore of his right on others, then the right can only be seen as an internal one. No one else would have been affected by Mr Laramore absenting himself from parades involving Christian prayers. Indeed, a Defence Force argument that permitting him to do so might have an adverse impact on discipline was expressly rejected by the Privy Council.

[79] Even if I am wrong in that, however, I would be wary about regarding *Laramore* as a precedent when determining the ambit of s 13. As already noted, art 22 of the Bahamas Constitution is similar in its terms to the composite rights in art 18(1) of the ICPPR and art 9(1) of the ECHR. As Lord Mance himself pointed out, manifestation in art 22 is expressed as a *subset* of the wider freedom:[49]

> … The first part of art 22(1) defines the protection afforded. It covers both of what the European Court of Justice recently called 'the *forum internum*, that

[49] At [12].

> is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public' … The second part specifies various aspects of the freedom (of conscience), the enjoyment of which is by virtue of the first part not to be 'hindered'. By use of the word 'includes' it specifies them on a non-exclusive, rather than an exclusive, basis.

[80] And even more importantly, *all* of art 22 (that is, both the internal and external components) was subject to a justification clause. For these reasons, the Privy Council simply did not need to distinguish between the internal and external rights in order to decide the case.

[81] It follows that I do not think *Laramore* can be taken as authority for the proposition that in any case where a person is required to act contrary to conscience, there will be hindrance, or interference, with that person's absolute s 13 freedom.

[82] In other overseas cases (particularly those involving conscientious objection to military service), the relevant tribunal has been split about which aspect of the wider right is engaged.

[83] For example, in *Atasoy v Turkey* the Human Rights Committee (HRC) was required to consider a complaint by a Jehovah's Witness who conscientiously objected to military service.[50] Mr Atasoy argued that criminally prosecuting him for his refusal (and Turkey's failure to accommodate his conscience by providing some alternative form of civil service) breached his right under art 18 of the ICCPR. A majority of the HRC held that his prosecution amounted to an infringement of his freedom of conscience.

[84] Importantly, however, although the minority agreed with the finding that art 18 had been breached, they disagreed with the route by which that finding was made. Writing for himself and another three judges, Mr Gerald L Neuman[51] disagreed with the majority that conscientious objection engaged the absolutely protected internal right, rather than the qualified external right:[52]

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50 *Atasoy v Turkey* (2012) No 1853/2008 (HRC).

51 Mr Neuman is presently the J Sinclair Armstrong Professor of International, Foreign, and Comparative Law, and the Director of the Human Rights Program at Harvard Law School.

52 Emphases added.

> In *Yoon and Choi v the Republic of Korea*, the Committee explained that punishing conscientious objectors for their refusal to perform military service amounted to a restriction on their ability to manifest their religion or belief, and that the restriction would be compatible with article 18 of the International Covenant on Civil and Political Rights only if it were shown to be necessary for a valid purpose within the meaning of article 18, paragraph 3. I would apply the same analysis in the present case, bearing in mind the particular factual circumstances in Turkey – the State party has not identified any empirical reasons why its refusal to accommodate conscientious objection to military service would be necessary for one of the legitimate purposes listed in the Covenant.
>
> The majority applies a different approach, first adopted by the Committee in *Jeong et al v the Republic of Korea*, in March 2011. It attributes the right of conscientious objectors to decline military service directly to the right to freedom of conscience, and does not undertake any examination of its necessity. Indeed, the Committee's general comment No 22 (1993) on article 18 observes that freedom of conscience, in contrast with freedom to manifest religion or belief, is protected unconditionally by the Covenant and cannot be subjected to any limitations whatsoever. *I continue to believe that the majority's new approach to conscientious objection to military service is mistaken.*
>
> *Refusal to perform military service for reasons of conscience is among the "broad range of acts" encompassed by the freedom to manifest religion or belief in worship, observance, practice and teaching.* Such refusal involves not merely the right to hold a belief, but the right to manifest the belief by engaging in actions motivated by it. Article 18 of the Covenant does permit limitations on this freedom if the high standard of justification in paragraph 3 can be met. *The majority's views in the present case do not provide any convincing reason for treating conscientious objection to military service as if it were an instance of the absolutely protected right to hold a belief. Nor does the majority clarify how conscientious objection to military service can be distinguished in this respect from other claims to exemption on religious grounds from legal obligations.*
>
> I recognize that the majority writes narrowly, in a manner that does not invite a broad expansion of arguments for absolute protection of religiously motivated action and inaction. I also recognize that the majority's approach has not led it to an inappropriate result in the present case. Nonetheless, I think that the error in the analysis is important, and that the Committee has not yet provided an adequate justification for its new approach to this issue. I would return to the Committee's earlier approach, based on the freedom to manifest a religion or belief in practice.

[85] Mr Neuman made the same point again in his dissent in another conscientious objection case determined later the same year, *Jong-nam v Korea*:[53]

> [The majority's] reasoning is problematic in several regards. The majority's reference to general comment No. 22 is incomplete as there, the Committee accepted that "the obligation to use lethal force may conflict with the freedom

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53 *Jong-nam v Korea* CCPR/C/106/D/1786/2008, 25 October 2012 (emphases added).

> of conscience *and* the right to manifest one's religion or belief" (emphasis added). With the latter reference (deleted by the majority) the Committee indicated that conscientious objection is based on two elements: *strong conviction that performing military service is incompatible with the demands of conscience and the manifestation of this conviction by actually refusing to join the armed forces.* While it is true that the freedom of thought, conscience and religion absolutely prohibits forcing anyone to divulge his or her inner convictions, the right to manifest such conviction in words or deeds may be limited under article 18, paragraph 3, of the Covenant. *By disregarding the fundamental distinction made by article 18 between these two rights, the majority seems to assume that certain conscientious decisions, including the one not to perform military service, are privileged insofar as their manifestation deserves the absolute protection of the freedom of thought, conscience and religion.* This approach implies that other convictions may not be worthy of such protection. Would the majority provide absolute protection to persons conscientiously refusing to pay taxes or to provide their children with any kind of education? If no, what are the criteria to distinguish between manifestations of conviction worthy of absolute protection and those expressions of one's beliefs that may be limited?
>
> The majority's approach dilutes and, in the long run, risks jeopardizing the very core meaning of the freedom of conscience, namely that the *forum internum* must be protected absolutely, even in the case of thoughts, conscientious convictions and beliefs considered offensive or illegitimate by authorities or public opinion. Freedom at its most basic level would be undermined if we would allow the State to assess what we think, feel and belief, even where we do not manifest these inner convictions.

[86] In my respectful view, the distinction sought to be maintained by Mr Neuman here is fundamental. If (in NZBORA terms) the s 13 freedom is absolutely protected and the s 15 freedom is not, there must be a readily discernible demarcation between them. And in my view the distinction will usually be relatively straightforward: s 13 absolutely protects internal thought processes and s 15 protects, in a qualified way, deliberate action or inaction that is actuated by religious belief or by conscience. As noted earlier, it is the potential for deliberate action or inaction to affect others that renders the possibility of qualification necessary. By contrast, thought alone does not have that external capacity.

[87] I am therefore unable to agree with Mr Bassett that s 13 is engaged in this case. It is clear to me that any conscientious objection to complying with s 14 of the CSAA potentially engages only the manifestation right in s 15. The plaintiffs conscientiously object to *acting* as s 14 requires. Any refusal to so act not only has the potential to, but does in fact, affect the (fundamental) rights of others. Conversely, it is not the *purpose* of s 14 to interfere with (improperly influence, affect or alter) the religious

beliefs or consciences of such people. Nor does the evidence filed by the plaintiffs give rise to even a suggestion that s 14 has had that effect. Indeed, the evidence makes it clear that the plaintiffs remain steadfast in their beliefs.

[88] Section 13 is therefore not engaged here.

Freedom to manifest: s 15

[89] My conclusion that s 13 of the NZBORA has no application does not mean it automatically follows that s 15 must, instead, be engaged by s 14 of the CSAA. In analysing whether it is, I propose to address the following questions:

(a) What does s 14 of the CSAA require the plaintiffs to do?

(b) Are the claimants' beliefs such that their manifestation should be protected by s 15?

(c) If so, does refusing to provide the information required by s 14 constitute manifesting the claimants' beliefs in "practice"?;

(d) If so, does s 14 interfere with the plaintiffs' freedom to manifest their beliefs?

What does s 14 of the CSAA require the plaintiffs to do?

[90] As Mr Perkins for the Crown said, when s 14 is read in the context of the Act as a whole—and read together with the obligation to maintain a list of abortion service providers under s 18—it requires conscientious objectors (as soon as possible) to:

(a) tell the patient of their conscientious objection;

(b) using the list maintained under s 18, identify the closest provider of abortion services to that person's practice; and

(c) tell the patient how to access the contact details of that provider by (for example) advising of the existence of the list and where it can be found.

[91] The example given by Mr Perkins was that a health practitioner in Auckland with a conscientious objection could discharge the s 14 obligation by saying "the Epsom Day Unit is the closest provider of abortion services for women in their first trimester. You can access the Unit's contact details by going to the Ministry of Health website".

[92] By contrast, there is no obligation on conscientious objectors to make a written referral to an abortion service provider, or to contact the provider themselves. Nor is there an obligation for the health practitioner to give the woman the contact details of an abortion service provider directly.

Are the plaintiff' beliefs such that their manifestation is protected by s 15?

[93] In *Williamson* Lord Nicholls observed: [54]

> … when questions of 'manifestation' arise … a belief must satisfy some modest, objective minimum requirements. These threshold requirements are implicit in art 9 of the convention and comparable guarantees in other human rights instruments. *The belief must be consistent with basic standards of human dignity or integrity.* Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection. The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental problem. …

[94] The existence and genuineness of the plaintiffs' beliefs is not in issue in these proceedings. In general terms, the relevant belief here is that abortion is morally wrong, and involves the taking of human life.

[95] All of those seven witnesses who filed affidavits on behalf of the plaintiffs in these proceedings (including their expert witness) deposed that this belief is grounded in their Christian faith, with three of them stating specifically that they are practising Roman Catholics. The deponents are silent on whether there are any circumstances in which they would accept that abortion should be available (such as to save the pregnant woman's life, where there is severe foetal abnormality, or where the pregnancy is the result of incest or rape). Rather, they speak in absolute terms—life

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54 *Williamson*, above n 44 (emphasis added).

begins at conception, is sacred, and cannot be ended except by God. So I proceed on the basis that their belief that abortion is wrong is absolute.

[96] I accept that the plaintiffs' beliefs meet the subjective factual threshold referred to by Lord Nicholls, namely that the assertion of belief "is made in good faith" and that it is "neither fictitious, nor capricious, and … not an artifice".[55] I also accept that their beliefs are not trivial and relate to a "fundamental problem". But—at least to the extent that those beliefs admit of no exceptions—there may be an issue about whether they are compatible with the "standards of human dignity or integrity" referred to by Lord Nicholls.

[97] In light of my earlier discussion, it cannot be disputed that the ability of women to access legal and safe abortions is a matter of fundamental rights. And it is not necessary to look far in the international case law to see examples of where acts (or omissions) of conscientious objection to abortion have been found to have denied those rights. By way of example, I need refer only to three Polish cases that have come before the ECtHR within the last 15 years.

[98] First, there was *Tysiąc v Poland*. Ms Tysiąc had severe myopia. She became pregnant, a condition that risked worsening her eyesight.[56] She was denied a certificate authorising an abortion by conscientious objectors, who told her that she should have the baby delivered by Caesarean section. But after giving birth, she was left virtually blind. The ECtHR found that there had been a breach of Ms Tysiąc's art 8 right to respect for her private life.[57]

[99] Secondly, in *RR v Poland*, RR had learned (following an ultrasound) that the foetus she was carrying might be suffering from a genetic abnormality.[58] Her attempts to access genetic testing to enable her to make an informed decision about whether to terminate the pregnancy were deliberately thwarted by conscientiously objecting doctors until the legal time-limit for abortions had passed. RR gave birth to a girl

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55 I do not mean to suggest that the belief of those plaintiffs who oppose abortion on ethical rather than religious grounds are any less genuine (or less worthy of protection); it simply makes the s 15 analysis less complicated to adopt this narrower focus.

56 *Tysiąc v Poland* [2007] ECHR 219.

57 At [116].

58 *RR v Poland* [2011] ECHR 828.

suffering from an incurable congenital disorder. The ECtHR found not only violations of RR's art 8 right to respect for her private life, but also her art 3 right to be free from inhuman or degrading treatment. In this latter respect, the Court said:[59]

> 159. The Court notes that the applicant was in a situation of great vulnerability. Like any other pregnant woman in her situation, she was deeply distressed by information that the foetus could be affected with some malformation. It was therefore natural that she wanted to obtain as much information as possible so as to find out whether the initial diagnosis was correct, and if so, what was the exact nature of the ailment. She also wanted to find out about the options available to her. *As a result of the procrastination of the health professionals as described above, she had to endure weeks of painful uncertainty concerning the health of the foetus, her own and her family's future and the prospect of raising a child suffering from an incurable ailment. She suffered acute anguish through having to think about how she and her family would be able to ensure the child's welfare, happiness and appropriate long-term medical care.* Her concerns were not properly acknowledged and addressed by the health professionals dealing with her case. The Court emphasises that six weeks elapsed between 20 February 2002 when the first ultrasound scan gave rise, for the first time, to a suspicion regarding the foetus' condition and 9 April 2002 when the applicant finally obtained the information she was seeking, confirmed by way of genetic testing. No regard was had to the temporal aspect of the applicant's predicament. She obtained the results of the tests when it was already too late for her to make an informed decision on whether to continue the pregnancy or to have recourse to legal abortion as the time limit provided for by section 4(a) paragraph 2 had already expired.

[100] And lastly, there is *P and S v Poland*. P had been 14 years old when she became pregnant as a result of rape by a classmate.[60] Her access to an abortion was obstructed by conscientious objectors. She was given deliberately distorted information about the relevant prerequisites. The hospital disclosed P's personal and medical data to the press and public. Hospital staff, a priest, and Police asserted that P's mother was trying to coerce her into having an abortion, resulting in state authorities removing P from S's custody and detaining her in a juvenile centre. Although P ultimately received a legal abortion (after intervention by the Ministry of Health) it was performed in secret and she was neither registered as a patient nor given post-operative care. The ECtHR found breaches not only of P's art 8 and art 3 rights, but also her art 5 right to liberty. The Court stated that conscientious objectors in Poland were legally obliged to refer patients seeking abortions to non-objecting providers.

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59 Emphasis added.

60 *P and S v Poland* ECHR 57375/08, 30 October 2012.

[101] These are, of course, individual cases that turn on their own relatively extreme facts. It was not argued by the Crown, and I do not think it can properly be said, that every manifestation of a person's conscientious objection to abortion will violate the rights of others to such an extent that it should, as a matter of principle, disqualify it from s 15 protection. Nonetheless, the cases demonstrate that impeding timely access to legal abortion services—the very wrong that s 14 of the CSAA is trying to remedy—can, itself, constitute an infringement of the rights of others. If nothing more, that reinforces my earlier conclusion that this case engages s 15 of the NZBORA, not s 13.

Does refusing to provide the information required by s 14 constitute manifesting the claimants' beliefs in observance or practice?

[102] Section 15 of the NZBORA (like both art 9 of the ECHR and art 18 of the ICCPR) confirms the right to "manifest" religion or belief in "worship, teaching, practice and observance".[61] There can be little doubt that the relevant manifestation here—declining to advise a woman seeking an abortion how to access the details of a non-objecting health care provider—does not involve worship, or teaching. So the question is whether this refusal can be regarded as involving the "observance" or "practice" of religion and belief. Again, the answer is not entirely straightforward.

[103] The international authorities suggest that the line between more formally recognised matters of religious "practice and observance" (the manifestation of which is protected) and actions that are merely *motivated* by the relevant religion or belief (the manifestation of which may not be protected) is not always clear. Thus, in *Eweida v United Kingdom* the ECtHR said:[62]

> 82. Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a "manifestation" of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 § 1 …. *In order to count as a "manifestation" within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of*

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61 The freedom to manifest thought and conscience is protected by s 14.

62 *Eweida*, above n 45 (emphasis added).

> *each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question* … .

[104] So the existence of the relevant nexus (between the manifestation and the religion or belief) must be established as a matter of fact. And as Mr Perkins pointed out, there was no evidence filed in this case that was directed at that issue.

[105] In an attempt to rectify that omission, Mr Bassett handed up a copy of the encyclical letter *Humanae Vitae* (sub-titled *On the Regulation of Birth*). Although the document provided to me was not dated, I understand that it was signed by Pope Paul VI on 25 July 1968 and issued at a Vatican press conference a few days later. At paragraph 14, the English translation states:

> Therefore We base Our words on the first principles of a human and Christian doctrine of marriage when We are obliged once more to declare that the direct interruption of the generative process already begun and, above all, all direct abortion, even for therapeutic reasons, are to be absolutely excluded as lawful means of regulating the number of children.

[106] Paragraph 17 is directed specifically to doctors and nurses. It is in general terms, and relevantly states:

> Likewise we hold in the highest esteem those doctors and members of the nursing profession who, in the exercise of their calling, endeavour to fulfil the demands of their Christian vocation before any merely human interest. Let them therefore continue constant in their resolution always to support those lines of action which accord with faith and with right reason. And let them strive to win agreement and support for these policies among their professional colleagues. …

[107] The premise of the encyclical appears to be (on my uninformed but careful reading of it) that human life is sacred because (the Roman Catholic) god is the ultimate source of its generation. In turn, that requires adherents to accept that it is only God, not humans, who may determine when conception should occur and when children should be born. Hence, the encyclical says, married couples (for it is only they who God says may procreate) are prohibited from any act or omission, including the use of artificial contraception, that directly interrupts the generative process.

[108] All other things being equal, I would be prepared to admit *Humanae Vitae* as evidence under s 129 of the Evidence Act 2006 on the basis that it is a reliable source

of information about traditional Roman Catholic teachings in this area.[63] But the difficulty is that there is no evidence before me as to the status this encyclical now has, some 50 years later. I would imagine, for example, that many adherents of that faith now honour a good part of it only in the breach. And many more would, I am sure, support a more nuanced and less absolute approach.[64] I am unable to accept Dr Hallagan's statement that "I have no doubt that by far and above the majority of Catholics throughout New Zealand would share my strongly held belief that abortion is wrong" is sufficient.

[109] In any event, even were I to regard *Humanae Vitae* as the necessary evidential foundation here, it does not automatically answer the critical question referred to in *Eweida* and the other cases: is the nexus between the relevant beliefs and their manifestation (refusing to act in the way summarised at [90] above) sufficiently close and direct to warrant s 15 protection?

[110] In my view, it is not.

[111] I do not consider that the provision of information, as required by s 14 of the CSAA engages the notions of practice or observance. It is far from clear to me why—particularly in the case of the minimal and remote act required by s 14—a proper interpretation of s 15 of the NZBORA would permit the conscience of one individual either to restrict the exercise of conscience by another, or to limit access by women to a process that is not only lawful, but is grounded in their fundamental rights.[65] Indeed, many commentators suggest that legal protection for conscientious objection to lawful medical procedures can *only* be justified at all, in human rights terms, when it is

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63 It does not, of course, speak to or for those plaintiffs who do not adhere to that particular form of Christianity.

64 By way of recent and informal example only, US President Joe Biden (who professes to be a devout Roman Catholic) has also been widely reported as expressing his support for the decision in *Roe v Wade*.

65 It is this impact on the fundamental rights of others that may differentiate conscientious objection in the health area with (for example) conscientious objection to military service.

accompanied by a duty to refer.[66] That is recognised in a raft of national and international ethical guidelines.[67] And s 14 stops short of requiring even a referral.

[112] This point is, I think, further borne out by authorities that state the freedom to manifest is unlikely to be engaged where:

(a) the relevant act or omission involves non-compliance with obligations imposed by law, and

(b) where the actor(s) involved remain free to manifest their beliefs in other ways.

[113] By way of one specifically relevant example, in its admissibility decision of *Pichon and Sajous v France*, the ECtHR declined even to entertain the proposition that a refusal by conscientiously objecting pharmacists to supply contraceptives was a qualifying "manifestation" of religious belief.[68] The Court said:[69]

> The word "practice" used in Article 9 § 1 does not denote each and every act or form of behaviour motivated or inspired by a religion or a belief.
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> …
>
> … as long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere.
>
> It follows that the applicants' conviction for refusal to sell did not interfere with the exercise of the rights guaranteed by Article 9 of the Convention and that the application is manifestly ill-founded …

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66 See for example *In Good Conscience: Conscience-based Exemptions and Proper Medical Treatment* (2015) 23 Med L Rev 221, where Sara Forvargue and Mary Neal argue that the legal protection of conscientious objection can only be justified in circumstances where three prerequisites are met: (a) the conscientious belief is genuine, (b) there is a duty to refer, and (c) the objection pertains to treatment whose status as "proper medical treatment" is contested or liminal. It may be observed that only the first of those would appear to be met in the present case.

67 Including the Royal Australian and New Zealand College of Obstetricians and Gynaecologists *Code of Ethical Practice* (2006), which, while recognising the right to conscientiously object, states that where a practitioner's personal beliefs conflicts with a patient's desired treatment, the practitioner "must make an appropriate referral and with the patient's consent, communicate relevant information to a new practitioner".

68 *Pichon and Sajous v France* [2001] ECHR 898.

69 Emphasis added.

[114] To similar effect is part of the ECtHR's decision in *Eweida*, dealing with a complaint by a Ms Ladele. Ms Ladele was a registrar of births, deaths, and marriages who had been disciplined for breaching her workplace's diversity policy by refusing on religious grounds to register same-sex partnerships. In finding that the disciplinary action violated neither her art 9 nor her art 14 right (freedom from discrimination), the Court said:[70]

> 106. … The Court takes into account that the consequences for the applicant were serious: given the strength of her religious conviction, she considered that she had no choice but to face disciplinary action rather than be designated a civil partnership registrar and, ultimately, she lost her job. Furthermore, it cannot be said that, when she entered into her contract of employment, the applicant specifically waived her right to manifest her religious belief by objecting to participating in the creation of civil partnerships, since this requirement was introduced by her employer at a later date. *On the other hand, however, the local authority's policy aimed to secure the rights of others which are also protected under the Convention. The Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights.* In all the circumstances, the Court does not consider that the national authorities … exceeded the margin of appreciation available to them. …

[115] For essentially the same reasons, my own view is that refusing to comply with the obligation to provide information in accordance with s 14 of the CSAA is not a manifestation of religion or belief that engages the s 15 right at all.

Does s 14 of the CSAA <u>interfere</u> with the plaintiffs' freedom to manifest their beliefs?

[116] If, contrary to the view just expressed, s 15 *does* protect the plaintiffs' freedom conscientiously to refuse to comply with s 14, the next step is to consider whether s 14 *interferes* with that freedom. As Lord Nicholls said in *Williamson*:[71]

> What constitutes interference depends on all the circumstances of the case, including the extent to which in the circumstances an individual can reasonably expect to be at liberty to manifest his beliefs in practice. …
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> …
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> … The question is, whether the … amendment of the law interfered, "materially, that is, to an extent which is significant in practice, with the claimants' freedom to manifest their belief by way of such refusal".

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70 Citations omitted; emphasis added.

71 *Williamson*, above n 44 at [38]–[39].

[117] And in *R (Begum) v Denbigh High School*, Lord Bingham noted that:[72]

> The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience.

[118] As the Crown acknowledged, however, the decision in *Laramore* (discussed earlier) seems to signal something of a retreat from this last proposition.[73] There the Privy Council endorsed the ECtHR's more recent statement that, in a case where an individual complains of a restriction on freedom of religion in the workplace:[74]

> … rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.

[119] Accordingly, I do not propose to deal with the question of interference here on the basis that the plaintiffs have a choice to practise in some other area of medicine.

[120] I accept that from the plaintiffs' subjective perspective, compliance with s 14 of the CSAA is seen as a substantial interference with their freedom to manifest their religious beliefs. The plaintiffs consider that compliance with s 14 would somehow render them complicit in a process that has abortion as its end goal, making it similarly wrong and immoral. Or, as Mr Bassett put it, s 14 requires them to "participate in a chain of causation" that leads to abortion, thereby significantly interfering with their religious beliefs.

[121] But as I have noted already, the reality is that the obligations imposed by s 14 are minimal and—at best—only remotely connected with any abortion that may or

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72 *R (Begum) v Denbigh High School* [2006] UKHL 15, [2006] 2 All ER 387. There are shades here of Macnaghten J's summing up to the jury in *R v Bourne* [1938] 3 All ER 615, where the Judge said (at 618):

> On the other hand, no doubt there are people who, from what are said to be religious reasons, object to the operation being performed at all, in any circumstances. … a person who holds such an opinion ought not to be a doctor practising in that branch of medicine, for, if a case arose where the life of the woman could be saved by performing the operation and the doctor refused to perform it because of some religious opinion, and the woman died, he would be in grave peril of being brought before this court on a charge of manslaughter by negligence

73 *Laramore*, above n 48.

74 At [21], quoting *Eweida*, above n 45.

may not follow. This was a point made by the ECtHR in *Open Door Counselling v Ireland*:[75]

> … it is to be noted that the corporate applicants were engaged in the counselling of pregnant women in the course of which counsellors neither advocated nor encouraged abortion, but confined themselves to an explanation of the available options … The decision as to whether or not to act on the information so provided was that of the woman concerned. There can be little doubt that following such counselling there were women who decided against a termination of pregnancy. Accordingly, the link between the provision of information and the destruction of unborn life is not as definite as contended.

[122] As well, the case law makes it clear that mere administrative acts only remotely connected to the abortion process do not constitute "participation" in that process and (so) are not within the ambit of conscientious objection clauses.[76] Moreover, as mentioned earlier, the authorities suggest that an obligation to *refer* (which is one step further than the mere provision of information) is effectively the quid pro quo for the right to conscientiously object at all.

[123] And lastly, there is the point made earlier, that complying with s 14 does not prevent the plaintiffs from manifesting the relevant belief in other ways.

[124] I am therefore unable to conclude there is the requisite material and significant interference here.

Conclusion

[125] Because I have addressed the "manifestation" issue in a number of parts, it is useful to summarise my findings here. In short:

(a) I accept that the plaintiffs' religious belief that abortion is wrong is a belief whose manifestation could be protected by s 15 of the NZBORA; but

(b) I do not accept that refusing to provide a woman seeking an abortion with information on how to contact an abortion services provider

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75 *Open Door Counselling v Ireland* [1992] ECHR 68 at [75].

76 *Janaway v Salford Area Health Authority* [1988] UKHL 17, [1989] AC 537; and *Doogan v Greater Glasgow Health Board* [2014] UKSC 68, [2015] 2 WLR 126.

constitutes a manifestation of those beliefs in observance or practice such that s 15 is engaged; and

(c) alternatively, I do not consider that being required to comply with s 14 interferes materially or significantly with their ability to manifest that belief.

Freedom of expression: s 14

[126] Section 14 of the NZBORA provides:

> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[127] The importance of the right cannot be doubted.

[128] In the present case the Attorney-General accepts that both s 14 and s 15 of the CSAA engage and interfere with health practitioners' freedom of expression. That is because both sections compel expression (speech) of a certain kind:

(a) s 14 dictates what conscientious objectors must tell a patient who is seeking an abortion; and

(b) s 15 may require a conscientious objector to disclose his or her conscientious objection in the course of employment or when applying for a job.

Section 14 of the CSAA

[129] As far as s 14 of the CSAA is concerned, freedom of expression has been found to include the freedom not to be compelled to say specific things or to provide certain information. The leading case on that aspect of the right is *RJR-MacDonald Inc v Attorney-General*, where a 5:2 majority in the Canadian Supreme Court held that the mandatory unattributed health warnings required to be included on tobacco packaging

were a form of forced expression that were unconstitutional and could not be justified.[77]

[130] But a careful reading of *RJR-MacDonald* suggests that there is an important point of distinction between that case and the present. The point is best understood by beginning with La Forest J's dissent, where the Judge drew a distinction between effectively putting words into a person's mouth and requiring a person to convey a message that is plainly not their own:[78]

> 113 I now turn to the appellants' final argument, namely, that s 9 of the Act constitutes an unjustifiable infringement of their freedom of expression by compelling them to place on tobacco packages an unattributed health message. I agree, to use Wilson J's phrase, that if the effect of this provision is "to put a particular message into the mouth of the plaintiff, as is metaphorically alleged to be the case here", the section runs afoul of s 2(b) of the Charter; …. This view had earlier been adopted by the whole Court in *Slaight Communications Inc. v. Davidson*, …. There a labour arbitrator had, *inter alia*, required an employer, by way of remedy for unjustly dismissing an employee, to provide a letter of recommendation consisting only of uncontested facts found by the arbitrator. Speaking for the Court on this point, Lamer J (as he then was) stated, …: "freedom of expression necessarily entails the right to say nothing or the right not to say certain things".
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> …
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> 115 I have, however, more fundamental problems accepting the appellants' contention that their s 2(b) right was infringed by the requirement that a prescribed health warning must be placed on tobacco packages. *It must be remembered that this statement is unattributed and I have some difficulty in seeing, in the context in which it was made, that it can in any real sense be considered to be attributed to the appellants. Simply because tobacco manufacturers are required to place unattributed warnings on their products does not mean that they must endorse these messages, or that they are perceived by consumers to endorse them.* In a modern state, labelling of products, and especially products for human consumption, are subject to state regulation as a matter of course. It is common knowledge amongst the public at large that such statements emanate from the government, not the tobacco manufacturers. In this respect, there is an important distinction between messages directly attributed to tobacco manufacturers, which would create the impression that the message emanates from the appellants and would violate their right to silence, and the unattributed messages at issue in these cases, which emanate from the government and create no such impression. … Seen in this way, the mandatory health warnings under s 9 are no different from unattributed labelling requirements under the Hazardous Products Act, under which manufacturers of hazardous products are required to place unattributed warnings, such as "DANGER" or "POISON", and hazard symbols, such as skull and crossbones on their products; see Consumer Chemicals and

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77 *RJR-MacDonald Inc v Attorney-General* (1995) 127 DLR (4th).

78 Emphasis added.

> Containers Regulations, SOR/88-556. I should add that the issue has ramifications for many other spheres of activity where individuals may in certain prescribed circumstances be required to place danger signs on facilities used by the public or on construction sites, and so on. This is not really an expression of opinion by the person in control of the facility or the construction site. It is rather a requirement imposed by the government as a condition of participating in a regulated activity.

[131] Writing for the majority, McLachlin J, disagreed with the view expressed by La Forest J at [113], saying:[79]

> The *combination* of the *unattributed* health warnings *and the prohibition against displaying any other information which would allow tobacco manufacturers to express their own views*, constitutes an infringement of the right to free expression guaranteed by s. 2(b) of the Charter.[80]

[132] And in considering whether the statutory requirement that the warning be unattributed failed to meet the minimum impairment requirement of proportionality, McLachlin J said:[81]

> The appellant corporations contend that a warning similar to that used in the United States, which identifies the author as the Surgeon General, would be equally effective *while avoiding the inference some may draw that it is the corporations themselves who are warning of the danger. They object not only to being forced to say what they do not wish to say, but also to being required to do so in a way that associates them with the opinion in question.* This impairs their freedom of expression, they contend, more than required to achieve the legislative goal.
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> … The government is clearly justified in requiring the appellants to place warnings on tobacco packaging. The question is whether it was necessary to prohibit the appellants from attributing the message to the government and whether it was necessary to prevent the appellants from placing on their packaging any information other than that allowed by the regulations.

[133] Importantly—and by direct contrast with the facts of *RJR-MacDonald*—s 14 of the CSAA does not restrain or prohibit conscientious objectors from:

(a) expressing their own opinion about abortion to a patient; or

(b) attributing the message they are required to deliver to Parliament, by telling the patient that they are required by law (and contrary to their

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79 At [124] (emphasis added).

80 The manufacturers were prohibited from displaying any writing other than: the name, brand name, trademark, and information required by the legislation.

81 At [172]–[173] (emphasis added).

own conscientious objection) to tell them how to access an alternative provider.

[134] There is, I think, a further point. It seems to me that s 14 of the CSAA engages—and is intended to further—the freedom of a woman who is lawfully seeking an abortion to obtain the information she needs. That freedom is, itself, protected by s 14 of the NZBORA. In *Open Door Counselling*, the ECtHR found that (notwithstanding that the Irish Constitution recognised "the right to life of the unborn") impeding or restraining the provision of similar information to women seeking and abortion overseas was an overly broad and disproportionate breach of a woman's right to receive it under art 10 of the European Convention.[82]

[135] For the reasons I have given, I am not persuaded that s 14 of the CSAA imposes a relevant limit on the conscientious objectors' freedom of expression.

Section 15 of the CSAA: what does it require?

[136] Because this is the first time I have considered s 15 of the CSAA in this judgment, it is useful to begin by reiterating, in broad terms, the import of the section.

[137] Section 15 provides that it is generally unlawful to take into account an individual's conscientious objection in employment decisions; it requires an employer to accommodate an applicant or employee's conscientious objection. This includes "arranging for the duties … to be carried out by an existing employee". The exception is where accommodating a conscientious objection would unreasonably disrupt the employer's provision of health services. Whether disruption is unreasonable is to be judged objectively, on a case-by-case basis.

[138] Accordingly, an employer would be permitted to recruit specifically for roles that require the provision of abortion services as part of the job description. The consideration of only candidates willing to provide abortion services would be lawful under s 15 where that is necessary for the employer to start or continue to provide abortion services; otherwise those services would be "unreasonably disrupted". For

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82 *Open Door Counselling v Ireland*, above n 75.

example, where a primary health care clinic requires two general practitioners willing to prescribe for early medical abortions in order to meet demand from its patient base, the practice would be permitted to invoke s 15 when replacing one of those general practitioners, as its provision of abortion services might otherwise be unreasonably disrupted. But if demand could be accommodated by those two practitioners, it would not generally be permitted to discriminate when hiring other practitioners.

[139] By way of specific example (given by Dr Page in his evidence for the Attorney-General) four out of seven specialists are required at Whangārei Hospital to provide medical and surgical abortions for the Northland region. While three conscientious objectors can be accommodated without disrupting services, the hospital would be entitled to invoke s 15 when replacing one of the current four health practitioners who do not conscientiously object.

Does s 15 of the CSAA limit conscientious objectors' freedom of expression?

[140] I am not persuaded that any "obligation" imposed by s 15 on conscientious objectors to tell an employer or prospective employer of their objection constitutes a limit on their freedom of expression in terms of s 14 of the NZBORA.

[141] As far as compelled disclosure to a *prospective* employer is concerned, the evidence filed for the Attorney-General makes it plain that any advertised vacancy for a position in which participation in the abortion process would be required will make that requirement clear. That will be the case as a matter of logic, and I decline to proceed on the basis that a conscientious objector would perversely apply for a position that was so advertised. No need for disclosure will therefore arise.

[142] Nor do I consider there will be any rights-infringing compelled disclosure if it transpires that an existing employee's conscientious objection unreasonably disrupts his or her employer's provision of health services. By definition, the relevant disclosure will already have occurred. That is because in most, if not all, conscientious objection cases the objection will need to be made known in order for the objector to take advantage of the protection that his or her conscience is afforded. And if disclosure is *necessary* to trigger the protection of the objector's conscience, it is

difficult to see how that disclosure could then be found to be a breach of some other right.

Conclusion

[143] In my view neither s 14 nor s 15 of the CSAA infringes a conscientious objector's freedom of expression.

Freedom of association: s 17

[144] Section 17 of the NZBORA simply provides that: "Everyone has the right to freedom of association".

[145] The plaintiffs say that s 15 of the CSAA limits this freedom because the employment consequences of having a conscientious objection to abortion services will operate to prevent conscientious objectors from obtaining the pre-requisite experience to become a member of professional bodies, such as the Royal Australian and New Zealand College of Gynaecologists (RANZCOG).

[146] But I agree with Mr Perkins that it is not s 15 that restricts or prohibit conscientious objectors from associating with other colleagues or joining any professional association. The fact that an individual may not qualify for membership of a professional body is not a freedom of association issue; professional bodies are entitled to define the qualifications and experience that qualify an individual for membership. That an individual may not be able to meet those qualifications because of their own beliefs does not equate to the state restricting or making unlawful that person's freedom to associate.

[147] Nor is a factual foundation for this claim made out.

[148] First, there is no evidence before the Court that it is the intention of the law, or that its practical impact will mean, that a conscientious objector will not be able to obtain whatever employment or experience in New Zealand as might be necessary to gain qualifications or fellowship of a Royal College. Dr Tait (the current President of RANZCOG) deposed that the selection of candidates for training or attaining

fellowship of RANZCOG is not contingent on their willingness to train for and provide abortion services. Rather, they "would always have the right not to be involved in abortion services"; it is not anticipated as a pre-requisite to entering that specialist pathway or obtaining necessary placements.

[149] Secondly, the evidence simply does not establish that conscientious objectors who wish to practise as health professionals in the area of obstetrics and gynaecology, or reproductive health, will be unable to obtain employment in New Zealand. Rather, the intent of s 15 is that objections *will* be accommodated where that will not unreasonably disrupt an employer's abortion services.

[150] And thirdly, the evidence also suggests that the reality is, and will continue to be, that in a number of workplaces, such as Whangārei Hospital, the requisite abortion services can be maintained by a cohort of health practitioners working alongside those who have a conscientious objection.

[151] I do not consider this aspect of the claim further.

Freedom from discrimination: s 19

[152] This aspect of the claim focuses solely on s 15 of the CSAA. I have already summarised the ambit and likely operation of s 15 at [136] to [139] above.

The scope of the claim

[153] It is important to note at the outset that the plaintiffs' case here cannot be about individual instances of unlawful discrimination. There is no evidence of that. Rather the plaintiffs allege that *in no circumstances* could the lawful application of s 15 be consistent with a conscientious objecting health practitioner's right to be free from discrimination, such that the CSAA *itself* is inconsistent with s 19.

[154] Section 19(1) of the NZBORA provides:

> Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

[155] Section 21 of the Human Rights Act 1993 (the HRA) sets out an exclusive list of the grounds on which discrimination is prohibited. The specific grounds relied on by the plaintiffs here are religious belief and ethical belief. They say that s 15 sanctions discrimination, contrary to s 19, by permitting an employer to differentiate between applicants or employees who do and do not have a conscientious objection to abortion, where accommodating that objection would unreasonably disrupt the provision of health services.

[156] I agree with Mr Perkins, however, that the contention that the CSAA discriminates against the plaintiffs on the grounds of ethical belief can be put to one side. That is because "ethical belief" is defined in s 21 as "the lack of a religious belief, whether in respect of a particular religion or religions or all religions". None of the plaintiffs here claim that they are discriminated against on the because of their *absence* of belief.[83] To the contrary, they all depose that their conscientious objection is grounded in their faith.

[157] So in this part of this judgment I consider only the claim of discrimination on religious grounds.

How is discrimination to be identified?

[158] In *Ministry of Health v Atkinson* the Court of Appeal said that a discrimination claim poses the following two questions:[84]

(a) Is there differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination?

(b) Does that treatment impose a material disadvantage?

[159] In a later case, *Ngarona v Attorney-General*, the Court of Appeal observed:[85]

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83 As noted in Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [17.8.13], the definition of "ethical belief" is "quite odd".

84 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55].

85 *Ngarona v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 (footnotes omitted).

> [121] There has been judicial debate in the Commonwealth about the usefulness of a comparator exercise. In the United Kingdom the search for a comparator has been described as an "arid" exercise. We accept that a comparator exercise should not be treated as a formula to determine the answer to an allegation of discrimination. Comparator groups can be overly refined by building into the comparators the contested assumptions, thereby neutralising the comparator exercise. However, since discrimination is, in essence, treating persons in comparable situations differently, it is inevitable that the reasoning involved in such a process will include choosing a person or group for comparison purposes. As we will elaborate, it is not necessary to fix a single conclusive comparator.

[160] Discrimination can be direct or indirect. Direct discrimination is where the law uses the prohibited ground as a basis for differentiating between two groups. Indirect discrimination is where a facially neutral law has differential effects based on a prohibited ground. As further explained by the Court of Appeal in *Ngarona*:

> [119] Indirect discrimination under s 65 of the Human Rights Act can arise when a criterion in a law or policy, which is not on its face discriminatory, corresponds to a feature (or lack thereof) of all or part of a group and results in that group being treated differently on a prohibited ground. A Canadian example we will refer to is a policy in a public health system which does not fund the provision of translation services to deaf patients who could otherwise use state care. The provision did not mention deafness, and did not explicitly exclude deaf patients from the benefit of state care, but a failure to provide translation services to deaf patients effectively denied them equal access to important benefits that were available to other persons who were not deaf. Accordingly, the discrimination does not need to be direct.

[161] In this case, the Attorney-General accepts that if the plaintiffs establish the first *Atkinson* step (either direct or indirect differential treatment on the grounds of religious belief) then the second step will be satisfied; taking steps permitted (in certain circumstances) by s 15(1) of the CSAA could result in material disadvantage to the applicant or employee.[86]

[162] It is therefore only the first question that I consider below.

Direct discrimination on the grounds of religious belief?

[163] I agree with the Crown that there is no direct discrimination here. Section 15 does not expressly or impliedly contemplate the use of religion as a basis for

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[86] He denies, however, that the disadvantage is of the kind or to the extent claimed by the plaintiffs.

distinguishing between two groups. Any differential treatment is not the result of a person's adherence to a particular religion or religious belief, but of their willingness to provide abortion services. While, in this case, the plaintiffs' witnesses have each deposed that their opposition to abortion is derived from their religious beliefs, not all those who oppose abortion share the same religious belief. Indeed, as one of the plaintiffs' witnesses acknowledges, a person may have no religious belief but still hold a secular moral objection to abortion. Section 15 treats such a person in the same way as a person who objects to abortion on religious grounds.

[164] Accordingly, any claim of direct discrimination must fail, at the first hurdle.

Indirect discrimination on the grounds of religious belief?

[165] As the dicta from *Ngarona* quoted above make clear, what must be shown to establish indirect discrimination is that the operation of s 15 in practice means that there is a group of health practitioners who, as a result of their shared religious belief, will be treated differently from (and worse than) a group of health practitioners who do not share that religious belief. It does not suffice to point to individuals who have been or may be negatively affected by a particular law.

[166] Again, the evidence for the plaintiffs here is lacking. And the evidence filed by the Attorney-General suggests that it is more likely that roles requiring abortion services to be provided will specify that requirement in the job description, and these roles will co-exist alongside roles that may be filled by conscientious objectors without unreasonably disrupting that employer's provision of health services. As noted earlier, Dr Page deposed that a number of conscientious objectors can continue to be employed alongside those performing abortion services, without affecting service delivery.

[167] Moreover, even if the evidence disclosed that opposition to abortion under any circumstances is a recognised feature of the Roman Catholic religion (which it does not, as discussed earlier), the evidence is also clear that membership of the group now complaining of discrimination is not confined to Roman Catholics. The group is defined by reference to its members' conscientious objection to abortion, not their faith. And as previously discussed, the evidence does not in my view establish that all Roman Catholic health professionals practising in this area would be united in the

absolutist position espoused by the plaintiffs' witnesses. I have no doubt that there are some Roman Catholic health practitioners who would not conscientiously object to a lawful and clinically indicated abortion in the first trimester, let alone in the more extreme circumstances involving grave risks to the mother's health, or a pregnancy that is the result of rape or incest.

Rights of minorities: s 20

[168] Section 20 of the NZBORA provides:

> A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

[169] The plaintiffs say that the impugned provisions effectively deny an ethnic minority—Pasifika peoples—from enjoying their culture, professing and practising their religion, or using their language. They say that ss 14 and 15 will prevent them from holding beliefs without interference and will adversely affect this community's access to culturally sensitive health care.

[170] The evidence relied on to support this contention comes from Dr Heather, who deposed that, in her experience, the "overwhelming majority" of Pasifika people are of a Christian faith, and have conservative Christian values, which include an objection to abortion.

[171] I confess that I find this aspect of the claim difficult to understand. The underlying contention must be that ss 14 and 15 of the CSAA will have the effect of denying Pasifika health practitioners in the area of obstetrics, gynaecology or reproductive health the right to "profess and practise" their religion. The flow on effect (the plaintiffs say) would be that Pasifika health practitioners will choose not to practise in those areas at all, to the detriment of Pasifika patients. But as I understand it, it is not—and could not be—claimed that the s 22 rights of Pasifika patients *themselves* are infringed by the operation of ss 14 and 15.

[172] Viewed in that way, it is difficult to see what this claim could add either to a s 15 (freedom to manifest religion) or a s 19 (discrimination) claim; the reasons why

those claims did not succeed would apply equally here. As with those claims, the necessary evidence is ultimately lacking. The evidence simply does not establish that:

(a) all or most current and prospective Pasifika health practitioners are likely to conscientiously object to telling a person seeking an abortion how to access the contact details of the closest available provider; and

(b) all or most current and prospective Pasifika health practitioners are likely to conscientiously object to participating in the provision of abortion services where abortion is lawful and clinically indicated.

(c) the prospect of having to do either of those things would deter all or most prospective Pasifika health practitioners from entering the profession, or force them to leave it; and

(d) the differential treatment in employment permitted by s 15 of the CSAA will mean that all or most Pasifika health practitioners will be unable to obtain employment in, and will effectively be excluded from, the relevant practice areas.

Justification

[173] It will be apparent from my analysis above that I have found none of the plaintiffs' core claims made out. In other words, I consider that none of the pleaded NZBORA rights are limited or infringed by either s 14 or s 15 of the CSAA. Strictly speaking, the question of justification does not arise.

[174] Nonetheless, for completeness, and out of an abundance of caution, I briefly address that question now. Although I acknowledge that, depending on which right is said to have been limited, there may be nuanced analytical differences between them for justification purposes, I intend to take a slightly more broad-brush approach that differentiates only as between s 14 and s 15. I think that a more global approach is warranted given my principal conclusion that justification is not in play at all.

[175] Section 5 of the NZBORA provides:

> Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[176] There can be no question that any interference with the rights said to be engaged here satisfies the "prescribed by law" requirement. Sections 14 and 15 are contained in a piece of primary legislation. They are clear in their terms.

[177] Limits on rights fall to be considered under s 5 in accordance with the *Oakes* test.[87] In order for such a limit to be justified:

(a) the objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom, meaning it must relate to concerns that are pressing and substantial in a free and democratic society; and

(b) the means chosen to achieve the objective must pass a proportionality test, meaning that they must:

(i) be "rationally connected" to the objective and not be arbitrary, unfair or based on irrational considerations;

(ii) impair the right or freedom in question as "little as possible"; and

(iii) be such that their limitation of rights and freedoms are proportional to the objective.

[178] A rational and proportionate limitation meeting this test will be "demonstrably justified in free and democratic society" under s 5.

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[87] *R v Oakes* [1986] 1 SCR 103. Adopted by the Supreme Court in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104].

The s 14 duty to inform

[179] Section 14 of the CSAA duty has the legitimate objective of facilitating access to abortions in a timely way. Delay in finding a provider of abortion services can create health risks for the pregnant woman, as well as additional cost and stress. The objective is linked to—and supports—a number of fundamental and internationally recognised human rights.

[180] The s 14 duty to provide information is rationally connected to that objective; it reduces the potential delay that would otherwise be caused by a conscientiously objecting health practitioner. Moreover, an obligation to refer (which is a more significant step than the s 14 requirement to provide contact details) is, in any event, rightly regarded as the quid quo of the right to conscientiously object at all.

[181] The s 14 duty also minimally impairs the rights of a conscientious objector; to the extent it requires participation in the provision of abortion services at all, that participation is minimal and remote. And the alternatives suggested by Mr Bassett—self-referral facilitated by the provision of the relevant information by the Ministry of Health through an 0800 number or on a website—would not achieve the objective as effectively.

[182] As Mr Perkins said, such suggestions ignore the likely reality that many women may not know such information exists and may reasonably seek advice from their general practitioner or practice nurse as a first port of call for all health services (especially if they have an established relationship with that practitioner). The s 14 duty serves as a practical response to women who seek assistance from their primary health care provider, who is ordinarily treated as a gateway to other health services and resources within the system.

[183] And while some women may have the knowledge, skills and resources to access a list of service providers on the Ministry of Health website and "self-refer" to an abortion service provider, others may not. Some women do not have ready—or perhaps even safe—access to the internet. Young women and girls who become pregnant may also choose to turn first to their general practitioner for help, comforted by the certainty of confidentiality. The s 14 duty is a necessary safeguard for women

and girls who do not have the means to navigate their way through the health system without assistance.

[184] And even if there remained room for argument around the margins, I also agree with Mr Perkins that Parliament was entitled to determine how best to achieve the important social policy objective of increasing timely access to abortion services. The legislature is rightly accorded considerable latitude in deciding which course should be chosen. More broadly, the amendments followed thorough consideration by the Law Commission. The issues were fully debated in Parliament.

[185] Any limits on NZBORA rights (which, if they exist, are minimal) are proportionate to s 14's objective,[88] which is to further and enhance the enjoyment of indisputable and fundamental rights.

[186] I therefore consider that, to the extent that s 14 of the CSAA limits any NZBORA rights (which I do not think it does), those limits can be demonstrably justified in free and democratic society under s 5.

The s 15 ability to differentiate

[187] Permitting an employer to differentiate, in certain circumstances, between health practitioners who conscientiously object and those who do not has the same legitimate objective noted earlier (ensuring women are able to access abortion services in a timely way). It achieves that objective by facilitating the employment of sufficient health practitioners who can provide abortion services. As well, s 15 has an important part to play in "levelling the playing field" by ensuring that women who live in more remote or less populated areas of New Zealand will not be disadvantaged by geography and will have equitable access to such services.

[188] Any limit on the rights of conscientious objectors permitted by s 15 is expressly designed to be minimally impairing, because the limits only arise where the objection cannot be accommodated without unreasonable disruption to the employer's provision of health services.

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88 *R v Hansen*, above n 87, at [123].

[189] The employer's duty to consider whether and how a conscientious objection could be accommodated, including by considering whether the duties could be carried out by an existing employee, ensures that the extent of any differential treatment is minimal and proportionate to the objective.

[190] Again, as Mr Perkins submitted, the Court in this proceeding is effectively being asked to balance the plaintiffs' individual beliefs against the need for employers in the public health system to be able to recruit sufficient health practitioners in furtherance of the general public interest in improving access to abortion services. And again, I consider Parliament was entitled to strike the balance it did. To the extent that—contrary to my primary conclusion—the provision limits any NZBORA rights, those limits can be demonstrably justified in free and democratic society under s 5.

Result

[191] I have found that neither s 14 nor s 15 of the CSAA limits—or is inconsistent with—any of the NZBORA rights relied on by the plaintiffs here.

[192] To the extent I am wrong in that, I consider that any such limit can be demonstrably justified in free and democratic society under s 5.

[193] The plaintiffs' claim therefore fails. The application for declarations of inconsistency is declined.

Costs

[194] I did not hear from the parties on costs. My inclination is that they should follow the event in the ordinary way, calculated on a 2B basis. I would be inclined to certify for second counsel.

[195] But if there is some relevant matter that counsel need to draw to my attention, or if agreement on that front cannot be reached, memoranda of no more than three pages in length are to be filed within 15 working days of the release of this judgment.

Suppression/access to the Court file

[196] Prior to the hearing of the plaintiffs' claim, applications were made by the Abortion Law Reform Association of New Zealand (ALRANZ) and a journalist, Ms Susan Strongman, for access to the Court file. Ms Strongman also later made an in-court media application in relation to the hearing itself. These applications were opposed by Mr Bassett.

[197] On 3 March 2021, in response to the in-court media application, I issued a minute in the following terms:

> Notwithstanding Mr Bassett's opposition to the application, I am unable to see why Radio New Zealand/Ms Strongman should be prohibited from recording or taking photographs at the hearing. The media are certainly entitled to report on the proceedings, in which there is a clear and legitimate public interest. Radio New Zealand/Ms Strongman are, of course, bound by the guiding principles contained in the *In Court Media Coverage Guidelines*, which include that "All film, photographs and recordings of courtroom proceedings that are used or published must provide or assist in providing an accurate, fair and balanced report of the hearing, and must not be used or published out of context." I have no reason to suppose that this principle will not be complied with.
>
> As far as the privacy interests of individual witnesses are concerned, I note counsel's recent confirmation to the Registry that there will be no oral evidence given at the hearing. There is, accordingly, no prospect of any of the applicant's witnesses being either recorded or photographed. To the extent there remains some genuine and identifiable privacy concern relating to a particular aspect of a witness's evidence, counsel can—in the event it is to be referred to in Court—ask me to direct that it not be reported. Any such request will be dealt with on its merits at the time it is made.

[198] At the beginning of the hearing, Mr Bassett reiterated that the plaintiffs' witnesses maintained their wish to protect their privacy and employment interests and wanted only to be identified as "Doctor One", "Nurse Two" and so on. I did not make a final ruling on that issue. Nor, as I understand it, have the access applications been finally resolved.[89]

[199] Apart from Dr Hallagan (whose name, and stance on abortion, are already a matter of public record by virtue of Mackenzie J's decision in *Hallagan*, referred to

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[89] I note, however, that it is generally regarded as inappropriate to grant access to affidavits or evidence contained on a Court file prior to the substantive hearing.

earlier), I have not named any of the plaintiffs' witnesses in this judgment, and nor have I referred to their evidence in any detail at all.

[200] As things stand, I do not see that there is any strong or legitimate public interest in knowing their identities. I also record (without comment) Mr Bassett's advice that the important issues with which these proceedings are concerned have sometimes become unnecessarily personalised.

[201] The upshot is that:

(a) there are no publication restrictions on the contents of this judgment;

(b) to the extent that ALRANZ or Ms Strongman wish to pursue their earlier requests for access to the Court file, they are to advise the Registry, specifying the material to which access is sought, and why;

(c) to the extent that ALRANZ or Ms Strongman wish to publish the names or identifying details of any of the plaintiffs' witnesses, they are to advise the Registry, and say why;

(d) if any advice pursuant to (b) and (c) is received, Mr Bassett will have the opportunity to respond; and

(e) any further request, together with Mr Bassett's response, may then be referred to me for determination on the papers.

Rebecca Ellis J

Solicitors:
Brace Legal for Plaintiff
Crown Law, Wellington for Defendant