IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2014-485-11265
[2015] NZHC 2393

IN THE MATTER OF	the Declaratory Judgments Act 1908 and Part 18 of the High Court Rules
AND	
IN THE MATTER OF	the Contraception Sterilisation and Abortion Act 1977
BETWEEN	RIGHT TO LIFE NEW ZEALAND INC Applicant
AND	THE ABORTION SUPERVISORY COMMITTEE Respondent

Hearing: 2 June 2015

Counsel: P D McKenzie QC for Applicant
W L Aldred for Respondent
I H V Reuvecamp for Family Planning Association of New Zealand Inc

Judgment: 1 October 2015

JUDGMENT OF WILLIAMS J

Introduction

[1] This application for declarations relates to the abortion clinic licensing provisions of the Contraception, Sterilisation, and Abortion Act 1977 (CSA Act). The applicant, Right to Life New Zealand Inc (RTL) says that the respondent, the Abortion Supervisory Committee (Committee), wrongly granted to the New Zealand Family Planning Association (FPA) a limited licence to carry out abortions at the Tauranga Family Planning Clinic in 2013 and wrongly granted annual renewals of that licence in 2014 and 2015.

[2] FPA's application was to carry out abortion procedures limited in time and method. First, only medical abortions (that is by the administration of abortifacient drugs) were proposed to be carried out at the clinic. Surgical abortions were not proposed in the application (and are not in fact carried out there), and there is no facility, plant or equipment on-site for that purpose. Second, it was proposed only to carry out abortions within the first nine weeks of pregnancy. Medical abortions in the first trimester of pregnancy are called Early Medical Abortions or EMAs.

[3] RTL says the CSA Act does not permit licences authorising medical abortions only or nine week-only abortions. Declarations to that general effect are sought.

Background

[4] "Abortion" is defined in s 2 of the CSA Act in these terms:

> **abortion** means a medical or surgical procedure carried out or to be carried out for the purpose of procuring—
>
> (a) the destruction or death of an embryo or fetus after implantation; or
>
> (b) the premature expulsion or removal of an embryo or fetus after implantation, otherwise than for the purpose of inducing the birth of a fetus believed to be viable or removing a fetus that has died

[5] In February 2013, the Committee granted FPA a limited licence under s 19 of the Act to carry out legal abortions at the Tauranga Family Planning Clinic. The limited licence followed the terms of s 19(3) (the limited licence provision in the Act). Section 19(3) provides as follows in that regard:

> A limited licence shall authorise the holder to permit the performance of abortions in the institution to which the licence relates *only during the first 12 weeks* of the pregnancy.
>
> (my emphasis)

[6] Form 2 of the Abortion Regulations 1978 contains the form of every limited licence. It provides:

> This licence is a limited licence and authorises the holder to permit the performance of abortions in the institution to which it relates *only during the first 12 weeks* of the pregnancy.

> This licence, unless it is sooner cancelled or renewed, will continue in force until [date], and shall then expire.
>
> Issued under the authority of the Abortion Supervisory Committee this [date].
>
> (my emphasis)

[7] As I have said, notwithstanding the 12 week pregnancy limit contained in s 19(3) and Form 2, the FPA applied only to perform abortions in relation to pregnancies up to nine weeks and the Committee was well aware of that fact when it granted the limited licence.

[8] In considering the application, the Committee was required to be satisfied of the criteria set out in s 21(2):

> On receiving an application for a limited licence in respect of any institution, the Supervisory Committee shall grant such a licence in respect of that institution only if it is satisfied—
>
> (a) there is a need for a or another licensed institution in the area in which the institution to which the application relates is situated; and
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> (b) that there are, in the institution, adequate surgical and other facilities, and adequate and competent staff, for the safe performance of abortions; and
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> (c) that adequate arrangements have been made with any other hospital or institution for the transfer of any patient suffering complications arising while she is awaiting, undergoing, or recuperating from an abortion to that other hospital or institution for treatment and care; and
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> (d) that the person who will be the holder of the licence if the application is granted is a fit and proper person to hold such a licence; and
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> (e) that adequate counselling services are available to women considering having an abortion in the institution, and are offered to such women whether or not they ultimately have an abortion.

[9] In respect of para (a), the Committee considered that the nearest abortion service was at Thames Hospital which provides only surgical abortions. There was, the Committee felt, a need for a licensed facility in the Bay of Plenty DHB area though not, it seems, for surgical abortions.

[10] In respect of para (b), the Committee considered there were adequate surgical and other facilities, and adequate and component staff to carry out EMAs as intended. By implication, the Committee must have been satisfied that full surgical facilities for the purpose of carrying out surgical abortions were not required at the clinic in light of the ambit of the application.

[11] In respect of para (c), the Committee was also satisfied that there were adequate care and transfer arrangements with specialists at the nearby Tauranga Hospital should complications arise from EMAs carried out at the clinic.

[12] Licences endure for one year.[1] Renewals are effectively automatic unless the respondent Committee is satisfied the clinic has failed to comply with relevant provisions of the CSA Act.[2]

[13] In February 2014, the licence was duly renewed but the terms of the renewed licence were changed to align more closely with the ambit of the application. Instead of the standard 12 week limit the new licence authorised the licence holder:

> ... to carry out Early Medical Abortions (EMA) within the first nine weeks (up to and including 63 days of the pregnancy).

[14] One further renewal was granted in January 2015 on the same terms.

[15] Dr Linda Holbury, Chair of the Committee advised in her affidavit that the Committee considered that consistency between the application and the limited licences was desirable. She advised further that the Committee did not take legal advice before changing the licence terms.

[16] RTL seeks declarations, the detailed terms of which need not be rehearsed here, but their effect is:

(a) that the definition of abortion includes both medical and surgical procedures for procuring the destruction of a foetus;

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1 CSA Act 1977, s 23.

2 Section 21(2) as to which see discussion below.

(b) s 21(2)(b) thus requires that the Committee had to be satisfied that there was sufficient surgical and other facilities for the safe performance of both procedures, there being no discretion in the Committee to grant licences for one procedure only;

(c) that as s 19(3) provides the only term upon which a limited licence may be issued, such licences may only authorise the performance of abortions during the first 12 weeks of pregnancy; and

(d) there was therefore no power to issue FPA a licence limited to the first nine weeks of pregnancy.

Issues

[17] These proceedings raise three issues:

(a) Does RTL have standing to bring them?

(b) Should the "or" in the definition of abortion be read conjunctively so as to require all abortion licences to permit both medical and surgical abortions?

(c) Does s 19(3) prohibit the issue of limited licences for any term shorter than 12 weeks?

Standing

[18] Express rights of challenge to licensing decisions under the CSA Act are tightly controlled by the terms of ss 26 and 27. Only a person dissatisfied with a *refusal* to grant a licence may appeal to the High Court and then only on a question of law. No party aggrieved by the *grant* of a licence (such as RTL) has any appeal right.

[19] Though precluded from appealing, RTL could have brought proceedings in judicial review; counsel for the Committee accepted that RTL had sufficient standing

for that purpose.[3] Instead however, RTL brought proceedings under the Declaratory Judgments Act 1908 (DJA).

[20] The venerable English authority to which reference is often made in this context takes a relatively narrow view of the jurisdiction of courts in England and Wales to grant declaratory relief.[4] Such jurisdiction is confined according to Lord Diplock in *Gouriet v Union of Post Office Workers*,[5] to "declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it ...".

[21] In New Zealand however, s 3 of the DJA mandates a broader approach. The section provides:

> Where any person has done or desires to do any act the validity, legality, or effect of which depends on the construction or validity of any statute, or any regulation made by the Governor-General in Council under statutory authority, or any bylaw made by a local authority, or any deed, will, or document of title, or any agreement made or evidenced by writing, or any memorandum or articles of association of any company or body corporate, or any instrument prescribing the powers of any company or body corporate; or
>
> Where any person claims to have acquired any right under any such statute, regulation, bylaw, deed, will, document of title, agreement, memorandum, articles, or instrument, or to be in any other manner interested in the construction or validity thereof,—
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> > such person may apply to the High Court by originating summons for a declaratory order determining any question as to the construction or validity of such statute, regulation, bylaw, deed, will, document of title, agreement, memorandum, articles, or instrument, or of any part thereof.

[22] RTL does not wish to do anything dependent on an empowering Act or instrument; nor does it claim to have acquired any right by such means. It must therefore establish that it is "in any other manner interested in the construction" of the relevant instrument – in this case, the CSA Act; or in the validity of the limited licence issued pursuant to it.

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3 Note however *Wall v Livingstone* [1982] 1 NZLR 734 (CA) cited by Wild J in *Right To Life New Zealand Inc v Rothwell* [2006] 1 NZLR 531 (HC).

4 *London Passenger Transport Board v Moscrop* [1942] AC 332 (HL) at 344-345 per Viscount Maugham.

5 *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL) at 501. I note however the modern approach of the courts in England and Wales is more liberal – see discussion in Zamir and Woolf *The Declaratory Judgment* (4th ed, Sweet and Maxwell, London, 2011) at 237-240.

[23] The leading case on the ambit of the DJA is the Supreme Court decision in *Mandic v Cornwall Park Trust Board.*[6] The case concerned the proper construction of the valuation provisions in a Glasgow lease. The applicants were lessees. Though not strictly necessary for disposal of the appeal, the Chief Justice discussed the breadth of the s 3 jurisdiction in response to a view expressed by the Court of Appeal that a "genuine dispute or lis" between the parties was required before s 3 could be utilised.[7]

[24] The Chief Justice considered that approach to be too narrow and did not accord with the breadth of the statutory language.[8] Section 3, the Chief Justice considered:[9]

> ... enables anyone whose conduct or rights depend on the effect or meaning of an instrument, including an agreement, to obtain an authoritative ruling.

[25] A dispute or lis between the parties was thus not required. In a separate judgment, the other members of the Court expressed agreement with this view.[10]

[26] The facts of that case made it unnecessary for the Courts to consider directly the ambit of the third category of possible applicants – a person "in any other manner interested", but earlier cases before this Court and the Court of Appeal have expressed opinions on that question. I turn now to consider some of those decisions.

[27] The 1975 High Court decision in *Turner v Pickering* covered elections to office in an incorporated society.[11] Casey J, in the end, considered the application did not relate to any question of the construction of the Society's rules, but he took the view nonetheless that the third category of possible applicants was very broad. Members of a society were sufficiently "interested" to seek an opinion under s 3 as to the construction of its rules. Specifically the Judge declined to follow earlier authority[12] suggesting that "interested" should, ejusdem generis, be read down so as to conform in nature to the other two categories of possible applicant in s 3; that is

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6 *Mandic v Cornwall Park Trust Board* [2011] NZSC 135, [2012] 2 NZLR 194.
7 *Mandic v Cornwall Park Trust Board* [2010] NZCA 576 at [13].
8 *Mandic v Cornwall Park Trust Board* [2011] NZSC 135, [2012] 2 NZLR 194 at [5]-[9].
9 At [9].
10 At [82].
11 *Turner v Pickering* [1976] 1 NZLR 129 (SC).
12 *New Zealand Educational Institute v Wellington Education Board* [1926] NZLR 615, 618.

persons wishing to act under or claiming a right under an instrument. Rather, in his view, the words indicated "an intention to confer a very broad right to seek the Court's assistance on construction or validity not limited by the preceding instances, set out in the provision."[13]

[28] This view was later confirmed by the Court of Appeal in *Wybrow v Chief Electoral Officer*.[14] In that case, the General Secretary of the New Zealand Labour Party sought declarations as to the meaning of vote counting provisions in the Electoral Act 1956. Richmond P expressed a preference for Casey J's broader approach rather than to the narrowing effect of ejusdem generis, quipping that it is "notoriously difficult to construct a genus out of a single species".[15]

[29] A final view on the point was not required however because even if ejusdem generis did operate to narrow the third category, Richmond P considered that the New Zealand Labour Party had a sufficiently strong interest in vote counting to qualify anyway.[16]

[30] If what admitted the New Zealand Labour Party into the narrower category was its strong self-interest in electoral vote counting as a party habitually fielding candidates for office, it may perhaps be said by implication that Casey J's wider category embraces situations where the applicant cannot point to a tangible or practical self-interest in the same way. This would be the case with advocacy groups and purpose-based organisations.

[31] One example of this wider category can be seen in *Royal Forest and Bird v Minister of Conservation*[17] in which declarations were sought in relation to the Wildlife Act 1953. MacKenzie J considered that the applicant, whose principal object was the preservation and protection of indigenous flora and fauna and natural features of New Zealand, was sufficiently "interested" to have standing under s 3 to seek declarations.

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13 *Turner v Pickering*, above n 11, at 135.
14 *Wybrow v Chief Electoral Officer* [1980] 1 NZLR 147 (CA).
15 At 150.
16 At 150.
17 *Royal Forest and Bird v Minister of Conservation* [2006] NZAR 265 (HC).

[32] Significantly however, the Royal Forest and Bird's standing was not challenged by the respondents.

[33] Another example, post-*Mandic*, may be found in *Great Christchurch Buildings Trust v Church Property Trustees*.[18] At issue was the post-earthquake fate of Christchurch Cathedral. The applicant argued that the respondent's resolution to demolish the Cathedral was in breach of the Anglican (Diocese of Christchurch) Church Property Trust Act 2003 and its trust deed. The case was primarily brought as an application for judicial review but the Court had also to consider whether there was jurisdiction under s 3 DJA. Chisholm J considered there was:[19]

> It is unnecessary for the applicants under s 3 to establish that a private right or a tangible interest has been affected.
>
> Clearly the applicant has a genuine interest in the construction of the 2003 Act and any earlier instrument/s giving rise the Cathedral Trust. It follows that jurisdiction to make a declaratory order under the Declaratory Judgments Act is not a problem.

[34] Before me, and for the Committee, Ms Aldred submitted RTL has an insufficient interest in the subject because even the most liberal cases require an interest that is either direct (*Turner v Pickering*, *Wybrow*) or personal in some way, (*Great Christchurch Buildings* in which Chisholm J noted the applicant had "an extremely strong personal connection" with the Cathedral Trust via two of its members).[20]

[35] Secondly, the Chief Justice in *Mandic* suggested, Ms Aldred submitted, that an applicant for the declaratory relief sought here must be one whose rights or conduct depend on the construction of the CSA Act. RTL does not have such an interest.

[36] In my view, the leading appellate authorities are not entirely clear on the question of whether a cause or purpose-based society can be said to have a sufficient interest in the construction of statutes affecting the relevant cause or purpose in some

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18 *Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045, [2013] 2 NZLR 230.

19 At [94]-[95].

20 At [78].

way. *Mandic* does not directly address the question nor did it need to, because the applicants clearly did have rights affected by construction of the relevant Glasgow leases. *Wybrow*, the last in the line of cases beginning in the 1920s with the *NZEI* case,[21] seems to suggest that a direct or personal interest in the outcome is not necessarily required, but Richmond P declined to finally decide the point.

[37] In this Court, both *Great Christchurch Buildings* and *Royal Forest and Bird* accepted that credible purpose-based organisations will have standing in respect of instruments affecting their purpose. MacKenzie J in *Royal Forest and Bird* said as much; and Chisholm J in *Great Christchurch Buildings* effectively accepted standing on that basis, even though he also pointed to the personal attachments to the Cathedral of two members of the society. I accept that in neither case was the issue closely argued, but the approach adopted by the two Judges was at least consistent with the spirit *Wybrow's* preference for a broad approach to standing. I see no reason to depart from that spirit here. On the contrary, given the Committee accepts that RTL had standing to bring judicial review proceedings, it seems to me, there is every reason to adopt an interpretation that is more rather than less consistent with that of the Judicature Amendment Act 1972.

[38] I find RTL has standing accordingly.

The definition of abortion

Background

[39] As indicated, abortion is defined as "a medical or surgical procedure" to procure the destruction, death or premature expulsion of a foetus. Mr McKenzie QC argues that the "or" in "medical or surgical", should be read conjunctively. If correct, the effect of this argument is that all licensed abortion clinics must provide or have available for use at the clinic, equipment and expertise to provide both forms of procedure. It would follow that no licence could be issued on the basis that only medical abortions are to be provided. That is, by the terms of s 21(2) the Committee would have to be satisfied that the clinic has "adequate surgical or other facilities,

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21 *New Zealand Educational Institute v Wellington Education Board*, above n 12.

and adequate and competent staff, for the safe performance of [both procedures to procure] abortions."

[40] It is common ground that the Tauranga Family Planning Clinic does not have the facilities or staff to carry out surgical abortions, and it has no intention of providing them.

[41] Mr McKenzie relies on the decision of Durie J in *Re A Case Stated by the Abortion Supervisory Committee* as the primary support for his interpretation of the statutory definition.[22] That case was concerned with whether there was sufficient compliance with the CSA Act if abortifacients were administered at a clinic, but the foetus expelled elsewhere, or whether the entire process had to occur at the clinic. Durie J found that the definition in s 2 referred only to the medical or surgical intervention ("procedure") and not to the ultimate result or effect of that intervention.[23]

[42] In the course of reaching this conclusion, the Judge said:[24]

> A drug-induced miscarriage is only one method of achieving an abortion. It remains open to insist that any institution that is to be licensed for abortions should have the facilities and staff necessary for surgically-induced abortions as well in case that procedure is preferred or is in fact required.

Analysis

[43] I do not consider that Mr McKenzie's approach to the Act is correct. My reasons are as follows.

[44] First, I do not consider the passage cited from the decision of Durie J was intended to mean that the Committee had no choice but to require applicant clinics to provide facilities and staff for surgical abortion procedures. Rather, the Judge said, it was "open to the Committee to insist" on such provision.[25] That suggests a discretion on the part of the Committee. For example, if there were a lack of surgical facilities within a reasonable distance from the applicant clinic that might well be a

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22 *Re A Case Stated by the Abortion Supervisory Committee* [2003] 3 NZLR 87.
23 At [35].
24 At [39].
25 At [39].

reason for the Committee to insist that any application for abortion services in the particular area must provide for both forms of procedure. Despite the distance to Thames Hospital, the Committee did not consider a surgical abortion service to be necessary in Tauranga.

[45] Second, there is no particular reason to read the disjunctive "or" in the definition as if it is conjunctive. The disjunctive meaning is the obvious and unstrained one. There is no particular reason sourced in the context, scheme or purpose of the Act to read s 21 as if a clinic cannot choose to perform only one or other of the two procedures – both are abortions in terms of the s 2 definition. The relevant purpose in terms of the Act's licensing rules is the provision by licensed clinics of safe and accessible abortion services for women in need of such services where those women have completed the Act's elaborate certifying procedures. This purpose does not call for a conjunctive construction of the definition of abortion. On the contrary, an interpretation that allows for medical abortion only clinics would logically be more consistent with the Act's accessibility purpose: such clinics are less expensive to establish and operate and so are more easily provided.

[46] In the present case, surgical abortions are provided at Thames Hospital but EMAs are not provided there. There is therefore a good accessibility argument available in relation to the provision of EMAs for the Tauranga district.

[47] As to the Act's safety purpose, Mr McKenzie rightly pointed to the FPA's own literature as identifying risks attendant upon EMAs. There are sometimes significant side effects. The FPA's EMA Clinical Agreed Procedures Manual identifies emergencies that may arise during EMAs,[26] and prescribes facilities that must be available on-site to deal with such emergencies. The clinic also has arrangements with Tauranga Hospital for transfer to that hospital where necessary. Risk is present, as would be the case with most medical procedures, but there was no evidence that these facilities and arrangements were clinically unsafe, or carried any safety concerns such as to call into question their consistency with the Act's safety purpose. On the contrary, according to the affidavit of Dr Holloway such risks are

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[26] At p 18.

well understood and no greater than those attendant upon any minor surgical or dental procedure.

[48] Third, I was originally attracted to the idea that the specific reference to "surgical" facilities in s 21(2)(b) ought to be taken to mean that surgical procedures in terms of the definition should be provided to an adequate standard. A word used in one part of an Act should be taken to have the same meaning in a different part unless content suggests otherwise. Such a construction would favour RTL's view. On reflection however, I do not think that is right. The better view is that advanced by Ms Aldred: "adequate" means adequate to the circumstances of the case – in this case, adequate surgical facilities for the carrying out of EMAs.

[49] Some surgical – that is surgery-based – facilities are required for EMAs. They are set out in the manual I have referred to above. But that does not necessarily mean that surgical abortions must be provided. A surgical "facility" (s 21(2)(b)) need not necessarily be for a surgical "procedure" (s 2).

[50] Appendix 8 of the manual contains a list of "Emergency medications and supplies" that every Family Planning clinic must have on hand. The list includes the following drugs, applications and equipment:

- Airways/Ambu bag
- Adrenaline 1:1000
- Atropine 0.6mg/ml
- Diazepam 5mg/ml and/or Stesolid rectal tubes 5mg or 10mg/2.5 ml
- Face Mask
- IV tray including IV Giving Set, IV Solution (sodium chloride), Scalp Veni set – 19 g, IV Catheter Placement Unit 18g, Syringes 2.5ml, Micropore Tape, Hook for hanging IV Solution, Sticky Labels, Pen
- Needles 22g & 25g
- Oxygen
- Phenergan 25mg tab

- Solu-cortef 250mg/ml
- Sterile Water for injection
- Syringes 2ml/2ml/10ml
- Tongue depressor
- Torniquet
- Ventolin Inhaler
- Ventolin Spacer/Nebuliser

[51] Some of these items are properly to be seen as component parts of a surgical facility. Their adequacy – by which I mean their fitness for purpose – depends on whether surgical abortion procedures must be provided. If not, they are clearly adequate. It follows that the use of "surgical" in s 21(2)(b) provides no useful contextual clue to the ambit of the Committee's powers.

[52] Fourth, it must be remembered that in the nearly 40 years since the CSA Act was enacted, much has changed in modern technology and medicine. In the 1970s, medical abortions were very significant procedures only undertaken in the second trimester. Now EMAs are, as I understand it, preferred in the first trimester and particularly within the first nine weeks. This is in accordance, I am advised, with applicable WHO standards. Whatever assumptions there might have been in 1977, the CSA Act must, in accordance with the Interpretation Act, be applied today to "circumstances as they arise".[27] In a statute about abortions that must include the circumstances of scientific advances in modern medicine.

[53] Burrows and Carter describe this approach to statutory interpretation as the dynamic or "ambulatory" approach.[28] The learned authors say such an approach is appropriate in construction of statutes that come to be affected by advances in science and technology long after they are enacted. The approach is permissible provided:[29]

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27 Interpretation Act 1999, s 6.
28 J F Burrows and R J Carter *Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015).
29 At 403.

> *First*, that these developments are written within the purposes of the Act; and *secondly*, that the words of the Act, albeit by liberal interpretation, are capable of extending to them.

[54] The cases cited in support of that proposition tend to relate to whether significant technological changes fit within the general purposes of the old statute: whether "telegraph" includes telephone;[30] whether a "carriage" includes a bicycle for road safety purposes;[31] whether a computer programme is a "literary work" for the purposes of copyright;[32] whether a "document" could include a tape recording;[33] and so on. Here the circumstances are somewhat similar: EMAs are now able to be carried out in the absence of surgical facilities but they were not in 1977.

[55] As I have said the relevant statutory purpose is the provision of safe and accessible abortion services for women in need of such services where they have completed the Act's certifying procedures. Even if the original assumption of the legislature was that full surgical facilities would be available at all limited licence clinics, there is no longer any good reason in terms of the relevant statutory purpose to interpret the statutory language in a way that transforms that assumption into a requirement.

[56] Mr McKenzie pointed to one further contextual clue in support of his argument. This related to the prescribed application form – Form 1 in the schedule to the 1978 Abortion Regulations. These regulations were promulgated under s 43 of the Act, the relevant part of which provides that the Governor-General may, by Order in Council, make regulations:

> … for … any of the following purposes:
>
> (a) prescribing forms to be used for the purposes of this Act.

[57] The application form requires any applicant to set out the "facilities" available at the institution; the extent of community need for the institution in the location; and the proposed counselling services to be provided. As to facilities, the form requires the applicant to:

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30 *AG v Edison Telephone Co* (1880) 6 QBD 244.
31 *Corkely v Carpenter* [1951] 1 KB 102.
32 *International Business Machines Corp v Computer Imports Ltd* [1989] 2 NZLR 395 (HC).
33 *Longcroft-Neal v Police* [1986] 1 NZLR 394 (CA).

Describe–

(a) *facilities for the accommodation of patients, including provision of overnight accommodation; and the number of wards or rooms available for the care of patients having abortions:*

(b) *the number of operating theatres and other surgical facilities:*

(c) *the facilities available for the care of patients suffering complications arising while they are awaiting, undergoing, or recuperating from an abortion:*

(d) *any arrangements made with any other hospital for the transfer of patients suffering any such complications:*

(e) *the number and qualifications of staff employed in or engaged by the institution.*

[58] The list does seem to assume that relatively elaborate facilities will be available onsite and that these will include operating theatres. But for a number of reasons, I do not think that this form assists in construing s 21.

[59] First, the form covers both full abortion licences and limited licences. Section 12(1) relating to full licences makes it clear that accommodation must be provided, for example. There is no such requirement for limited licence clinics. Nor does it follow that an assumption implied (even if that is accepted) in a prescribed form, creates a binding obligation to provide the presumed service. I see no reason why it is not open to an applicant to record that the facility will involve no overnight accommodation nor any operating theatres if such facilities are unnecessary. Ultimately the purpose of the form is to assist the Committee to make its s 21 assessment, not the reverse.

[60] Second, except in quite narrow circumstances, the authorities are not generally supportive of the principle that delegated legislation may be used to interpret a parent Act. Burrows and Carter cite the English House of Lords decision in *Hanlon v Law Society* for the proposition that such recourse is permissible "[w]here the Act provides a framework built on by contemporaneously proposed regulations."[34] That is, essentially, where the Act and regulations were prepared as a single package. Otherwise, it seems to me to be wrong in principle to retro-construe

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[34] *Hanlon v Law Society* [1981] AC 124 (HL) at 194.

Parliament's work through the lens of an instrument authored by an entirely different entity. There was no suggestion made before me that the regulations were indeed contemporaneously constructed or otherwise formed part of a single mutually reinforcing package.

[61] Interestingly the Supreme Court decision in *Zaoui v Attorney-General (No 2)*[35] considered the precise question of whether a prescribed form (in that case a warrant of commitment) could be used to confine the discretion available to a District Court Judge as to the place of Mr Zaoui's detention, when the parent section itself contained no such restriction.[36]

[62] The Court said it could not. The Court looked to the section authorising the prescribing of forms. It could only be utilised "for the purposes of the Act". It did not, the Court concluded, empower the promulgator to exclude possible detention venues not excluded by the Act itself.[37] Beyond that, the Court said, subordinate legislation cannot repeal or interfere with the operation of a statute.[38]

[63] I have already cited the terms of s 43 of the CSA Act. It is in substantially identical terms to that applicable in *Zaoui*. Since the power to prescribe forms is thus predicated on divining the "purposes of the Act", it would be illogical to find a more restricted meaning in the form than is necessarily expressed in the Act and then deploy that narrower construction to interpret the parent Act.

[64] I consider that it is open to the Committee to grant limited licences on the basis that the clinic will perform medical abortions only. Further, the terms of Form 2 do not prevent the Committee from explicitly restricting the licence in this case to EMAs only. For the reasons outlined, the terms of the licence need not follow the prescribed form in this respect as the form is overly prescriptive. See below however for my assessment of the lawfulness of including express time limits in the terms of the licence.

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35 *Zaoui v Attorney General (No 2)* [2005] 1 NZLR 577 (SC).

36 Section 114O of the Immigration Act 1987 provided for warrants of commitment to be issued by the District Court.

37 At [86].

38 At [87].

Conditions?

[65] For completeness, I note finally that counsel also made submissions on the alternative basis that the real question here related to the authority of the Committee to impose its own conditions on limited licences. That is whether the Committee could impose conditions restricting limited licences so as to control the procedure employed or allowable gestation period. Whether conditions are permissible is probably more squarely raised by the renewal licences than the original grant as it was the renewal licences that expressly restricted their terms to EMAs within the first nine weeks. The original 2013 licence strictly followed the language of the prescribed form even though the scope of the application was narrower.

[66] In any event, I consider the issue of the permissibility of conditions to be a red herring. The real issue raised by this proceeding is whether limited licences to perform abortions may be further restricted to only one of the two available procedures; and whether the 12 weeks gestation limit may be reduced further by the terms of the licence. The underlying question is whether such restrictions are contemplated by the terms, scheme and purpose of the Act. If the answer to that question is yes, it does not matter whether such restrictions are treated as going to application scope or licence conditions – either way, the law will imply the necessary power to control these matters. If the terms and purpose of the Act contemplate such restrictions, the power to impose conditions must be implied by the terms of s 14(2):

> The Supervisory Committee shall have all reasonable powers, rights and authorities as may be necessary to enable to carry out its functions.

[67] The question then is one of broad statutory construction rather than sifting through the Act to find a condition making power. I therefore set that issue to one side.

The nine week restriction

Background

[68] As I noted above,[39] s 19(3) relates to limited licences and permits the issue of such licence "only during the first 12 weeks of pregnancy". Form 2 of the Regulations contains the form of every limited licence and its terms reflect that time constraint. I have set them out at [6] above.

[69] As I also noted at [12] above, the February 2014 and January 2015 licence renewals were not in precisely those terms. Rather, they authorise the licence holder to carry out EMAs only within the first nine weeks of pregnancy.

[70] The question raised is whether the words "only during the first 12 weeks of pregnancy" mean 12 weeks is the only available limit, or whether it is no more than an upper limit. Neither counsel grappled with that question in any detail. They preferred to treat time limits as an ancillary question to, or perhaps as a question rolled up in, the medical versus surgical debate. In my view the two issues are distinct because the relevant statutory language in each case is different. Section 19(3) deals expressly with time limits as does Form 2. It is in that language that the answer to this question is to be found.

[71] Mr McKenzie argued that the nine week requirement in each of the renewals was ultra vires because both s 19(3) and the prescribed form are clear that limited licences are limited only in time and the only allowable limit in that respect is 12 weeks. Crucially, he argued, s 19(3) uses the words "shall" and "only".

> A limited licence *shall* authorise the holder to permit the performance of abortions in the institution to which the licence relates *only* during the first 12 weeks of the pregnancy.
>
> (my emphasis)

[72] Mr McKenzie submitted that in the context of a statute that permits the lawful termination of life, the authorising provisions should be read strictly because the

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[39] At [5].

language reflects the delicate balancing of competing views and interests undertaken by the legislature when it crafted the statute.

[73] Ms Aldred did not grapple with this issue as a distinct question preferring to address her submissions to the legality of restrictions on procedure and the imposition of conditions.

Analysis

[74] The wording of the subsection is very prescriptive. To paraphrase the statutory language, s 19(3) says that a limited licence must authorise FPA to perform abortions at its Tauranga clinic during the first 12 weeks of pregnancy. That language is explicit, clear and mandatory. There is no room to read into the provision a discretion to grant licences for a shorter period than 12 weeks. The broad terms of s 14(2), the Act's implied powers provision, though they are permissive in character, cannot override such clear language. Nor is it appropriate to adopt an ambulatory approach to construction of s 19(3) in order to take into account advances in EMA procedures when interpreting the provision. There is simply no room in the words, even by adopting a deliberately liberal interpretation, to extend the terms of s 19(3) so as to treat 12 weeks as no more than an upper limit.[40]

[75] It must follow that the terms of the licence renewals in 2014 and 2015 are ultra vires to the extent that they adopt a nine week limit.

[76] That said, the Committee's hands are not completely tied. By the terms of s 14(1)(c), the Committee may "prescribe standards in respect of facilities to be provided in licensed institutions." Should the Committee consider that there are patient health issues around the timing of EMAs, it may impose relevant safety standards to reflect that, and such standards will bind the institution in accordance with s 21(2)(b) in relation to the safe performance of abortions. If nine weeks is now considered 'best practice', then that fact will be relevant to s 21(2)(b). And a prescribed standard to that effect will be relevant to every renewal application under s 24(a) and (b), the latter requiring the institution "to take all reasonable and practical

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[40] See discussion of Burrows and Carter at [53] above.

steps to ensure that the provisions of the abortion law are complied with …". The "abortion law" is defined in s 2 and includes any prescribed standards under s 14(1)(c).

[77] Second, as I said with respect to medical only abortions, applications will always be restricted by their scope. An application that only applies for the right to perform abortions up to nine weeks of pregnancy undertakes not to perform abortions after that time. Such undertaking is binding notwithstanding the terms of s 19(3). It will be open to the Committee to cancel or refuse to renew licences that exceed the scope of the relevant application where such exceedances provide a basis for the Committee to conclude that the institution no longer has adequate surgical and other facilities or adequate and competent staff for the safe performance of abortions.

[78] I conclude therefore that although RTL is entitled to declarations in respect of the 2014 and 2015 renewals, I do not apprehend that such declarations will affect the current operations of the clinic.

Disposition

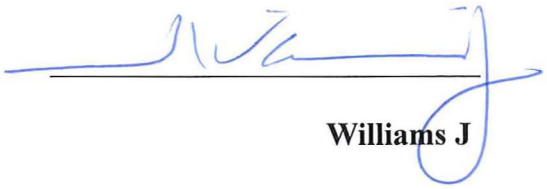
[79] First, I make a declaration that the limited licence renewals for 2014 and 2015 in relation to the Tauranga Family Planning Clinic are unlawful to the extent that they purport to use the phrase "within the first nine weeks (up to and including 63 days of pregnancy)".

[80] Second, and consequentially, I declare that in place of the foregoing unlawful wording, the correct formulation for limited licences must be "only during the first 12 weeks of pregnancy".

[81] Third, the application is otherwise dismissed.

[82] Fourth, I specifically refrain from declaring that FPA's current limited licence in relation to the Tauranga Family Planning Clinic is void as I consider the unlawful words of the licence to be severable and may be treated as if substituted by the correct formulation as that was the only lawful formulation.

[83] Fifth, costs are reserved and may be dealt with by memoranda if necessary.



Williams J

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