IN THE SUPREME COURT OF NEW ZEALAND SC 73/2011

BETWEEN **RIGHT TO LIFE NEW ZEALAND INC**
Appellant

AND **THE ABORTION SUPERVISORY COMMITTEE**
Respondent

Hearing: 13 March 2012

Court: Elias CJ
Blanchard J
Tipping J
McGrath J
William Young J

Appearances: P D McKenzie QC, I C Bassett and R Wong for the Appellant
C R Gwyn and W L Aldred for the Respondent

CIVIL APPEAL

MR McKENZIE QC:

May it please the Court, I appear with Mr Bassett and Ms Rachel Wong for the appellant.

ELIAS CJ:

Thank you Mr McKenzie, Mr Bassett, Ms Wong.

MS GWYN:

May it please the Court, Cheryl Gwyn, I appear with Ms Aldred for the respondent.

ELIAS CJ:

Thank you Ms Gwyn, Ms Aldred. Yes, Mr McKenzie.

MR McKENZIE QC:

Yes.

ELIAS CJ:

Now I understand that there was a query about whether we had in Court with us the bundle of lower Court decisions that came in with the leave application. We don't. Or at least maybe one or two of us do but the rest don't.

MR McKENZIE QC:

Yes, perhaps I can explain that to the Court. Initially, it was thought convenient to tender to your Honours the judgments from the Court below in one bundle that had already been used in another Court but the court office required the respective judgments to be bound into volume 1 of the case on appeal. So yes, there's no need for your Honours to have that additional bundle, unless of course it's convenient for you to have the judgments together?

ELIAS CJ:

No, thank you. I just wanted you to know that we didn't have it, in case it mattered.

MR McKENZIE QC:

Then, if your Honours please, I do seek the Court's leave to introduce a third counsel for the appellant, Ms Rachael Wong, with the Court's leave.

ELIAS CJ:

She's going to address us?

MR McKENZIE QC:

No, she's not.

ELIAS CJ:

No, thank you.

MR McKENZIE QC:

She's here as part of the team for the appellant your Honour.

ELIAS CJ:

Yes, thank you.

MR McKENZIE QC:

Then there's one preliminary matter that perhaps I should assist the Court with. In working through the affidavits again, I realised that the exhibits to the affidavits and where they can be found in the bundle or in the case on the appeal, might cause some confusion and I thought I should just explain briefly to the Court. If the Court were to, your Honours were to look at the case on appeal volume 1, the table of contents, your Honours will notice that at item 12 there's reference to the first affidavit of Kenneth Alfred Orr and then a number of exhibits are referred to and your Honours will notice that they have a Court of Appeal reference.

The exhibits, if your Honours were to look at Mr Orr's affidavit which is in volume 2 – well, perhaps I won't take you there but your Honours will notice that they are referred to by reference to a designation, ABD. Now they were identified by the witness by reference to an agreed bundle of documents which is what the ABD refers to when exhibits, or some exhibits are referred to in Mr Orr's affidavit. They are indexed there in volume 1 of the case.

ELIAS CJ:

Well does that mean that we're to find those exhibits in volume 4 which is what I'd take from that?

MR McKENZIE QC:

That's right but the references there, perhaps somewhat confusingly, are to the page numbers at the foot of the page rather than at the top.

ELIAS CJ:

Well I must say I found the numbering almost impossible to follow in this case on appeal but, if we want to look at exhibit ABD – are they all ABD?

MR McKENZIE QC:

They're not all ABD. Your Honour will notice that at page 2, after a long list of ABDs, there are references to six exhibits and they were actually exhibited to the sworn affidavit rather than by reference to the agreed bundle.

ELIAS CJ:

Well if this reference is to case on appeal volume 4, page 776, I think we're immediately in difficulties if the numbering is at the bottom of the page because I don't seem to have a page 776 in my volume 4.

MR McKENZIE QC:

Yes. Your Honour, the case on appeal numbers, that's from the Court of Appeal which are referred to there, appear at the foot of the various volumes.

ELIAS CJ:

Well Mr McKenzie, sorry, perhaps you can just take us to each exhibit when you actually refer them to us but if you take, as an example the first one, COA 4/776, where do we find that?

MR McKENZIE QC:

Yes, if Your Honours were to turn to – in this case it's volume 3.

ELIAS CJ:

Well how do we know that?

MR McKENZIE QC:

The difficulty would be resolved your Honour, if your Honour were to turn to that volume and note the page number at the foot of the page which is 776.

ELIAS CJ:

Oh I see, go by the page number rather than the volume number?

MR McKENZIE QC:

So go by the page number rather than the volume number.

ELIAS CJ:

I see, okay.

MR McKENZIE QC:

In many cases, the volume numbers are the same as – I've endeavoured to keep the volumes in a similar sequence but to identify those exhibits, your Honours will need

to use the numbering at the foot of the respective pages, rather than rely on the volume.

ELIAS CJ:

Thank you Mr McKenzie.

MR McKENZIE QC:

And it may assist your Honours, as a guide to working through what will be referred to quite frequently, that is the reports of the Committee and then the various reports of Parliament. They are contained in volumes 4 and 5 and also at the end of volume 3, this is where the sequence with the Court of Appeal ceases, in that volume 3, tab 67, the Committee's reports begin with the first report for 1978 at that tab. So from that point onwards, from volume 3, tab 67 onwards, your Honours will find in sequence all of the reports of the – the annual reports of the Committee, followed by the reports of Parliament.

ELIAS CJ:

And ending when, what's the last report in the sequence?

MR McKENZIE QC:

The last report in the sequence will be found in volume 5 at tab 98, page 1047 and then that's followed by the Parliamentary material.

ELIAS CJ:

Do we have the later reports –

MR McKENZIE QC:

Yes, yes –

ELIAS CJ:

– it's just it is all now getting quite dated, isn't it?

MR McKENZIE QC:

Yes, for your Honours assistance, my friend Ms Gwyn has collated the remaining reports for 2008, 09, 10 and 11 and they form part of a further bundle that was filed with the Court last week and included also Mr Newall's fourth affidavit.

ELIAS CJ:

Is this the respondent's bundle of authorities?

MR McKENZIE QC:

Not the volume of authorities but a further volume of the case.

ELIAS CJ:

Is it numbered?

BLANCHARD J:

Six.

ELIAS CJ:

Six.

MR McKENZIE QC:

It's volume 6 your Honour.

ELIAS CJ:

Thank you.

MR McKENZIE QC:

For the assistance of the Court, I've reduced my opening remarks to some speaking notes which, with the leave of the Court, I would seek to present for the assistance of your Honours to the Court.

ELIAS CJ:

How lengthy are they Mr McKenzie?

MR McKENZIE QC:

I think it's at – it's 10 pages but fairly – it's in a more noted form and is followed by, for again the Court's assistance, although I may not speak to them depending on time and that is just a series of points of reply, by reference to paragraphs in the respondent's submissions.

ELIAS CJ:

Well we really are – we've all read the written submissions and generally we take in only very brief notes, so this is rather lengthier than we would prefer but we'll take it, thank you.

MR McKENZIE QC:

I'm grateful to your Honour.

TIPPING J:

Is this really a substitute for the written submissions, or what is it Mr McKenzie?

MR McKENZIE QC:

Well not a substitute, it's a I suppose –

TIPPING J:

An extraction of the key points?

MR McKENZIE QC:

A best points presentation to the Court at the opening of my submission and I would propose to move through it fairly quickly, if your Honours please. I mention, referring to the notes, that the Court granted leave in relation to three questions. Two of them related to ways in which his honour Justice Miller presented his judgment in two respects. The substantive question, calling for determination by the Court, is the first question and it's that question that I really address in this speaking note.

First, with reference to the statutory balance, it's central to this appeal, it's what the Court in *Wall v Livingston* [1982] 1 NZLR 734 (CA) described as the balance provided in the CSA Act and I cite from the report. In paragraph 28 of the respondent's submissions, the respondent submits and, in my submission, somewhat courageously that, "the balance referred to by the Court in *Wall* has largely been accomplished and maintained," and then claims that, "the litigation brought by the appellant is an attempt to disturb that balance". It is this tension that is central to the present litigation. The appellant does not seek to persuade the Court to any particular view of the ethical or social implications of abortion, that is a matter for Parliament but rather the appellant takes the opposing position to that advanced by the respondent. The appellant maintains that the careful balance that the Act endeavoured to reach, between on the one hand, the rights of the unborn child and

on the other, the rights and position of the mother, has not been adhered to and the Act is being applied more liberally in favour of the mother than it was intended –

ELIAS CJ:

Will you be taking us to the sections that you say demonstrate this balance?

MR McKENZIE QC:

Yes.

ELIAS CJ:

Yes, thank you.

MR McKENZIE QC:

And it's referred to really by the Court in *Wall v Livingston*, the reference earlier to the careful attempt made by Parliament to balance those social attitudes –

ELIAS CJ:

But that isn't an indication of this antithesis that you're referring to here and it's that that I'd like some assistance on when you come to the legislation.

MR McKENZIE QC:

Thank you your Honour. In relation to the interpretation of the Act, the appellant submits that the Act must be interpreted having regard to its purpose and context and thus places particular weight on the context in this case, where the provisions of the Act are directed at procedures for termination of life and the way they are to be reported and whether they may be reviewed and that requires, with respect, the most careful scrutiny and consideration by the Court and I refer there to matters that were also covered in the written submissions.

The appellant refers to a dictum of Justice Speight, who was at first instance in *Wall v Livingston*, at page 3 of his judgment and that's the final judgment in the volume of the appellant's authorities at tab 20: "It's implicit in the necessary consideration of the criteria that the right of the unborn child is at the forefront of clinical consideration - there is presumption in its favour." Now the Court of Appeal in *Wall v Livingston* omitted reference when they cited the preceding passage, omitted reference to their being a presumption when they cited this passage. However, the Court did not contradict or express any dissent from the way in which Justice Speight stated the

construction of the Act should be approached and I do bring in aid there also what his honour Justice Tipping said in *Wilcox v Police* [1994] 1 NZLR 243 (HC) where he stated that, "the rights of the unborn referred to in the long title must prevail unless withdrawn by the statute," and I can provide your Honours with a copy of that judgment.

The long title to the Act is, and your Honours will be familiar with that, "an Act to [...] provide for the circumstances and procedures under which abortions may be authorised after having full regard to the rights of the unborn child". It is significant that the long title with those words was inserted into the Bill by resolution of a unanimous committee of the whole house following the clause by clause vote by Parliament sitting in committee on the provisions of the Bill and your Honours will find that debate included in the bundle, volume of authorities rather, at tab 2 and the final section of that tab is the clause by clause debate culminating in – on the second to last page – a resolution of the whole house, it's at tab 2. The Act, in conjunction with section –

McGRATH J:

Mr McKenzie, is that the sole reference in the Act to the term "the rights of the unborn child"?

MR McKENZIE QC:

It is indeed your Honour, yes and that was noted by the Court in *Wall v Livingston*, that the Act does not, in its substantive provisions, again refer to the rights of the unborn child but those are taken care of by way of the – what the Committee called "the legal code" that they had introduced in the Act.

The Act, in conjunction with the relevant provisions of the Crimes Act 187A, which was enacted at the same time, authorises what would otherwise be unlawful under sections 182 to 187 of the Crimes Act, namely the taking of human life. In *Wilcox v Police*, his Honour Justice Tipping stated, with reference to the long title, "it is implicit from the context that when speaking of the rights of the unborn child Parliament was referring to its right to be born and that right must prevail [...]" - and his Honour was citing really from Justice Speight who used those words - that right must prevail "unless there exists a lawful ground for it to be withdrawn in favour of what the law regards as a higher right".

ELIAS CJ:

Mr McKenzie, you're not contending that there is a balance to be struck in each case, are you? You're simply saying that Parliament has struck the balance and the balance is the assessment by two consultants which meets the statutory test. I don't understand your argument to differ from that?

MR McKENZIE QC:

No, I'm not suggesting your Honour that there's some balance that the Committee –

ELIAS CJ:

Or the consultants?

MR McKENZIE QC:

– or the consultants are required to apply in each case –

ELIAS CJ:

No.

MR McKENZIE QC:

– that's not the submission but rather, that in interpreting the Act, where there is ambiguity or doubt, then an interpretation in favour of the unborn should be applied. The presumption that was referred to by Justice Speight and as Justice Tipping stated, the right must prevail, the position of the unborn, if one could say, is that it is entitled to live, unless it's clear from the statute, the matter of interpretation is clear, that it is withdrawn in favour of what the law regards as a higher right. So in that balance your Honour –

ELIAS CJ:

Well there's a general prohibition, so that must be right. There's a general prohibition on abortion, so –

MR McKENZIE QC:

Yes.

ELIAS CJ:

– unless you come within the statute it's not lawful.

MR McKENZIE QC:

Exactly –

ELIAS CJ:

Yes.

MR McKENZIE QC:

– and that's what his honour Justice Tipping was saying in *Wilcox v Police*, yes.

ELIAS CJ:

Yes.

TIPPING J:

There was nothing very sort of – there's no great depth about this, I mean, it was just a narration, wasn't it, of what I perceived to be the basic thrust of the Act?

MR McKENZIE QC:

Yes.

TIPPING J:

But it's really the Act that we should be focusing on, isn't it, rather than all this warm up stuff?

MR McKENZIE QC:

Yes, your Honour but in approaching the Act there are questions of interpretation. This case is one of construction and therefore, it is my submission, that the Court needs to exercise a particular scrutiny of those provisions in relation to that balance –

ELIAS CJ:

But what I suppose I'm querying is your language of presumption because, of course, the procedure has to come within the permit of the legislation but I remain – I would like you to elaborate from the text of the statute why you say that there is a presumption. It may be that there is no ambiguity and that it is not necessary to be pushed to presumptions of interpretation but I remain to be persuaded that there's any presumption such as you are articulating here.

MR McKENZIE QC:

Yes, well I'll take your Honour to the provisions of the Act but in doing so it would be my submission that the Court, when examining those provisions and determining which of two opposing interpretations certain sections in the Act take and what the context is in which they are placed and to what extent does that apply – that inquiry has behind it, if I can put it that way, the need to preserve this balance that was referred to by the Court of Appeal in *Wall* and that not – and it's a balance that, in a sense, ought not to be disturbed or provisions ought not to be construed in a way that would disturb the position of the unborn, unless it's very clear.

ELIAS CJ:

Well, isn't the position though that the balance struck by Parliament must be observed?

MR McKENZIE QC:

Yes.

ELIAS CJ:

Yes.

MR McKENZIE QC:

But in determining what did Parliament determine in the Act then, in my submission, the Court can have regard to the impact of that provision on the position of the unborn child.

ELIAS CJ:

Well it's that, that you will need to develop a little more by reference to the overall structure and terms of the legislation.

MR McKENZIE QC:

I won't dwell on this point in detail but it was in the written submissions and I just draw the Court's attention again to what was said in *Wall v Livingston* and of course by the Royal Commission which was there referred to about the foetal advocate. That proposal was not adopted by the Royal Commission and the Court in *Wall v Livingston* proceeded to say that, "It is done" - that is the rights of the unborn are protected- "by surrounding the lawful termination of a pregnancy with the precautionary process of prior medical authorisation by two certifying consultants

which must be obtained". It is by what the Court of Appeal called its 'precautionary process' that the statutory balance is to be maintained and the rights of the unborn, referred to in the long title, receive protection and it's the appellant's submission that the Supervisory Committee has a central role in that 'precautionary process,' and I'll come back to that.

This case turns on construction of certain provisions of the Act - refer to them there - read in context with the long title and the statute as a whole. Do those provisions, as the appellant and Justices Arnold and Miller state, confer a supervisory role on the Committee in relation to certifying consultants so that the Committee - it should be - is empowered to review or scrutinise the performance by certifying consultants in relation to their central function or, on the other hand, is the Committee - and the majority of the Court of Appeal is correct in interpreting the Act as not placing a role of this kind on the Committee and, in particular, not empowering the Committee to review or scrutinise the clinical or medical decision of certifying consultants in relation to individual cases, and that's really the nub of this case.

TIPPING J:

Are you arguing that the Committee can look at individual cases and look at the clinical or medical decision in an individual case?

MR McKENZIE QC:

Yes. It has power to do so your Honour, that's my submission. It may not require the name and address of the mother, that is precluded by the legislation.

TIPPING J:

And the purpose of this inquiry is to see whether they're observing the law, is it Mr McKenzie, so it's a quasi-criminal investigation?

MR McKENZIE QC:

With respect, no your Honour and I do come to that. It's –

TIPPING J:

Well, I just want to be clear where you're heading.

MR McKENZIE QC:

Yes.

TIPPING J:

Are you saying that the purpose of this scrutiny or review is to see whether they're observing the law, in the Committee's opinion?

MR McKENZIE QC:

It's to see your Honour, whether certifying consultants are acting consistently with what is called the tenor of the Act in section 35 –

TIPPING J:

Well, call a spade a spade Mr McKenzie. Is the purpose to see whether they're obeying the law?

MR McKENZIE QC:

It's for the purpose of auditing their performance your Honour, to see whether they are acting in accordance with the tenor or spirit of the Act. That's an important –

TIPPING J:

Are you not able to –

MR McKENZIE QC:

– factor on their reappointment –

TIPPING J:

– answer my question more simply?

MR McKENZIE QC:

I can put –

TIPPING J:

If you're not, that's fine. I don't want to press you but I'm just –

MR McKENZIE QC:

No, no, yes –

TIPPING J:

– finding it interesting that you're not addressing it directly.

MR McKENZIE QC:

What I'm submitting is that the inquiry that the – review that the Committee conducts is at the level of a monitoring and auditing of the performance of certifying consultants and their very central position under the Act. In doing so –

BLANCHARD J:

Can you give us an example of how they would go about that because I too am puzzled by your answer? Give us some specifics of how you say they would go about doing that.

MR McKENZIE QC:

Yes, well central I think, to the provisions that confer certain powers on the Committee in this respect is section 36 and under that section the Committee may for example, enquire from consultants as to whether they have been following the advice given by Dr I A Simpson. Your Honours may be aware of that from the earlier submissions. Dr Simpson provided an opinion to the Committee and encouraged the Committee to, or suggested to the, recommended to the Committee that it encourage certifying consultants to provide their diagnosis and there were certain forms of diagnosis that he regarded as acceptable and he also added the severity of the condition of the woman. Now, given that situation the Committee –

ELIAS CJ:

The statute talks about the severity of the risk?

MR McKENZIE QC:

The –

ELIAS CJ:

Of mental ill health?

MR McKENZIE QC:

Yes. The –

ELIAS CJ:

I'm just flagging –

MR McKENZIE QC:

– the danger your Honour, yes –

ELIAS CJ:

– that I think sliding into talking about the severity of the condition may not be accurate.

MR McKENZIE QC:

If I can take your Honour to the actual words that – I agree that it's important that they're right.

ELIAS CJ:

Yes.

MR McKENZIE QC:

It's at tab 3 of the volume of that statutory material, section 187A(1)(a) of the Crimes Act 1961 and the reference there to this particular ground is, "that the continuance of the pregnancy would result in serious danger (not being danger normally attendant upon childbirth) to", and in the present context, "the mental health of the woman or girl." So it continues –

ELIAS CJ:

Do you not accept that serious danger is serious risk?

MR McKENZIE QC:

Well, of course a dangerous situation involves risk.

WILLIAM YOUNG J:

There may be a difference between danger to mental health and serious risk of danger to mental health. I'm not sure. It's a different set of words.

MR McKENZIE QC:

Yes, with respect, I think your Honour is correct because the Royal Commission in its report, when it – discussing the mental health context, placed particular weight on the need for caution in this particular area, and that was referred to, in fact, by Justice Miller in his judgment. I take your Honours, if your Honours –

ELIAS CJ:

Sorry, can – please do enlarge on it but can we, just looking at this, I'm quite keen to know what your argument is on the words of the statute first because you talked about the seriousness of the condition and what I am raising with you is that it's the serious danger to physical or mental health –

MR McKENZIE QC:

Yes.

ELIAS CJ:

– that is the statutory language and that, that may not – that is capable of being construed as serious risk to mental health rather than risk of – rather than emphasising, as you said in your oral submission a moment ago, the seriousness of the condition.

MR McKENZIE QC:

With respect your Honour, although of course danger involves risk, I would submit that the use of the word "danger" indicates the serious threat to the mental health of the person concerned.

ELIAS CJ:

Yes but that's not necessary – what I'm worried about is whether you're sliding into talking about the seriousness of the condition because you may have a danger of –

WILLIAM YOUNG J:

Not yet crystallised.

ELIAS CJ:

Well you may have a danger of – there's that as well, but you may have a danger of disturbance of mental health. I'm wondering whether you're saying that the consultants have to rate the seriousness of the condition so that for example, a depression might not constitute, in your submission, a sufficiently serious condition. You're not arguing that, are you?

MR McKENZIE QC:

I could perhaps take your Honour to the way in which the matter was put by Dr Simpson –

ELIAS CJ:

I know how Dr Simpson put it but I'm interested in knowing whether you are right and whether you can substantiate, by the statutory language, the oral submission you just made, that the doctor has to assess the seriousness of the condition of the patient?

MR McKENZIE QC:

Speaking to that your Honour, the doctor must assess the circumstances and state of health, mental health in this case, of the person before him. Her condition is obviously relevant. The doctor describes that in terms of a diagnosis. What is the condition, particular mental illness; if there be symptoms of mental illness present; what is the condition from which this woman is suffering and what are the dangers associated with it? Is it a temporary –

ELIAS CJ:

Ah, well that's exactly what I was driving at. You don't accept that if there is a clinically recognisable mental disorder and there is a serious risk of that clinically recognised mental disorder, that that's sufficient?

MR McKENZIE QC:

No.

ELIAS CJ:

You say that the consultant has to assess how serious, on some sort of scale, that condition is, is that right?

MR McKENZIE QC:

Yes, there must be an assessment of the danger your Honour. The Act, in my submission, requires that. There must be serious danger and the consultant must direct –

TIPPING J:

But you may have a serious danger –

MR McKENZIE QC:

– his or her attention to that –

TIPPING J:

– you may have a serious condition which doesn't lead to serious danger to mental health. One doesn't necessarily follow from the other. It's the consequences of the condition that's important, isn't it? You've got to look forward and say this person has a condition and I think that that amounts to serious danger to their mental health if the pregnancy continues. It's very hard to paraphrase the statutory language really.

MR McKENZIE QC:

I agree with your Honour and I think the words were chosen to alert consultants to the high –

TIPPING J:

But you, quite a long time ago –

MR McKENZIE QC:

– threshold at which they were to act –

TIPPING J:

– you said that the sort of inquiry, announced to my brother Blanchard who was following up a concern I had, that the sort of inquiry would be, "have you been following Dr Simpson's approach?". Now, does that suggest that if anyone doesn't follow Dr Simpson's approach and comes to a conclusion favouring abortion, that they would be acting inappropriately?

MR McKENZIE QC:

I'm going a little further than that. It's the approach that Dr Simpson took to recording the serious danger that – there's the clinical diagnosis and the doctor directing his or her mind to the serious danger and –

TIPPING J:

What's troubling me is –

MR McKENZIE QC:

– and recording that –

TIPPING J:

– how can you, after the event, put yourself into the position of the clinician and second-guess the clinician? That's what I find perplexing about this proposition and you'll no doubt want to come to it in due course.

MR McKENZIE QC:

Yes, I have some more developed argument on that –

TIPPING J:

I can understand looking at the thing globally and extrapolating whatever conclusions you can from that but what I really have anxiety about is this idea that you can look at individual cases for the purpose of saying implicitly, "you got that wrong."

WILLIAM YOUNG J:

Well it may be for the purpose of disseminating later information as to how abortions in practice come to be authorised and it may, a corollary of that, may be the suggestion or implication that some decisions are wrong but that may just be a subset of a more general power and perhaps duty to disseminate information or to report to Parliament.

TIPPING J:

Well it's a very fine line, if that's –

MR McKENZIE QC:

That is certainly an aspect of it and I will tell your Honour that in an auditing and monitoring function of this kind, the Committee, at first base, is calling really for records, for the consultant to inform the Committee and on an audit basis not every consultant but those that are chosen –

TIPPING J:

Well I'm puzzled because I, on reading –

MR McKENZIE QC:

– to provide the diagnosis –

TIPPING J:

– on reading your primary submissions and the way this case has been handled throughout, I didn't think you were arguing that examination could be given to individual cases but apparently you are?

MR McKENZIE QC:

The individual's name and circumstances – name and details – are not to be revealed and of course I accept that the Committee may not revisit consultants' decisions in the sense of reversing them or overruling them in any way, *Wall v Livingston* makes that very clear but the Committee can, after the event, call for records from consultants and check that they are carrying out their functions in an appropriate manner, that they are keeping the records that are required, that there is a record of the diagnosis, that the consultant has turned his or her mind to the serious danger and that that is recorded.

TIPPING J:

But section 36 simply gives, puts a duty on consultants to keep records as the Supervisory Committee may from time to time require. It's the other sections, isn't it, that give us a clue to what is the purpose of that exercise?

MR McKENZIE QC:

Yes.

TIPPING J:

Do you agree with that?

WILLIAM YOUNG J:

But also –

McGRATH J:

And submit reports.

TIPPING J:

And – yes.

WILLIAM YOUNG J:

It is a power to require consultants to submit reports.

TIPPING J:

Yes, yes, absolutely.

WILLIAM YOUNG J:

And the only statutory limitation on the power, although obviously it has to be read in the context of the Act as a whole, is that such a report may not identify the patient.

MR McKENZIE QC:

Exactly your Honour.

TIPPING J:

But the report must be derived, presumably, for the purpose of performing one of the functions. You don't just get the report in the air. You get it for the purpose of performing one of your functions, presumably.

WILLIAM YOUNG J:

One would be to obtain, monitor, analyse, collate and disseminate information relating to the performance of abortions.

TIPPING J:

I agree but I don't see that that necessarily involves getting into the detail of individual cases to the point where you are in effect examining the validity of the clinical judgement. Now that’s where the difficult line, I think, arises in this case.

MR McKENZIE QC:

It may not be often that the Committee will be required to do that but, in my submission, the enquiry that it makes enables it, in appropriate cases, to go that far but in many cases all the Committee, all that the appellant envisages that the Committee will be doing is conducting an audit of the way in which certifying consultants are carrying out their central function. Are they keeping appropriate records? Are they adhering to regular and accepted diagnostic practice?

BLANCHARD J:

Does that mean that they can actually ask for a copy of the records with the identifying name and particulars deleted?

MR McKENZIE QC:

That would be my submission your Honour, yes.

ELIAS CJ:

What about their duty to disseminate information, does it go so far as to disseminate this information collected?

MR McKENZIE QC:

That would be a matter for the judgement of the Committee but, in my submission, the Committee would not need to do that. The information that it receives would form part of its overall review of the way in which consultants in New Zealand are carrying out their functions and it may comment generally on that.

ELIAS CJ:

But some people may take the view that this is a matter of public interest and that these details should be disclosed and there would seem to be quite a powerful argument that the Committee may be compelled to disclose that sort of information, if it is relevant to their functions.

MR McKENZIE QC:

It may well be relevant for the Committee to disclose that last year there were 50 consultants who we found, as a result of a survey that we carried out, checks we undertook, were not keeping appropriate records of their certifying function –

ELIAS CJ:

But no one's really –

MR McKENZIE QC:

– that could –

ELIAS CJ:

– worried about that –

MR McKENZIE QC:

– could be disclosed –

ELIAS CJ:

– sort of information collection. It's about the assessment, the clinical judgement in individual cases which, on the argument you're advancing, the Committee is entitled to know about simply with an anonymisation of the women's names and addresses.

MR McKENZIE QC:

It has that information available to it. It's use of it, of course, is subject to natural justice considerations and where revealing information might identify particular certifying consultants, the law in relation to a fair hearing and natural justice, before the Committee discloses publicly such matters, would protect the situation.

McGRATH J:

Mr McKenzie, we've sort of ranged in a pretty important part of the case but you're referring to Dr Simpson's advice, I think, which was really advice as to how the statutory standard might be satisfactorily met by consultants. You're going to, I think, move on to link that to section 36 and, in particular, what the Committee might require. It seems to me the word "require" is quite important here in relation to records and reports and I think you were going to give the Simpson advice as an example and you're going to apply it. If so, I'd like to hear you on that point because I think we're otherwise going to quickly get into the central issues of the case and I'd just like to hear you a bit further on section 36.

ELIAS CJ:

Yes, well I interrupted and diverted you from taking us to Dr Simpson and perhaps you should go to that but I want to flag that I think there is – I'm still left unconvinced, at the moment, that you're not transposing "serious" from "danger" to the condition of the woman or girl. So you may want to come back to that later but by all means take us to Dr Simpson's material now.

MR McKENZIE QC:

Perhaps just in the interim on that point, I draw your Honour's attention to what the Royal Commission said and then I think what – I could come back to it later. If I took your Honour to page 270, at tab 1 of the appellant's authorities and it was a passage that Justice Miller referred to, albeit in passing.

TIPPING J:

Page again, sorry?

MR McKENZIE QC:

At page 270 under the heading "Mental health". That's the context your Honour, within which the Royal Commission recommended –

ELIAS CJ:

Well, that's a –

MR McKENZIE QC:

– the use of the –

ELIAS CJ:

– distinction between –

MR McKENZIE QC:

– words "serious danger' –

ELIAS CJ:

– that's a distinction between psychological stress and serious danger to mental health.

MR McKENZIE QC:

Yes but I think it goes further than that your Honour. It's referring to terminating a pregnancy because of some psychological stress which was relatively short in duration or of relatively mild intensity. One has to look at the danger in terms of the effect, if one can put it that way, on the woman of continuing with the pregnancy. The serious danger that, that would present.

ELIAS CJ:

A serious danger to mental health, so there has to be some recognisable mental health disorder that would result?

MR McKENZIE QC:

Yes.

ELIAS CJ:

Yes.

MR McKENZIE QC:

Yes, I agree. Coming then to section 36, if I could take your Honours to the foot of page 3 of the note, the consequence of the limited view of the scope of the Committee's powers taken by the Committee in the majority is brought particularly into focus when the application in section 36 is considered. That section requires "Every certifying consultant to keep such records and submit to the Supervisory Committee such reports relating to cases considered by him and the performance of his functions in relation to such cases as the Committee may from time to time require". It is important not to give the name or address of any patient.

The appellant argues that this section empowers the Committee to call on a certifying consultant for a report which includes the clinical diagnosis and medical reasons for authorising an abortion in particular cases but without disclosing the name or address of the patient. In particular, in relation to an abortion carried out on the mental health ground, the Committee can call for a certifying consultant to report on the diagnosis made by the consultant and the severity of the condition, that is, the danger to the woman's mental health. The Committee and the majority of the Court of Appeal take a contrary view and read the section as not empowering the Committee to enquire into and see a report.

The claimed practical difficulties, I'd suggest, that there's been a straw target erected here without real substance. The respondent argues, in support of the majority of the Court of Appeal, that the construction that Justices Arnold and Miller have placed on the section could not have expressed Parliament's intention because of practical difficulties in conferring the supervisory role on the Committee that the appellant's are arguing for. An elaborate argument has been developed in this respect, referring to the Committee not being equipped under the statute to deal properly with the disciplinary issues that would arise and that these are properly the province of the Health and Disability Commissioner and the Medical Council.

With respect, the role that the appellant says is envisaged for the Committee under section 36 does not require the elaborate disciplinary process constructed by the respondent and I rely really on what Justice Arnold said, "the Committee is simply seeking to review the work of certifying consultants in order to make reappointment or revocation decisions (the latter may of course engage natural justice considerations) and report to Parliament on the operation of the Act."

So I summarise the appellant's position under a series of bullet points to perhaps illustrate where the appellant is coming from. The Committee has a role not only in revoking the appointment of a certifying consultant but also in making the annual reappointment decision required by section 30, subsection (6) and your Honours may wish to turn to that section because it's very, I think, central to the way in which the respective parties have approached section 36. Your Honours will notice in subsection (6) that, "Every appointment to the list of certifying consultants shall be for a term of one year but the Supervisory Committee may reappoint any practitioner on the expiry of his term," and the respondent puts weight on the fact that there's no process or machinery surrounding that provision, as there is in the case of the licensing of institutions.

Coming to the second bullet point, the significance of the Committee being required to make an annual reappointment decision, although recognised by Justice Arnold in the passage cited, largely escaped the attention of the majority, possibly because section 30 subsection (7), that's the revocation power, was the main focus of argument in the Court of Appeal. It is important to recognise that when renewing the licence of an institution, section 23(4) requires the Committee, in the case of an institution, to be satisfied that the provisions of the abortion law were complied with in the institution and if a licence is not renewed, give a written statement of reasons for refusing to renew the licence.

So institutions, like certifying consultants, are placed under regular oversight of the Committee because in each case the Committee must review the appointment annually but institutions are also on an annual string.

TIPPING J:

Is it of significance that the certifying consultant is not subject to the stricture of compliance with the abortion law?

MR McKENZIE QC:

I am coming to that your Honour. I think there are reasons that can explain what might appear to be a statutory omission.

TIPPING J:

It may not be an omission. It may be deliberate.

MR McKENZIE QC:
Well, I'll take –

TIPPING J:
I mean –

MR McKENZIE QC:
– your Honour through the submission and –

TIPPING J:
– I would have thought that was equally arguable, that the certifying consultant's role is marked out for a different treatment from that of people who hold the licence for the premises.

MR McKENZIE QC:
That is indeed so your Honour. I think that there are reasons for the Act approaching the reappointment function in a different way. In the fourth bullet point, I deal with that in this way, that it's important to note the different way in which the Act approaches the Committee's role in relation to institutions as compared with certifying consultants. The role of the Committee in relation to licensed institutions primarily relates to compliance with certain specific prerequisites. Your Honours will see them in sections 21, a whole series of matters including counselling and that the institution has proper facilities, accommodation and so on, all of which, those boxes must all be ticked and all of which must be in place if – and the Committee must be satisfied if a licence is to be granted or an application renewed. If a licence is not renewed, then a written statement of reasons is required.

The compliance expected of consultants as the gatekeepers, in relation to decisions on the availability of abortion, is a different enquiry however. They should have views that are in accordance with the tenor of the Act. Section 30, subsection (5) makes that clear. It is one of the matters that the Committee is to have regard to in making appointments. They should have views that are in accordance with the tenor of the Act. This is not required of institutions, their views on abortion are not relevant. For this reason the machinery provision which, relating to licensing institutions, requires a number of prerequisites to be satisfied on relicensing, are not included in the Act in relation to consultants.

ELIAS CJ:

Though, is that not consistent with the thrust of the Act being that once you eliminate those with implacable views at the two extremes, the matter is left to the clinical judgement of the clinicians?

MR McKENZIE QC:

In carrying out their certifying function that is so but it's my submission that in reviewing the way in which they are carrying out their role, particularly when it comes to –

ELIAS CJ:

Well, is that their certifying function?

MR McKENZIE QC:

Which is their primary role. The Committee, on an annual reappointment, doesn't simply rubber stamp the, or should not rubber stamp the reappointment of consultants but there should be some consideration given by the Committee as to whether or not that consultant should be reappointed and it's this review that the appellant contends for that empowers the Committee to make such enquiries as are appropriate for that purpose.

ELIAS CJ:

But if Parliament has taken the view that if you eliminate those holding the extreme positions, the matter is a clinical judgement, why should the – what is there in the legislation that suggests Parliament intended the Committee to narrow that, or to effect that transfer of responsibility?

WILLIAM YOUNG J:

Subsection (5) does say, when it gives the two examples, "without otherwise limiting the discretion of the Supervisory Committee."

ELIAS CJ:

Ah, yes, yes. That's probably the significant –

McGRATH J:

So that's section, subsection (5) of –

WILLIAM YOUNG J:

Section 30 subsection (5).

MR McKENZIE QC:

The section that provides for the, or deals with the views of certifying consultants being in accordance with the tenor of the Act. To make that Act work effectively, Parliament envisaged that the gatekeepers need to be honest. They have a very central role, under the Act, in maintaining that balance that was referred to and it would be, in my submission, quite consistent with the Committee and their certifying the consultants' role in that respect, for the Committee - not interfering with the certifying decision, that is for them alone but - reviewing the way in which certifying consultants are carrying out their functions.

Section 36, with respect your Honour, is very difficult, in my view, looking at the plain wording of that section, to read in any other way. If I took your Honour to the words of the section –

TIPPING J:

The key problem is what sort of detail can the Committee require in these reports? There's no doubt that they can call on them for reports. They can require them and about cases and performance but what sort of detail? I mean, it's a really tricky one because I can see the point that they must be able to get general reports but are they allowed to, in effect, go behind the clinical judgement –

MR McKENZIE QC:

They can't –

TIPPING J:

– and tease out whether that clinical judgement was justified?

MR McKENZIE QC:

They can't go behind that clinical judgement for the purpose of reversing it –

TIPPING J:

Oh no, of course, I fully – that's obvious because by that time, probably the thing will have happened.

McGRATH J:

So it's retrospective.

MR McKENZIE QC:

It's retrospective and it's looking at the way in which certifying consultants are carrying out their functions. If one looks at section 36, it refers to "the performance of [their] functions" and with respect, I submit to the Court, the appellant submits, that the section, with the very wide discretion it confers on the Supervisory Committee, can only be read - its plain meaning - it's empowering the Committee to enquire into or call for reports, cases, considered by the consultant and the performance of his functions in relation to such cases. Now those are individual cases.

TIPPING J:

I would read that naturally, in the context of the Act as a whole and the fact that the certifying consultant's judgement is really central, as simply, how many cases have you done on this ground, on that ground and that ground, how many times have you exceeded the statutory time limits, that sort of thing, administrative matters, not clinical judgement matters, going behind the – but that is the nub of the problem, I suspect.

WILLIAM YOUNG J:

Say the Abortion Supervisory Committee suspects that a particular certifying consultant isn't conforming to the requirements of the Act, would it be open, in relation to appointment and revocation functions, to call on the consultant to provide detail associated with those particular discretions, those authorities?

MR McKENZIE QC:

I would submit yes, your Honour, and that it would be surprising if the section could be read in a way that would limit the Committee's power to require that information. The only limitation in the section is the limitation of subsection (2) on the name and address of any patient. There's no other limitation expressed. If the certifying consultant has records which the certifying consultant should have, according to Dr Simpson, a record of the decision and the clinical basis for that decision and the severity or danger to the woman's mental health, to say that the Committee cannot call on the consultant to disclose that record seems very surprising in the absence of express language in the section.

TIPPING J:

How are you ever going to be able to determine whether, in an individual case, the judgement of the certifying consultant was sound? It may be in good faith but another person would say well, I wouldn't have called it that way. We're really – I can understand if there was an allegation of bad faith, that would be a different matter but if there's no allegation of bad faith, are you going to have a huge hearing where everybody is going to come along and say well, I wouldn't have called it that way on those records?

MR McKENZIE QC:

Your Honour, if I could trespass into a recent example from the United Kingdom which I think would indicate an area where the Committee may well, were a similar situation to arise in New Zealand, seek to be involved because it's the only body that could be effectively involved. The speaking note contains –

TIPPING J:

Well no, the police could be involved if there was an allegation of bad faith.

MR McKENZIE QC:

– reports a situation in the United Kingdom of gender selection which is believed to be –

TIPPING J:

Gender selection of?

WILLIAM YOUNG J:

Forty female foetuses.

MR McKENZIE QC:

Of the foetus, so that –

TIPPING J:

Well I'm not familiar, you'll have to elaborate.

MR McKENZIE QC:

Right. An inquiry is being called for in the UK because an investigation conducted by one of the newspapers there has indicated that some medical practitioners, who are

certifying abortions in the United Kingdom where the practice is similar in many respects to here, have been prepared on a 'no questions asked' basis to provide women with the abortion of a female foetus because that is not desired by the couple. Now, there's been a considerable –

TIPPING J:

Well that's bad faith.

MR McKENZIE QC:

Yes it would be the concern in the United Kingdom, but in order to, in order to detect whether practices of that kind are going on, the Committee, with respect, is empowered to call for consultants to provide reports. If a particular consultant had the reputation for or it became known was available to provide certificates in that situation, surely one would not put the Committee in a position where it could make no inquiry in the matter.

ELIAS CJ:

Well shouldn't the police be making that inquiry?

TIPPING J:

They've committed a crime, if that's the case, under our law, if those facts were proved.

WILLIAM YOUNG J:

They may possibly be somewhere between committing a crime and practising in a way that, while in good faith, isn't particularly congruent with the Act.

ELIAS CJ:

Yes but we're positing the extreme case first, so if we can get an answer on that then we can move to more the nuanced.

MR McKENZIE QC:

Yes, well in the extreme case there may be sufficient evidence for the Committee to go straight to the police and we know there are some cases where, on complaint to it from outside, it has done so but there will be other cases where the Committee may have some doubts as to the way in which particular consultants are operating but there's no evidence that one could take to the police in the matter. Neither would

there be sufficient evidence, possibly, to bring a complaint before the Health and Disability Commissioner and, furthermore, if the practice was believed to be widespread, then an audit conducted by the Committee, from time to time of practitioners, as to the way in which they were carrying out their functions, would assist in revealing what was going on.

McGRATH J:

So Mr McKenzie, if we come to this issue of what's – look at the matter perhaps and try and find a principle that can be applied: what is it that the Committee can require the consultants to record and report on because the word "require" is used in the Act and is that what is necessary, in the Committee's opinion, for it to be able to discharge its responsibilities under the Act, if you put it at its most general and being that which the Act does not prohibit? Is that a principle – that's a very general principle – but is that a principle that would be in accordance with your approach?

MR McKENZIE QC:

Yes, it would indeed Sir. The Committee has a reappointment function annually and to provide the Committee with the power to review the performance of certifying consultants seeking reappointment would be entirely consistent with conducting an inquiry under, or calling for reports under section 36, in terms of what the section says: "cases considered by [the consultant] and performance of his functions in relation to such cases." So the Committee can, in my submission, under the plain words of the section, call for a consultant to provide such reports so that the Committee can complete a review in relation to that consultant.

McGRATH J:

If we come to what the Act might prohibit in terms of, prohibit the Committee from requiring, that's presumably what's prohibited by necessary implication. Is there any help you can give us with spelling that out, again, trying to stay at the level of principle, rather than going to particular situations?

MR McKENZIE QC:

Your Honour is seeking where a line can be drawn as to such matters that the Committee –

McGRATH J:

Well the principle that I think I've put to you and you've largely accepted is a very general principle. It's not providing huge practical assistance. I'm wondering if we can start to get it a bit more specific and I'm asking you, in that regard, to look at – can you help us with what might the Committee be prohibited from doing in seeking information by necessary implication? I mean, obviously subsection (2) is an express provision –

MR McKENZIE QC:

Yes, yes.

McGRATH J:

– but what can be implied from that in the scheme of the Act is the no-go areas for the Committee.

MR McKENZIE QC:

Yes your Honour, what, what – yes, clearly the Committee should not be looking at revisiting the earlier decision. The purpose for which it's seeking information is for the purpose of monitoring the performance of certifying consultants. Of course if the Committee, in the course of that activity, discovers irregularities then it may refer the matter to appropriate authorities. One could say that where there is clearly some evidence of bad faith and wrongdoing evident on the part of consultant then, for natural justice reasons, the Committee should refer that matter to the Health and Disability Commissioner who has the appropriate powers to conduct a disciplinary inquiry which are not available to the Committee but the carrying out of an auditing and monitoring function on a sort of macro basis, if I can put it that way, across consultants, in accordance of course with the resources available to the Committee would be, in my view, quite consistent with its powers under section 36.

BLANCHARD J:

Looking at section 36, I notice that the distinction is made between "records" and "reports" which might suggest that the Committee can't ask for the records, even on an anonymised basis. It would have been so easy for Parliament to say, "shall keep such records and submit to the Supervisory Committee those records on request but with the name and address of the patient deleted".

MR McKENZIE QC:

Yes, it's difficult your Honour to envisage that a report would not require the consultant, in a case where the Committee is asking some particular information, about the diagnosis used. The consultant is not going to refer to and inform the Committee of the records that the consultant holds on a particular matter. The Committee would of course be required to ask the consultant whether it has kept relevant records and what are they and significant information as to –

BLANCHARD J:

Well the –

MR McKENZIE QC:

– the records of the consultant would be available to the Committee.

BLANCHARD J:

It would be very difficult for the Committee to know what to ask for. All it has is a record that there have been X number of abortions on the ground of mental health. Is it going to ask for a report on every one of those cases which would be oppressive? It would be much easier if the Committee were able to ask for anonymised records, then it could have a look at them and ask questions from there but it does seem to me that it can't do that.

MR McKENZIE QC:

With respect, if your Honour is suggesting that the Committee is not able to require from a consultant a report with the way in which the consultant carried out his or her functions in a particular case, then the plain wording of the section seems to be, in my view, against that. It's a –

TIPPING J:

Well is it Mr McKenzie because as my brother has pointed out, the duty is to keep records and submit reports?

MR McKENZIE QC:

Submit reports relating to such cases and the performance of his functions in relation to such cases.

TIPPING J:

It doesn't give a duty to submit the records. The duty is to keep records obviously, so that you can then compile the report.

MR McKENZIE QC:

If I could look at it this way your Honour, there are two things required there. The Committee can require the consultant to keep such records as the Committee may require –

TIPPING J:

I know that the Committee doesn't but the Act requires the keeping of records.

MR McKENZIE QC:

Well it –

WILLIAM YOUNG J:

But it's the records as required by the Committee, isn't it?

MR McKENZIE QC:

Yes, I think the words "as required by the Committee" refer to both records –

TIPPING J:

Well I'm sorry, yes, I beg your pardon –

MR McKENZIE QC:

– and reports –

TIPPING J:

– I was wrong on that –

ELIAS CJ:

As the Supervisory Committee, yes.

TIPPING J:

– but I don't think that infects the other point.

MR McKENZIE QC:

So the Committee for example, looking at what Dr Simpson said, didn't go quite this far but he could say the Committee requires every consultant to keep a record of the diagnosis and of its severity or the danger to the woman's health in mental health cases.

TIPPING J:

But looking at it in steps, where is the power to submit the records, or the duty? Where is the requirement to submit the records, as opposed to the report?

MR McKENZIE QC:

In calling for a report, the Committee can require the consultant to refer to the diagnosis, as stated in the records kept and maintained, as required by the Committee.

TIPPING J:

But do you accept that there is no power to require the records, as opposed to a report?

MR McKENZIE QC:

Well the submitting does refer to the reports but my submission would be that the report can call on the consultant to identify and refer to records that he's kept.

TIPPING J:

You're not really addressing the point. I'm simply asking you, on what basis can they require the records, never mind the content of the report. Do you submit and if so on what basis, that the Committee can require the record?

MR McKENZIE QC:

No, I think I would need to accept that the record itself need not be produced but the report can call for information as to what is contained in that record, the nature of the record and what record-keeping the consultant is undertaking.

TIPPING J:

Yes, all right, thank you. That's all I wanted to know because it seemed to me that it would be hard to submit otherwise.

ELIAS CJ:

Mr McKenzie, I'm a little puzzled as to why, with the mileage that you're making from the figures that are known to the Committee and which it's reported on, there isn't sufficient information for its purposes in any event. Without going into the assessment in individual cases, the fact that you have a consultant who might have performed a thousand abortions and turned down two for example, the Committee itself seems to think that this is significant. Why doesn't it have enough information for its purposes from that?

MR McKENZIE QC:

That would be a situation where the Committee may well wish to ask the consultant for a report as to the diagnosis used, the basis on which that consultant was exercising the certifying power. The Committee may be put on enquiry that this is a situation that should be looked into and section 36 would enable it, in my submission, to do so.

WILLIAM YOUNG J:

Say the Committee says well, we're thinking of whether we should renew your appointment, it might be reluctant to do that on the basis of raw statistics which may be susceptible to all manner of explanations along with the kinds that have been provided. It may be that it would want to say well, we are looking at your appointment, could you give us a report as to how this particular situation has arisen?

MR McKENZIE QC:

Yes, I think that's, I would adopt –

TIPPING J:

What if the doctor wrote back –

MR McKENZIE QC:

– with respect, that as a submission –

TIPPING J:

– and said I exercise my clinical judgement in good faith in terms of what I saw in each patient and that was the result, would that be a sufficient report?

MR McKENZIE QC:

In my opinion, no your Honour.

TIPPING J:

Well why not?

WILLIAM YOUNG J:

Bit like a general denial, might not be a –

TIPPING J:

A general demurrer.

WILLIAM YOUNG J:

– sufficient answer to a particularised statement of claim.

TIPPING J:

But what more are they going to say?

MR McKENZIE QC:

Well, they're go –

TIPPING J:

I mean, right or wrong, what more are they going to say?

MR McKENZIE QC:

Well –

TIPPING J:

They're not going to say oh yes, I accept that I made a terrible error and lots of them and I wasn't in good faith in some of them.

MR McKENZIE QC:

Yes but a very general response of that kind I think could put the Committee on enquiry to return to that consultant and say well, identify in a report to us the particular record that you kept in relation to these certifying decisions. We want a report on the danger to the mental health of the woman that was at the basis of so many hundred decisions that you made on that ground –

TIPPING J:

We've got to remember that any particular consultant will have had his opinion agreed with, with another consultant, won't he, before it will have gone ahead? Either two agree, or if two differ, then a third has to concur with the abortion proceeding.

MR McKENZIE QC:

Yes.

TIPPING J:

So you're really, you're really sort of attacking two.

MR McKENZIE QC:

You may need to in some cases your Honour and I believe the power is available under section 36 to do that –

TIPPING J:

So you then have to co-ordinate and –

MR McKENZIE QC:

– and I think it needs to be borne in mind in looking at the section, that section 45 contemplates that the Committee can go beyond the, you know, the general grounds that are stated in section 36 and obtain information from, in that case, the operating doctor.

TIPPING J:

Well, that section may, in part, resolve the problem with section 36 because –

ELIAS CJ:

Sorry, which section?

TIPPING J:

Forty-five, a duty to submit a report.

MR McKENZIE QC:

Section 45 and it's the opening words, "Without limiting anything in section 36 of this Act...".

TIPPING J:

Well, that may well ameliorate the problem with section 36 because if there's a duty to provide a report independently of 36, "...the record thereof and of the reasons therefore..." So they've got to do that anyway.

WILLIAM YOUNG J:

But aren't the reasons just given by reference – in formulaic form, by reference to the particular head of the –

MR McKENZIE QC:

In *Wall v Livingston* the Court considered that the reasons need not go beyond the statement of the statutory ground and they are used by the Committee for statistical purposes, referring to the various grounds of abortion but the significance that section, in my submission, for section 36 is that that section is not to limit anything in section 36.

WILLIAM YOUNG J:

So you're saying that in fact the Committee could require more elaborate records and if that happened then section 45 would bite to the more elaborate records?

MR McKENZIE QC:

Yes.

WILLIAM YOUNG J:

Okay. So in the absence of a requirement from the Committee, all the consultants have to do is give the formulaic response?

MR McKENZIE QC:

Yes and if I could –

ELIAS CJ:

Is your complaint – in your statement of claim, did you – is it the failure to exercise section 36 that you're complaining of?

MR McKENZIE QC:

It's not, it's not only, it's not only the failure under section 36 but at section 36 read alongside the powers and functions of the Committee under section 14 and the particular ones there identified but I have focused, I know, in this argument on 36 because that is perhaps the power that's most germane to the way in which the Committee can go about its function of seeking records from certifying consultants, seeking reports from certifying consultants.

If I could just take the Court to the foot of page 5, there's just a couple of further points that I would wish to make there, that the role of the Committee, in relation to certifying consultants, that each annual reappointment is focused at a different and macro level, that is, different to the institutions, licensing institutions and section 35, subsection (5) comes into play there. That's the provision about the view of the consultant not coloured by views that are incompatible with the tenor of the Act.

What the Committee is conducting, with respect, is not a police or disciplinary inquiry but an audit at a macro level and it should also be noted that institutions must apply for their initial licence and for the annual renewal of a licence, whereas no such application is required of certifying consultants. No formal application is required from certifying consultants before they are appointed. The Committee is required to draw up and maintain a panel from which consultants are appointed. Consultants therefore, unlike institutions, do not apply for reappointment. There are no formal steps required for the Committee in relation to reappointment. This difference in the formality of the process also explains, in my opinion, why the draftsmen did not introduce provisions in relation to the reappointment of certifying consultants that correspond to the process –

ELIAS CJ:

I'm sorry, I don't quite understand this. I thought that earlier you had suggested to us that they are reappointed?

MR McKENZIE QC:

Oh, they, they are indeed –

ELIAS CJ:

Yes.

MR McKENZIE QC:

– but without a formal, a formal process of application –

ELIAS CJ:

But that is presumably because the Committee hasn't set up a process, has it?

MR McKENZIE QC:

Well, the Act doesn't have an equivalent process in relation to reappointment of consultants as there is on renewal of licences for institutions. In their case they have a number of boxes that they must tick and the Committee must be satisfied that these various matters are being attended to before a licence can be issued. That's not the position with certifying consultants and the Committee, under the Act, has a power of reappointment but my submission there is that it's not, that does not carry with it the implication that that is simply a matter of rubber-stamping the reappointment of existing consultants who wish to continue.

ELIAS CJ:

Sorry, can you just take us again to the reappointment provision?

MR McKENZIE QC:

Section 30, subsection (6).

ELIAS CJ:

Oh yes, "may reappoint". So is your complaint – I'm just trying to work out what your complaint is here. Is it that the Committee isn't undertaking a formal process under section 30, subsection (6)?

MR McKENZIE QC:

Not that it's not undertaking a formal process, no, I'm not suggesting to the Court that it should call for applications from certifying consultants but rather that, in carrying out its reappointment function, it gives consideration to whether consultants, on seeking reappointment, may be complying with the tenor of the Act –

McGRATH J:

Is it entitled to –

MR McKENZIE QC:

– and it needs information to do that –

McGRATH J:

– is it entitled simply to reappoint without any close focus on the matter if there's no, there's nothing to indicate that the particular consultant is doing anything unusual?

MR McKENZIE QC:

Oh, I'd agree your Honour. It's not a witch hunt and it's not a case where the Committee has got to put a consultant through some process of review every year on reappointment but –

McGRATH J:

Does it not follow from that, that it's a matter for the Committee's discretion what degree of consideration it gives before reappointing someone?

MR McKENZIE QC:

Yes, the exercise of its power of reappointment is clearly a discretionary one but it's, in my submission, not a discretion that should be exercised in a vacuum, that the Committee, in two ways I think, could give, you know, should be giving substance to that reappointment decision. One is by an auditing function, where it may routinely be looking at the way in which certifying consultants are carrying out the performance of their functions and the other is where, from the information available to it which is usually from the statistical information provided by consultants, it becomes aware that there's the possibility, it's no more than that, that some consultants might be overusing the mental health ground. That's no more than that but the Committee and, perhaps his Honour Justice Young indicated, but perhaps in the interest of the consultant herself or himself, can call for a report from that consultant in order to be satisfied that the function is being carried out in a proper way.

McGRATH J:

But whether or not it's necessary and desirable for that to be done itself is a question within the Committee's judgement, is it not?

MR McKENZIE QC:

These are discretions –

McGRATH J:

They're not – never mind the discretionary part. I'm just thinking, it's a matter for the Committee's judgement, is it not, as to whether or not it needs to call for further information beyond what it gets from the formal reporting sources?

MR McKENZIE QC:

Yes, I'd accept that's a judgement the Committee must exercise but where this comes into focus in this, in this case, is that the Committee is on record, as has been pleaded on a number of occasions, as saying it doesn't have such powers available to it, citing *Wall v Livingston* in that respect.

ELIAS CJ:

Well, yes, it doesn't have the power to enquire into individual cases. Isn't that the tenor of its reports?

MR McKENZIE QC:

Yes your Honour, that's the way in which –

ELIAS CJ:

It hasn't said that it's not able to get more information than it gets under the section 45 reports by using section 36, it's simply declined to look at individual cases, is that not right?

MR McKENZIE QC:

It's declined to call for reports from consultants in relation to the way that they're carrying out their functions in individual cases, yes.

ELIAS CJ:

Yes.

MR McKENZIE QC:

It reads *Wall v Livingston* more widely, with reference there to individual cases, as precluding any enquiry into the way in which the certifying function has been carried out, whether before or after the fact.

ELIAS CJ:

The substance of the assessment they regard as no go?

MR McKENZIE QC:

Yes.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.49 AM

MR McKENZIE QC:

Thank you, your Honour. Perhaps, with reference to the matter that was just raised before the adjournment, I could take your Honours to Mr Orr's affidavit. This was the question relating to the Committee's statement taken from *Wall v Livingston*, that it was given no control or authority or oversight in respect of the individual decisions of certifying consultants. Now Mr Orr's affidavit is in volume 2, at tab 12, and I can take you to page 4 of that affidavit.

ELIAS CJ:

Sorry, which volume is that?

MR McKENZIE QC:

Volume 2 of the case, tab 12, at page 4 and paragraph 11, well in paragraph 10, Mr Orr has really summarised the position that the appellant, the plaintiff there, claimed in relation to the Committee wrongly interpreting the Act as conferring no power on the Committee to review the way in which certifying consultants are carrying out their functions, etc –

ELIAS CJ:

I don't want to hold you up at this point but would you come back, later on, to point out where else, or where, subsequently to 2001, the same approach is indicated in reports of the Committee? Refers to the report of the Committee for 2001.

MR McKENZIE QC:

Right. Subsequent to 2001?

ELIAS CJ:

Yes, I just wondered if –

WILLIAM YOUNG J:

There's one in 2003 that is referred to.

ELIAS CJ:

Ah yes.

WILLIAM YOUNG J:

Isn't there one in 2005?

MR McKENZIE QC:

The 2005, it would be the latest, I think, of the statements. That of course was the report just preceding or at the time the litigation was commenced.

ELIAS CJ:

Yes. I'd just like to be reminded how they – don't take the time now, but come back to it, before you finish, how they are expressing that view.

MR McKENZIE QC:

Yes well, just coming back to Mr Orr's affidavit, in paragraph 11, your Honours will see the statement that's cited from the Committee, "the Committee's given no control or authority or," and your Honours will notice, the word, "*oversight* in respect of the individual decisions of certifying consultants." And then reference is made to four reports where that statement has been repeated.

And then reference is made in the following paragraphs to other statements from the Committee as to, which include an indication of its limited functions in this respect. So –

ELIAS CJ:

So you really only take issue with the oversight in that, do you? Because you're not arguing they have control or authority in respect of individual decisions.

MR McKENZIE QC:

No. I'm not, not suggesting that they can, they can review, in the sense of reverse or challenge individual decisions of consultants but the, yes, the "oversight" is really the key word there.

ELIAS CJ:

Depending what they mean by that, whether it's overseeing individual decisions or whether it's providing oversight of the way in which consultants are carrying out their responsibilities.

MR McKENZIE QC:

Yes and the position that the Committee's taken in this litigation is that it, it does not have that oversight, in particular in relation to reviewing after-the-fact decisions of consultants. Then just –

TIPPING J:

We've finished with Mr Orr's affidavit, have we?

MR McKENZIE QC:

Yes, I just wanted to draw your Honours' attention to those passages where the Committee had repeated that statement but the Court will of course be interested in the other references that Mr Orr makes in the page, two pages that follow, to various reports of the Committee that identify the Committee's position with regard to certifying consultants.

McGRATH J:

You've mentioned, you've referred there and highlighted the Auckland, Wellington, and Christchurch situation. Does the Committee compare with other centres the position, which presumably differs?

MR McKENZIE QC:

The reference your Honour's making is to where?

McGRATH J:

I'm referring at page 5 of Mr Orr's affidavit to the, the five line quote. It's a quote at the top of the page.

MR McKENZIE QC:

Oh yes.

McGRATH J:

There's a reference there to Auckland, Wellington, and Christchurch, but by implication, Mr Orr, sorry, the Committee chairperson is saying the position is different elsewhere. I just wondered if there's something in the Committee's report that spells that out?

MR McKENZIE QC:

Not that – no, not in, not in, in that detail, your Honour. Certainly, the statistics, Mr Orr being from Christchurch, that were put before the, well, received from the Committee and were put before the Court in relation to the number of decisions being made by consultants came from Christchurch, but no, I'm not aware of the Committee's reports indicating a different practice in other centres other than there is often reference in the reports to the difficulties that women have, in some areas of the country, in obtaining the services of certifying consultants and are required to travel, in some cases, to main centres in order to obtain an abortion.

McGRATH J:

There's nothing specific in the Committee's report?

MR McKENZIE QC:

Nothing specific in terms of that the certifying decision is made, no.

McGRATH J:

Thank you.

MR McKENZIE QC:

Then in relation to section 36, and I don't want to spend too much further time, sorry, on this section, I would just take the Court, again, so that it's not lost, to section 30, subsection (5) and this is in relation to the making of appointments of certifying consultants, and the words there, "...the Supervisory Committee shall have regard to the desirability of appointing medical practitioners whose assessment of cases coming before them will not be coloured by views in relation to abortion generally...". Now it's the words there "whose assessment of cases coming before them".

Now, I accept that, that refers to the initial appointment and the drawing up of this, this consultant, that the Committee's required to do but it's submitted that, that is a forward-looking provision, in that, it is relevant for the Committee, in view of that direction in the statute, to consider, for the purposes of reappointment also, the desirability of appointing or reappointing, in that case, medical practitioners whose assessment of cases coming before them will not be coloured in that way and the auditing, monitoring function that the appellant refers to would assist in that respect.

Yes, I think a good deal of what I've got there in section 36 has already been covered but I would emphasise, perhaps, the final reference in paragraph 23 or perhaps coming back to the last bullet point there on page 10 of the speaking note, as Justice Arnold observed at paragraph 182, "the Committee's role is one of general oversight," and it could be added "supervision", and he went on to say that it cannot be expected, given its resources and expertise, even supplemented by specialist assistance in terms of section 16 – and it should not be forgotten by the Court, the Committee, although it is a Committee of two medical practitioners who may not be specialists under section 16, can draw on technical expertise and assistance and generous resources have been made available by Parliament to the Committee under that section. So it's significant in that respect – that it would examine every decision made by every certifying consultant, that is not required by the Act but rather the Committee's role is one of review where, in terms of section 36, it may from time to time audit the way in which certifying consultants are carrying out their authorising functions where, as Justice Miller held, the Committee is put on enquiry by information available to it from statutory reports that it receives.

The appellant respectfully adopts the following paragraph from Justice Arnold's judgment, paragraph 179, "Given the central role of certifying consultants in the statutory scheme, it seems to me implausible that Parliament would have intended to preclude the Committee from keeping under review the way in which they performed their role".

Then finally, in this respect, I would like to take your Honours to the Royal Commission's report and the role that it envisaged for the Committee and that is at page 295, at tab 1 of the appellant's authorities through to 297. It called the Committee "the Statutory Committee" and it's perhaps significant that Parliament used the term "Supervisory Committee" and then it referred particularly to paragraph

1, subparagraph 1, "The oversight of the working of the abortion laws throughout New Zealand," which again is captured in section 14, and then paragraph 7, "The review of the process of decision making, whether it be by panel or otherwise", paragraph 10, "the maintenance of consistent standards and the interpretation and administration of the abortion laws," and 12, again these have been carried over into section 14, "Reporting to Parliament on the working of the abortion code".

Then I take Your Honours to the next page at paragraph 6 –

ELIAS CJ:
Sorry, what page are you at?

MR McKENZIE QC:
I was on 295.

ELIAS CJ:
Yes. So 296, is it?

MR McKENZIE QC:
I'm now moving on to 296 at paragraph 6, there's reference there to the panels. That was the Committee's preference but it had an alternative recommendation which was for two doctors described there, which became the certifying consultants in the Act, as an alternative. In 6 it says that, "In order to ensure the uniform, impartial and efficient working of the abortion laws, panels should be established under the jurisdiction and oversight of the Statutory Committee to decide after considering all relevant information whether the abortion sought is justified within the law". That's the reference there to the jurisdiction and oversight of the Statutory Committee.

Then paragraph 11 refers to the panel's duties with regard to keeping of records and reporting to the Statutory Committee. It's framed in different terms to section 36 which of course now excludes the personal details.

Then finally, on page 297, the next page, to paragraph 17 which I think is significant in the context of the argument this morning, "That as an alternative to the system of decision making by panels the decision be made by two doctors under the general framework and supervision of the Statutory Committee". So that's what we now

have, with two certifying consultants and I emphasise the words, “under the general framework and supervision of the Statutory Committee”.

ELIAS CJ:

So counselling wasn’t part of it if – the panel proposal, it was just, it was an additional safeguard, was it, if the alternative recommendation were adopted?

MR McKENZIE QC:

Counselling was recommended by the Commission, although it was not mandated.

WILLIAM YOUNG J:

295, recommendation 1.5.

ELIAS CJ:

I just wonder why they said “then be made only after”?

MR McKENZIE QC:

Yes, it was, no, it was there from the start, the recommendation that there be adequate facilities for counselling, yes, 1.5, subparagraph 5.

So that when one looks at 17, one can see, in my submission, that the Committee is given a very significant role in relation to the certifying function to be carried out under the general framework and supervision of the Statutory Committee. That’s consistent with the way in which the appellant seeks the interpretation of the provisions of the Act.

ELIAS CJ:

It’s interesting, in para 6 of the recommendations which you probably took us to while I was trying to find the volume, the sort of data that the Royal Commission envisaged which is pretty general?

MR McKENZIE QC:

And that’s paragraph 6?

ELIAS CJ:

Yes, at page 295.

MR McKENZIE QC:

Oh, I see. There's the data there on, in relation to the statistical information. Yes, in my submission, that's only one of a number of functions and the Committee's function is not limited to collecting that data and it – there is the obligation referred to in paragraph 11 which was carried over to section 36 in very broad terms, the duty to keep full records and report regularly so that there is a wider obligation than simply to collect data.

So that, concluding on this aspect of the case, it is the appellant's submission that when the broad power to require the submission of reports and the keeping of records under section 36, is looked at in the context of the Royal Commission's recommendation and then in the context of the functions of the Supervisory Committee under section 14(1), keeping under review, paragraph (a), of all the provisions of the abortion law, the operation and effect of those provisions in practice, and I'd remind the Court again of the primary submission and the way in which the word "review", in a not dissimilar context, was given a very expansive interpretation by the Court of Appeal in the *City Realties v Securities Commission* [1982] 1 NZLR 74 (CA) case, referred to in the written submissions.

Then the reference in paragraph (h), keeping under review the procedure – perhaps I'll come back to that paragraph. Paragraph (i), "Taking all reasonable and practicable steps to ensure the administration of the abortion law is consistent throughout New Zealand and ensure the effective operation of this Act and the procedures thereunder." A significant role for the Committee there. Then (k), the annual report to Parliament, again very broadly stated, on the operation of the abortion law.

So far as (h) is concerned your Honours, just speaking briefly to that, it was submitted by the respondent that there had been no appeal to the Court of Appeal by the appellant from Justice Miller's finding in relation to that ground but that is not correct your Honours. Paragraph 41 of the respondent's submission your Honours –

TIPPING J:

Well whether it's correct or not, I would have thought Justice Miller was plainly correct but the focus here is on the procedural matters referred to in ss 32 and 33, not the substance of it.

MR McKENZIE QC:

That was the position taken by his Honour Justice Miller and so he disagreed with the, with the plaintiff, the appellant, in relation to the availability of that ground. He saw it in the way that your Honour has done. It was cross-appealed and if your Honours need a reference to that, it's the notice of appeal at tab 5, page 2. It was one of the grounds of appeal to the Court of Appeal. It wasn't specifically dealt with by the majority of the Court of Appeal but I accept that at paragraph 139, the majority implicitly agreed with the narrower construction put on that paragraph by Justice Miller, paragraph 139, so I accept that by implication –

TIPPING J:

Are you arguing that that's wrong? Because if you're not, it doesn't matter much.

MR McKENZIE QC:

What I'm submitting is what Justice Arnold, the position that Justice Arnold took and if I could turn your Honours to that at paragraph 63, subparagraph (c) of the judgment, which is the position that the appellant takes, the Court of Appeal's judgment, 163, subparagraph (c) but your Honours may just wish to read.

ELIAS CJ:

Para 163 at (c)? The consistency point.

MR McKENZIE QC:

Oh no, I think I've got the wrong paragraph reference there, I'm sorry your Honour.

ELIAS CJ:

Is it (b)?

MR McKENZIE QC:

It's (b), yes, thank you your Honour, in fact I have it marked, yes. Justice Arnold there refers to the terms of that section and your Honours may wish to read what he said into the next page.

TIPPING J:

Well I have difficulty with that, Mr McKenzie, frankly. I would have thought it's clearly directed to the procedural matters referred to in those two sections.

MR McKENZIE QC:

Yes, whether that's so or not, your Honour, what Justice Arnold concluded was that it does not, it may not matter whether construed on the wider or narrower basis, it is difficult to see how the Committee could perform this function without examining how certifying consultants go about their statutory role and I respectfully adopt that approach.

TIPPING J:

Well that may well be a fair comment but insofar as (h) is said to support the proposition that they can get, delve into the individual cases, in my view it clearly doesn't.

MR McKENZIE QC:

Well that's not a matter that's being pursued by the appellant before this Court.

TIPPING J:

No, no.

MR McKENZIE QC:

And it's not one of the grounds of appeal that the Court has allowed to go forward but I, I respectfully adopt the approach that Justice Arnold took in his, his final observation on the fact that it may not matter, at the end of the day, the –

TIPPING J:

Well if you don't get home without that, you're certainly not going to get home with it.

MR McKENZIE QC:

It could perhaps be put that way, your Honour, yes. Then just realise, trespassing probably on time to go to the respondent but just a couple of matters and then I want to deal very briefly with the, the second and third grounds. Mr Newall's fourth affidavit was tabled by the respondent in, in the recently filed case, case of appeals, volume 6, case of appeal, volume 6. With reference to, to that evidence, I think it's important for the, for the Court to note that – no I'm sorry, I'm – that, yes, that the observations that were contained in the standardised system for referrals that was introduced by the Committee that Mr Newall refers to –

BLANCHARD J:

I'm sorry, I'm lost, where's Mr Newall?

MR McKENZIE QC:

It's in the new casebook that was filed, volume 6. The fourth affidavit of Mr Newall and it has appended to it a –

ELIAS CJ:

What tab are we looking at? Oh I see, yes, tab 1.

MR McKENZIE QC:

A standardised reporting system for referrals that had been circulated by the Committee. The Committee has chosen termination law in New Zealand rather than abortion law but that apart, in the passage on the role of the general practitioner, and religious and moral conflict, on page 1145, taking the page number at the foot of the, that report –

ELIAS CJ:

Sorry, what is this? This is a, this is an information book?

MR McKENZIE QC:

Yes it's an information memorandum circulated to practitioners about the system of referrals and the standard system of referrals.

WILLIAM YOUNG J:

Sorry, I lost the page number in that, what was the page number?

ELIAS CJ:

1146.

WILLIAM YOUNG J:

1146.

MR McKENZIE QC:

I'm referring to page 1145 where it deals with the role of the general practitioner, the GP. Your Honour will notice in the right hand column under the heading "Religious moral conflict", the discussion of the obligations of the general practitioner who has a

conscientious objection and I simply refer to that to draw your Honours' attention to the fact that there's been a subsequent High Court decision of Justice McKenzie in *Hallaghan v Medical Council of New Zealand* HC Wellington CIV-2010-485-222, 2 December 2010. It's not really relevant to this appeal, but I can make it available to the Court.

BLANCHARD J:

I'm sorry, I'm completely lost. What's the relevance of all this?

MR McKENZIE QC:

It's not relevant to this appeal –

BLANCHARD J:

Well why are we hearing it then, haven't we got enough problems?

MR McKENZIE QC:

The material has been submitted to the Court and it really needs to be noted that the reference there to conscientious objection is now subject to what the High Court said in the *Hallaghan* case.

ELIAS CJ:

Well we're not dealing with conscientious objection –

MR McKENZIE QC:

No –

ELIAS CJ:

– in this case.

MR McKENZIE QC:

– but it's just a matter for your Honours to note.

ELIAS CJ:

But this, since we are looking at it, this booklet, is it, booklet of best practice, does it say anything that is relevant to us? Because presumably this is put out by the Committee as part of its general supervisory functions, is it?

WILLIAM YOUNG J:

Is it put out by the Committee?

ELIAS CJ:

Oh, well I had assumed it was. Who is it put out by?

MR McKENZIE QC:

It's put out by the Committee. With respect, I agree with your Honour that not a great deal turns on it but it was put before the Court really to indicate that the Committee is carrying out a general oversight role in relation to certifying, well in this case, not certifying consultants but practitioners, in relation to the way in which the law should be applied in New Zealand. It's providing guidance but not – really so far as the issues that the Court has to determine in this case, it's of limited relevance.

ELIAS CJ:

Right.

MR McKENZIE QC:

Then the other matter that I draw attention to relates to Mr Newall's third affidavit which is at tab 59. Sorry, it's at tab 15 in volume 2. I'm sorry your Honours, I have the wrong notation in my notes here but –

ELIAS CJ:

What's the point that you're –

MR McKENZIE QC:

– I will provide your Honours the reference, it's the Committee's statement and it's referred to in their submission that, paragraph 45.2 of the respondent's submission, "that most" – Mr Newall has stated in his affidavit – "that most certifying consultants have changed their practice to take note of Professor Simpson's recommendation, (ie, that when authorising an abortion on the ground of serious danger to mental health, the consultant should state both the condition from which the woman suffers and that the severity of the condition is such as to pose a serious danger to her mental health".

What's important to recognise, for the Court to recognise there, is that what Mr Newall is saying is that most certifying consultants have changed their practice to

take note of Professor Simpson's recommendation. He does not say that certifying consultants are in fact stating what Professor Simpson encouraged, in his opinion, that consultants should not only use these diagnoses but should state that the severity of the patient's condition is of such a degree as to constitute a serious danger to the patient's physical or mental health. So –

ELIAS CJ:

Sorry, what were you just reading from there?

MR McKENZIE QC:

That's from Professor Simpson's report, or opinion which is at volume 3 in tab 59.

BLANCHARD J:

Aren't you being a little linguistically challenging? I would have thought the natural meaning of what Mr Newall is saying, assuming this is his actual words, are that they have changed their practice in accordance with the recommendation. You could hardly say that they've changed their practice if all they've done is to say oh well, we'll note that but we won't do anything.

MR McKENZIE QC:

Well, it's an unusual way of putting it, they've changed –

BLANCHARD J:

Well, it may be –

MR McKENZIE QC:

– their practice to take note –

BLANCHARD J:

– it may be but really, I think you're reading far too much into that.

ELIAS CJ:

It's not a pleading.

TIPPING J:

Even if it were, we'd probably in today's world be benevolent, more's the pity.

MR McKENZIE QC:

Well, in my submission, that if consultants have simply taken note –

BLANCHARD J:

They have changed –

MR McKENZIE QC:

– of that recommendation –

BLANCHARD J:

– their practice, it says.

MR McKENZIE QC:

– and changed their practice in that respect, it may not mean –

BLANCHARD J:

Well, if they're only taking note and they're not doing anything, they haven't changed their practice. Come on Mr McKenzie, we're getting bogged down in silly detail, with respect.

TIPPING J:

Wouldn't it be better to get on with the other grounds of appeal, while you're still on your feet?

MR McKENZIE QC:

Yes, well I would have expected a clearer statement but that apart your Honour, I think the issue that's of importance for the Court here, regardless of the way this was put, is that the Committee, in the appellant's submission, has the power to see that the respondents are taking some notice of that recommendation and are in fact implementing it. It has the power to do that and to make the – to call for the appropriate report from consultants. It would be strange, in my submission, very surprising, if the Committee had no power to see that consultants were adhering to a practice –

TIPPING J:

Is this a new point or –

MR McKENZIE QC:

– that was encouraged –

TIPPING J:

– simply a repetition of what you've been saying before?

MR McKENZIE QC:

– by an opinion circulated to them.

TIPPING J:

Is this a new point or is this just a repetition of what you've been saying before?

MR McKENZIE QC:

It goes to the same point your Honour, yes. Then finally, with regard to the final two questions and what the appellant wishes to put before the Court in relation to those two questions really is covered in the written submissions but there are just some points of response to the respondent's submission that I wish to draw the Court's attention to.

First of all, paragraphs 109 to 10 of the respondent's submission which say that the Judge's conclusion that certifying consultants must have in effect misinterpreted or been manipulating or flouting the law is a grave one, harmful to the reputation of all certifying consultants and with possible legal consequences for them, and so on.

It is submitted that Justice Miller made no finding of criminal liability. He said, as did the Court of Appeal in *Bayer v Police* [1994] 2 NZLR 48 (CA), which is at tab 4 of the appellant's authorities, that he had "misgivings about the lawfulness of many abortions" and held that the statistics which were also before the Court of Appeal in *Bayer*, put the Committee on enquiry. The basis for his statements that have been criticised, is also the statement of the Court of Appeal in *Bayer*, was derived from those statistics and the Court needs to bear in mind that they are statistics compiled by the Committee itself and it's the Committee's own interpretation of those statistics that was cited by the Court in *Bayer* and that of course was cited and, with other references, given by Justice Miller in his judgment. It's the Committee itself that referred to abortion on pseudo legal grounds and that the law is being applied more liberally than Parliament intended.

So it's the submission of the appellant that, it cannot seriously be contended that the consultants' reputations have been affected by the statements made in Justice Miller's judgment, when the Committee itself put the same accusation into the public domain much earlier and when this has already been commented on in very similar terms, some time ago, by the Court of Appeal in *Bayer*. So it cannot seriously be contended again that the Judge has drawn inferences that he could not properly draw, this is paragraph 112 of the respondent's submission: "The inferences that the High Court Judge drew, from his own review of the abortion statistics, were not inferences that could properly be drawn".

With respect, they were inferences that were drawn by the Committee itself in its reports, where it commented on the statistics and it seems unfair, with respect to the majority and to the respondent, to criticise his Honour for drawing inferences in that way.

McGRATH J:

These "inferences" as you describe them, well as you quote –

MR McKENZIE QC:

Quoting the respondent –

McGRATH J:

– your opponent is describing them –

MR McKENZIE QC:

– your Honour, yes.

McGRATH J:

– are they obiter in the scheme of Justice Miller's judgment?

MR McKENZIE QC:

In my submission, they were not essential if one can look in a strict way at ratio and obiter to the decision made by his Honour. I think one could say that they were not essential but what was pleaded was that those statistics put the Committee on inquiry. That it had taken a certain view, which is set out in Mr Orr's affidavit, as to an invitation on its powers and in fact said and that was cited, that there was nothing that it could do about the situation drawn to its attention in consequence of these

statistics and its own comments on them. Its hands were tied because of *Wall v Livingston.*

TIPPING J:

Wasn't the issue power, pure and simple, rather than a gratuitous observation about the subject matter that the Judge was addressing? What relationship did it have with the issues in the case?

MR McKENZIE QC:

The statistics were pleaded as providing evidence that the Committee knew –

TIPPING J:

Never mind the pleadings Mr McKenzie but I understood the issues in the case were those of the legal powers of the Committee?

MR McKENZIE QC:

Yes.

TIPPING J:

Yes. Well I don't understand, in what sense, the observation the Judge made related to those issues?

WILLIAM YOUNG J:

Could it be that it pointed to there being a practical context to the interpretations of sections 30 and 14 that he preferred?

MR McKENZIE QC:

Indeed your Honour and that –

WILLIAM YOUNG J:

But there's no actual order made, it's just contextualising the argument.

MR McKENZIE QC:

That there was a situation that the Committee itself recognised called to be addressed and that's, you know, the Committee itself recognised that and claimed –

TIPPING J:

Well the issue is whether –

MR McKENZIE QC:

– that it was powerless –

TIPPING J:

– it had the power to address it –

MR McKENZIE QC:

– to do anything about it. Those observations really went to the question of the Committee's misconstruction of its own statutory powers.

TIPPING J:

Surely the issue is whether the Committee had any power to address it?

MR McKENZIE QC:

It was also relevant as to whether the Committee had misinterpreted the provisions of the statute.

TIPPING J:

In what way?

MR McKENZIE QC:

By repeatedly expressing the value that in spite of –

TIPPING J:

No, in what way was it relevant to the misinterpretation question, the matter the Judge –

MR McKENZIE QC:

It indicated the serious consequences of the position that the Committee was adopting.

TIPPING J:

I'm all in favour of Judges being entitled to make whatever observations they think appropriate, don't get me wrong Mr McKenzie, but I just want to understand how it

properly arose in the context of this, of the issues that the Judge had to focus on. My brother Young has suggested a premise, are there any others than the one suggested by my brother?

WILLIAM YOUNG J:

Weren't you looking for mandatory orders?

MR McKENZIE QC:

Yes. The Committee, when it went before Justice Wild and Justice Miller, was seeking mandatory orders. Justice Miller indicated that they were not available but the Committee was – in fact put the *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 decision at the forefront of its submissions, that this was a case where there were certain discretionary powers available to the Minister and the issue was whether the Minister had thwarted the statutory intention by refusing to exercise powers that were available and that was one of the matters that was pleaded.

TIPPING J:

I see, all right, thank you.

ELIAS CJ:

It was an exercise, *Padfield* was exercise, not non-exercise, wasn't it?

TIPPING J:

Exercise for a purpose outside the statutory –

ELIAS CJ:

Yes, not for proper purpose.

TIPPING J:

Mmm.

MR McKENZIE QC:

Yes.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

But you were saying the evidence is such that the Abortion Supervisory Committee has no choice but to exercise its discretions or powers in a particular way?

MR McKENZIE QC:

Well, yes –

WILLIAM YOUNG J:

An argument that you in the end failed on but as an intermediate step along the way, you had to point to an evidential basis that would support that?

MR McKENZIE QC:

That's the position. *Julius v Bishop of Oxford* (1880) 5 App Cas 214 H L(E) was the authority that was cited there, that this was a case where the discretionary power really was in the – the discretion was in the nature of a statutory function, that the Committee was required to exercise and failed to do so.

ELIAS CJ:

The indication that the Committee was misconstruing its powers is solely attributable, is it, to the quotations you took us to that it was not empowered to control or supervise individual decisions?

MR McKENZIE QC:

Not only those quotations but the Committee's comments on the implications of 98.2 percent of abortions being carried out on the mental health ground. That was in the 2000 report.

ELIAS CJ:

But that doesn't really go to the misconstruction of their powers point because, on one view, that's a report to Parliament.

MR McKENZIE QC:

Yes but –

WILLIAM YOUNG J:

Did they ever write a letter – didn't the Committee write a letter at some stage and is there actually a crystallisation of the Committee's position, as it were, outside what counsel have said, outside –

MR McKENZIE QC:

Yes well again, if I take you to Mr Orr's affidavit, there were a series of letters that are all referred to in that affidavit.

ELIAS CJ:

Is that volume 3?

MR McKENZIE QC:

Yes. Passing between, in one case, Right to Life and the others between – in one case another organisation – the others Right to Life, calling on the Committee to exercise its powers and the Committee declining to do so.

ELIAS CJ:

Can you take us to that?

MR McKENZIE QC:

Yes, that's in volume 2, tab 12, Mr Orr's affidavit and at page 12, "Correspondence in which the Committee has been requested to carry out its statutory duties or exercise statutory powers and discretions." Then paragraph 37 lists –

ELIAS CJ:

But there's –

MR McKENZIE QC:

– items of correspondence that have passed between –

ELIAS CJ:

What I'm after is the best evidence you have to support your contention that the Committee is misconstruing its statutory powers and you have the reference which is set out in para 11 of this affidavit and is there anything else? Is there anything in this correspondence that indicates –

TIPPING J:

And it's important to distinguish between a denial of a power as against a declining to exercise it and I think that's –

ELIAS CJ:

Yes.

TIPPING J:

We're not helped if they simply say we're not going to do it. What we're helped by is if they say we have no power to do that.

MR McKENZIE QC:

I think the correspondence and also the statement from the Committee that it has no oversight, the one that's cited in paragraph 11, repeated several times –

ELIAS CJ:

In respect of individual decisions.

MR McKENZIE QC:

Decisions of certifying consultants and that was in – if the Court looks at the correspondence, the Committee takes that position in relation to requests for it to exercise power now, in terms of enquiries and review –

TIPPING J:

So is this really it? Is this the, is this – I'm not saying it's insufficient but this is the compass of it? The Committee is given no control etc or variations of that theme?

MR McKENZIE QC:

Yes. That the Committee is given no control, that there's nothing that it can do about the difficulties that were pointed to –

ELIAS CJ:

I think –

MR McKENZIE QC:

– there were a number of –

ELIAS CJ:

– it may be necessary for you to take us to the correspondence, if they refer to lack of power to obtain the information.

MR McKENZIE QC:

Yes, well the particular report that I'd refer to in that context is the 2000 report, volume 5, tab 91.

ELIAS CJ:

So, sorry, does that mean that there isn't anything in the correspondence that you want to take us to?

MR McKENZIE QC:

Oh, I can certainly take you to the correspondence, yes.

ELIAS CJ:

Well, I don't want you to take us unless it, unless there are statements there about the Committee's understanding of its powers. So this one, the 2000 report, which page is that?

MR McKENZIE QC:

It's at page 5.

ELIAS CJ:

Sorry, where's this?

MR McKENZIE QC:

In the – under the heading, "Review of Contraception".

ELIAS CJ:

Oh but that's a report about their recommendations for change to the Act. Where's – I'm interested in them saying that they don't have the power to obtain information from certifying consultants.

MR McKENZIE QC:

Well, I'll take your Honour through the correspondence, that may be the way to access the material.

ELIAS CJ:

Well, sorry Mr McKenzie but in paragraph 11 of that affidavit, the quote is set out. Presumably, from what we've seen, that's repeated in some of the reports and what I'm interested in knowing, is there any further statement of the Committee's control, authority or oversight and its understanding of it?

WILLIAM YOUNG J:

There's something that perhaps isn't absolutely on the button, at page 605 at the bottom of volume 3 and it's really got to be read with the earlier letter, the preceding document.

MR McKENZIE QC:

Yes, thank you your Honour, that's one of the items of correspondence that passed between the parties.

ELIAS CJ:

"To interfere with decisions"?

WILLIAM YOUNG J:

Yes. Is there any – do they say anything in the affidavits?

MR McKENZIE QC:

If your Honour looks at the preceding letter under that tab, the one immediately before 605, that's 604, there's reference there to Dr Simpson's report, his opinion.

WILLIAM YOUNG J:

There's another letter at 616.

MR McKENZIE QC:

And there's reference to – in that letter the question is asked as to what action the Committee is to take in response to authorisations on the ground of mental health with no specific diagnosis shown and the answer is the one on 17 March at page 605.

WILLIAM YOUNG J:

There's another letter at 616.

TIPPING J:

They simply come back to the same theme in the penultimate paragraph of 616, they actually parrot the very same words. I don't mean parrot in pejoratively.

ELIAS CJ:

It's all tied to individual decisions of certifying consultants.

MR McKENZIE QC:

Yes but I think the way in which those words are repeated is significant, that the Committee had adopted a particular view of *Wall v Livingston* which it saw as being an answer to all requests for it to take any review action in relation to certifying consultants.

WILLIAM YOUNG J:

Is their position set out in the affidavits?

MR McKENZIE QC:

It's really in the statement of defence that the Committee's position is given. That's at tab 7 of volume 1 and paragraphs 18 and 19.

WILLIAM YOUNG J:

Paragraphs 17 and 18 is sort of repetitions of what we've had before.

MR McKENZIE QC:

Yes, 17 is quite an express pleading.

TIPPING J:

Clearly there's no variation really on the essential theme that first emerged in paragraph 11 of Mr Orr's affidavit. It's all to the same effect, isn't it? That doesn't matter, Mr McKenzie. We're – that is the essential issue in this case.

MR McKENZIE QC:

Essentially the Committee had adopted a particular view which it adhered to, yes.

There's one other reference that I just wanted to take your Honours to. Well, perhaps I can draw your, the Court's attention to the pleading, that's the third

amended statement of claim, and there's a series of references pleaded there to the Committee's observations on its limited powers, and perhaps the most significant of those is at page 80, paragraph 17, coming from the 1996 report. And then the Committee's view in its 2001 report, repeating the previous year, this report says, "The Committee noted in its last year's report that the law is being liberally interpreted and is not working as was originally intended. The Committee does not have power to alter the situation".

So there's a confession there on the part of the Committee that it cannot do anything about the situation that was outlined in the 2000 report that I drew your Honours attention to, that 98.2 percent of abortions were being carried out on what the Committee considered to be misleading grounds. Now that was a serious statement for the Committee to make but it then confessed well, there's nothing we can do about it.

WILLIAM YOUNG J:

Was there any, a sort of human cry raised by the certifying consultant community over those remarks by the Committee?

MR McKENZIE QC:

Not that I'm aware of your Honour. The Committee has a series of reports, as is pleaded there, and has made observations that one could construe as being critical of the way in which certifying consultants were carrying out their function.

The other place where those authorities are helpfully gathered together is of course in the judgment of Justice Miller himself and the authorities on which he relied. Interestingly enough, I think the particular one relied on in *Bayer v Police* was not mentioned, so that's additional to the authorities referred to in the judgment. I'll give your Honours the page reference, from tab 9 of volume 1, tab 9 and then at paragraph 44 and the following paragraphs which of course have been the subject of criticism by the majority in the Court of Appeal.

The particular passages there are those at paragraphs 50, 51, 52, 53, the citing of the report from the former chairman of the Committee and, as I mentioned, there is also – his Honour could have referred to the allegation relied on in *Bayer v Police* from the 1986 report.

McGRATH J:
Isn't that at 55?

MR McKENZIE QC:
Mmm, I'm sorry Your Honour?

McGRATH J:
Isn't that at 55, doesn't he – is that not the point he's making at paragraph 55?

MR McKENZIE QC:
Paragraph 50?

McGRATH J:
Paragraph 55.

MR McKENZIE QC:
Paragraph 55. Yes of course, yes of course, by citing *Bayer* he implicitly adopts the particular ground referred to there. Yes, your Honour is quite correct, so it also gets him to the judgment.

Then perhaps, just a couple of final observations on the respondent's submissions. The respondent again repeated at paragraph 117 matters which, with respect, were firmly rejected by both Justice Wild and Justice Miller. They're claiming that the real purpose of the appellant was to generate publicity in relation to the rate of abortions in New Zealand stating that, "That reservation has been consistently advanced by the respondent throughout the history of this proceeding".

I simply draw your Honours attention to Justice Wild's judgment and perhaps I'll put that before your Honours before closing my submission, where his Honour, at paragraphs 111 to 113, firmly rejected that view, as also did Justice Miller at paragraph 115 of his judgment. So it's somewhat surprising to find that view advanced again in this Court.

Then at paragraph 118.5 of the respondent's submissions, it claimed that Justice Miller's comments were based on the statistics and no more –

ELIAS CJ:

I'm sorry, I'm just trying to understand that rejoinder to paragraph 117 because I suppose it's, it maybe say – the submission is that the abortion statistics are not relevant to the argument being advanced and that may be so if it's a matter of interpretation of the Committee's powers?

MR McKENZIE QC:

The matter –

ELIAS CJ:

I don't –

MR McKENZIE QC:

– was put – well, the matter was dealt with by Justice Wild in just that very context your Honour, that his Honour there, by reference to the abortion statistics, said though these had been put before the Court bona fide and were properly advanced –

ELIAS CJ:

Oh I see, it's the motivation –

MR McKENZIE QC:

It's the motivation –

ELIAS CJ:

– that's, yes, I see, sorry –

MR McKENZIE QC:

– that the statistics were put forward –

ELIAS CJ:

– yes, yes –

MR McKENZIE QC:

– to generate publicity and not for any proper reason and both Courts regarded the plaintiff as properly having advanced arguments based on the statistics. Then in relation to paragraph 118 at point 5 of the respondent's submissions, it's not correct,

in my submission, for the respondent to suggest, this is down there, that Justice Miller's comments were based on the statistics and no more. Justice Miller cited in support, inferences drawn from those statistics which the Committee itself compiles and tables, drawn by the Committee itself, inferences that it drew and that same inference was drawn by an earlier Court of Appeal. So that, it's the Committee's own interpretation of the statistics which was really given publicity.

Again, finally, the respondent, paragraphs 122 and 123, challenges the statement which, in the ground of appeal that the approval rate was remarkably high, saying, "Against what was this measured?" The submission in response is that the Judge measured this against the words of the Act, the "serious danger to the physical or mental health of the woman or girl". Also to call in aid, paragraph 56, which I'd earlier cited to your Honours, on mental health from the commentary of the Royal Commission.

So that when one has regard to the language of the statute, I think there was a basis for – on which the Judge could assert, having regard to the need to show serious danger to the mental health of the woman, that the level of approvals was remarkably high and that was a view the Committee itself held.

Well I've unduly trespassed on the respondent's time and I should perhaps conclude matters there, other than to place before your Honours, *Wilcox v Police*, a judgment that I referred to earlier. The judgment of Justice Wild which I think, perhaps your Honours should have, in view of the comments that I've responded to there from the respondent.

Finally, I seek leave to put before your Honour the affidavit of Mr Ronald Paterson who was, at the time, Health and Disability Commissioner and his affidavit which was filed on behalf of the appellant, or the plaintiff then, was in the case before the Court of Appeal but the respondents were not prepared to have it included in this case but, in my submission, it is relevant, particularly to the question of the role of the Health and Disability Commissioner and the way that intersects with the role of the Committee –

ELIAS CJ:

Is this a subject of a submission you've made to us?

MR McKENZIE QC:

Yes, it was in the written submissions. I foreshadowed there that I would be seeking leave to put this affidavit, although I've only extracted the relevant case referred to and excluded the other. There were two cases commented on and seek leave to place that before the Court.

ELIAS CJ:

All right, thank you. Well maybe you can pass those to the registrar to distribute to us during the adjournment.

MR McKENZIE QC:

Thank you.

ELIAS CJ:

All right, we'll take the adjournment now, thank you.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.16 PM

ELIAS CJ:

Yes, Ms Gwyn.

MS GWYN:

Thank you your Honour. I want to speak to, rather than to read my written submissions, simply to highlight the key points that are made in the written submissions. If I could start, rather than go through the introductory paragraphs about the arguments and the grounds, if I could start to make a few points in relation to the section that starts at paragraph 21, in relation to the interpretation of the Act.

The respondent agrees with the majority of the Court of Appeal that this case turns on the proper interpretation of the Contraception, Sterilisation, and Abortion Act and the meaning of that Act is to be ascertained from its text and in light of its purpose. There are several submissions that the appellant has advanced, both orally and in writing, around the interpretation question, that I did want to respond to.

In its written submissions, the appellant at paragraph 21, asserts that the CSA Act is a statute that authorises the taking of human life and that for that reason the provisions of the Act require the most careful scrutiny in consideration by the Court. My response to that submission is that it's plainly not correct that it is this Act that has that effect, it's the Crimes Act, section 187A with its series of exceptions which prevent the termination of a pregnancy being branded as unlawful and that point is made very clearly in the Court of Appeal's judgment in *Wall v Livingston*. This Act, the CSA Act, sets out the process by which the substantive criteria in the Crimes Act are applied.

In oral submissions this morning, my learned friend advanced the proposition that in cases –

ELIAS CJ:

Sorry, but do you accept that the provisions of the Crimes Act are part of the so-called abortion law, they're part of the definition, aren't they?

MS GWYN:

Yes, they are your Honour. Abortion law is defined to include both the provisions of the CSA Act and the Crimes Act but what I was responding to your Honour was a submission from the appellant that this Act, the Contraception, Sterilisation, and Abortion Act, is an Act that authorises the taking of human life.

The second point I wanted to respond to was an oral submission from my learned friend this morning, where he said that in cases of ambiguity when interpreting this Act, the Court ought to have regard to a presumption in favour of the unborn child's rights when – or the Committee ought to have regard to that presumption when its interpreting what Parliament intended. Again, in my submission, that's plainly not so, as the Court of Appeal in *Wall v Livingston* noted, it's the Act itself and the procedures that are detailed in the Act that do the balancing between the various rights involved.

The other question of interpretation that arises in the appellant's submissions and it's dealt with in the written response, is a contention that although, on the Royal Commission's recommendation, the Act did not include the position of foetal advocate, nevertheless that the Committee has something akin to that role and that, that is something the Court ought to have regard to. Again, in my submission, that's

clearly rejected in both the Royal Commission report itself but also by the Court in *Wall v Livingston* noting that recommendation.

I want to turn now to paragraph 29 and following of the written submissions in regard to the role of the Abortion Supervisory Committee and the general thrust of the respondent's submissions is that the Act sets up the Committee as a Committee to have general oversight over the administration of the abortion law. It has general supervision responsibilities and that is consistent with the Royal Commission's recommendations. My learned friend –

TIPPING J:

The emphasis is on the "general" rather –

MS GWYN:

Yes, your Honour. It's on the general and it's on the oversight function and this is a point that's noted, in particular at paragraphs 7 and 8 of the Court of Appeal's judgment, where the Court summarises the relevant passages of the Royal Commission's report. The Court there refers to chapter 25 which my learned friend took you to, where the Committee recommended the establishment of such a Committee, as the Committee in South Australia and considered that such a Committee would be better suited to the general oversight of the administration of the abortion law than the Department of Health.

Then also in the summary of its recommendations the Royal – and this is not in the materials that your Honours have before you but it is set out in paragraph 7 of the Court of Appeal judgment. In its summary, the Royal Commission said, "The Committee" – referring to the Abortion Supervisory Committee to be set up – "would prescribe standards and give general supervision to the working of the abortion law".

In my submission, that view of the role of the Committee as one having a general oversight role, is also consistent with the text of the Act itself and that includes the purpose of the Act set out in the long title which talks about the Act being, "...to provide for the circumstances and procedures under which abortions may be authorised...".

As to the text of the Act, as the Court of Appeal majority noted and this is particularly at paragraph 20 and following of the majority judgment, where the legislature

intended that the general functions of the Committee, under section 14, be supplemented or made more specific, then this was specifically implemented through other provisions of the Act and the Court of Appeal majority there looks for example, at the licensing of institutions to carry out abortions. At paragraphs 22 to 24, it sets out the detailed provisions in the Act which are contained in sections 18 to 27 which cover the licensing function, the types of licences that may be granted to institutions, the effect of those licences –

WILLIAM YOUNG J:

That's section 14(1)(b)?

MS GWYN:

Yes.

WILLIAM YOUNG J:

Is section 14(1)(a) fleshed out anywhere?

MS GWYN:

No.

WILLIAM YOUNG J:

If it was going to be, you would think it would be somewhere between 17 and 18, where there's a bit of a hole?

MS GWYN:

Yes Sir and, in my submission, the ones that are fleshed out under section 14 are 14(1)(b), (c), (d), (e) and (f), all of which have more specific provisions that follow, that give detail to –

WILLIAM YOUNG J:

But those aren't the provisions that are relied on by the appellants?

MS GWYN:

No, the appellants rely on the general –

WILLIAM YOUNG J:

They rely on (a) –

MS GWYN:

They rely on –

WILLIAM YOUNG J:

– (g), (h), (i) and k.

MS GWYN:

And for the purposes of this appeal your Honour, as I understand the provisions that are in issue, they are (a), (i), (k) and 36.

WILLIAM YOUNG J:

And the latter subsections at section 30?

MS GWYN:

Yes, that's certainly been part of the argument your Honour, although not part of the specific grounds of the appeal. The point I wanted to make was that where Parliament did intend that those powers or functions that are listed in section 14 be more detailed, it's gone ahead and done that, in some considerable detail in relation to the licensing institutions but also for example, in relation to counselling which is referred to in section 14(1)(e). There's also section 35 of the Act which refers in more detail to counselling.

The second point to note and again, this is a point that's also made by the Court of Appeal, is that where the Court has provided – where the legislature has provided for more detailed provisions in relation to these operational functions, they are functions that are vested solely in this Committee and are not the subject of other legislation, or powers that are held by other bodies and the licensing provisions are a particularly good example of that. The other specific powers –

ELIAS CJ:

Sorry, to be contrasted what, with Police and the Health and Disability Commissioner?

MS GWYN:

Yes, yes, in relation to the particular issues here. The only specific powers of the Committee in relation to certifying consultants other than, if you like, tangential references in sections 32 and 35, the only specific references or links between the

Committee's role in relation to certifying consultants are section 30, the appointment section and section 36, the power to call for reports.

WILLIAM YOUNG J:

Ms Gwyn, in the material that Mr McKenzie put up were references to a newspaper sting operation in England a month or so ago. Say that happened here, would it be open to the Committee to write to one of the consultants concerned and say please explain, writer please explain letter? You say no?

MS GWYN:

On the basis of a newspaper sting –

WILLIAM YOUNG J:

Yes, well –

MS GWYN:

– operation, no –

WILLIAM YOUNG J:

– I mean, yes, the newspaper sting operation has consultants recorded apparently as being willing to certify for abortions on the basis of gender selection, all right?

MS GWYN:

(Nods)

WILLIAM YOUNG J:

These recordings were actually on the paper's website. Now say that happened here, would it be – could the Committee under section 36 say, "Dear Dr So and So. We require you to report on the circumstances disclosed in the newspaper article such and such and the recording which we've seen, explain how it was that you came to certify for an abortion in this case". Or do you say that it's really just got to go right through the process of a disciplinary hearing, perhaps a prosecution and in the meantime, while presumably the Committee can look at external sources in terms of its appointment and revocation decisions, it can't actually ask the consultant for a report.

MS GWYN:

I think the Committee's appropriate response in that situation if – I haven't read in detail the extracts that my friend handed up but if certifying consultants were recorded as doing something that on its face was plainly contrary to the Act, the Committee's appropriate response would be to refer the matter to the police.

WILLIAM YOUNG J:

But what about their appointment as – their continuation of their appointment as certifying consultant, isn't that something for the Committee to –

MS GWYN:

It is something for the Committee and –

WILLIAM YOUNG J:

Could it not, associated with that function, ask the consultant for a report under section 36 and if not, why not?

ELIAS CJ:

Well, it's not either/or I suppose, it could go – refer to the police and, depending on the result of the police enquiries, drop them.

WILLIAM YOUNG J:

But could it not ask – do you say that it would not be open to the Committee to write to the consultant to say, "Dear Dr So and So. Reference this. Under section 36, the Committee requires you to report on the reasons why you certified for an abortion in this case"?

MS GWYN:

I don't think the Committee could do what your Honour's proposing. I think it could write to the certifying consultant and say, we have this information, we've placed it in the hands of the police and, depending on –

WILLIAM YOUNG J:

Why does it – I mean, there's nothing in the Act about going to the police. There is something in the Act about appointing and revoking the appointment of consultants. Why doesn't it just act within the four corners of the statute?

MS GWYN:

It could, on that information, revoke the appointment without more, there's no requirement under section 30 for it to give notice to a certifying – or to give reasons to a certifying consultant for revocation.

WILLIAM YOUNG J:

But wouldn't a sensible Committee say, we'd better write to the consultant and see what he or she has to say because there may be a complete answer.

MS GWYN:

Yes and it could do so in general terms but not requiring the kind of detail that the appellant seeks to have the Committee require as to specific diagnoses and specific clinical judgements in individual cases.

TIPPING J:

So you're saying it could write to the doctor saying, it appears from this that you hold the general view that gender selection is a proper focus of abortion, could you please tell us whether that is so and, if so, you know, why?

MS GWYN:

It could certainly elicit –

TIPPING J:

Generality but not –

MS GWYN:

– those general views –

TIPPING J:

– *apropos* of any particular case?

MS GWYN:

Yes, yes your Honour.

WILLIAM YOUNG J:

Have you got section 36 in front of you?

MS GWYN:

Yes, I do.

WILLIAM YOUNG J:

So it's entitled to call for reports relating to "cases". Now "cases" is used earlier in the Act, it does mean the particular decision on a particular abortion, "considered by him and the performance of his functions in relation to such cases". So what is there in that language to prevent the Committee saying, we require you to give a report to us on the following three cases, being A, B and C and the way in which you performed your functions in relation to those cases, that is, the way in which, the grounds upon which and the circumstances in which you certified because that's the most natural reading of those words, isn't it?

MS GWYN:

I think the difficulty that leads to your Honour, is that if it's going to require that information in that context, it can only be for the purpose of the Committee itself, then forming a view about the judgement that was undertaken in a specific case.

WILLIAM YOUNG J:

Yes and can it not form that view in relation to its decision whether to license, whether to approve a consultant, appoint a certifying consultant?

MS GWYN:

No. In the respondent's submission it can't. It can't go behind the clinical judgement in any particular case.

WILLIAM YOUNG J:

Where does the statute say that?

MS GWYN:

It doesn't specifically say that but, in my submission, it's a necessary implication from the lack of – from several things. One, from the point that I made to the Court earlier, that where more detailed powers have been conferred on the Committee, they've been conferred specifically. Second, from the lack of power to require all of the supporting information that would be necessary to actually undertake a clinical judgement in terms of a review. So it can't for example, compel, as the Court noted

in earlier discussion, the Court can compel reports, it can't compel the doctors' records on –

WILLIAM YOUNG J:

What about under section – it's entitled to require consultants to keep records, as it specifies and under section 45, records have to be made available, don't they?

MS GWYN:

The section 45 provision is somewhat different Your Honour. That's the provision that relates to the operation surgeon. So the person who performs the abortion submits a record of it and that form is actually in the materials.

WILLIAM YOUNG J:

But the report could say, "Based on your records, give me full detail. Report to me as to: (a) when you saw patients A, B and C; your diagnosis; the reasons for it." Couldn't – there's nothing in section 36 to stop that, is there?

MS GWYN:

No but without more, in my submission, that doesn't take the Committee very far because –

WILLIAM YOUNG J:

But all the Committee has really got to do – it doesn't actually have to make a judgement on a particular case. All it really has to do in the end is decide, in the situation we're postulating, whether such and such a person should remain or have a renewed appointment as certifying consultant. Or (b), whether it should report, disseminate information in relation to the general powers under section 14. It doesn't have to, in the end, come to a decision on the facts of the case except perhaps, in the sort of situation I was postulating earlier where there's been, you know, the gender selection example.

I'll put it to you another way. Say there had been, this *Daily Telegraph* sting had happened in New Zealand, could the Committee have said to all consultants, kindly let me know whether you have been – how many patients have sought abortion on the grounds of gender selection and what did you do?

MS GWYN:

I think what it could do is write to certifying consultants and say we've become aware of this sting and this report, we remind you of your obligations under the Act, as it does when it appoints certifying consultants or when it invites expressions of interest, it provides the candidates for appointment with material which sets out the provisions of the Act and what their requirements are if – on them, if they are to be appointed as certifying consultants.

That might be a convenient point to take the Court – well perhaps if – before I take the Court to the information that the Committee does actually seek from certifying consultants, I did want to go to the judgment of his Honour Justice Arnold, who on these issues, was in the minority in the Court of Appeal because the appellant put some reliance on Justice Arnold's decision but, in my submission, Justice Arnold doesn't go as far as the appellant suggests and his Honour's judgment, first at 155, he says: "The possibility of a generalised view of whether certifying consultants are performing their proper statutory role does not mean that the Committee must reach specific conclusions about the legality of specific abortions in the sense precluded by this Court's decision in *Wall v Livingston*...".

Then at 179, his Honour says: "The majority are of course right to say that there are other mechanisms for dealing with complaints or disciplinary matters involving medical practitioners but the Committee is not concerned with such issues nor does it have to determine whether particular abortions were carried out lawfully or unlawfully. Its role in this context is simply to make revocation reappointment decisions and to evaluate the operation of the CSA Act for the purpose of reporting to Parliament."

At 182, "In undertaking such review processes, the Committee's not attempting to determine the legality of particular abortions or whether particular consultants have committed criminal or disciplinary offences. Rather, it is attempting to assess whether consultants are making decisions consistently with the tenor of the CSA Act... The Committee's role is one of general oversight. It cannot examine every decision made by every certifying consultant."

At 187, "...The Committee cannot intervene in individual decisions. If judicial review is available, it's available only in the most constrained circumstances," and at 199, "...The Committee is simply seeking to review the work of certifying consultants in order to make reappointment or revocations decisions...".

ELIAS CJ:

Sorry, are you able to shed any light on what's meant by "If judicial review is available, it's available only in the most constrained of circumstances"? Because the respondent is said not to have challenged that. So you may have some inkling of what's meant by that. It's not very clear.

WILLIAM YOUNG J:

It's really a reference to what was said in *Wall v Livingston*, isn't it?

MS GWYN:

I think it is, your Honour.

ELIAS CJ:

Ah yes.

MS GWYN:

Where the Court considered the issue of standing but also the issue of the availability of judicial review per se in relation to an abortion decision. And the point about the passages in Justice Arnold's judgment that I've taken you to is that, one, they don't go so far as the appellant would like them to go but, two, where his Honour's judgment is, with respect, unsatisfactory is that it simply doesn't deal with what the practical application would be, the kind of questions that your Honour, Justice Young, is asking, how could the Committee enquire further and in what circumstances?

McGRATH J:

Ms Gwyn, can I just – just give me the last paragraph reference again. I don't want you to go to it but the one following 182.

MS GWYN:

There are two, your Honour, there's 187 and 199.

McGRATH J:

Thank you.

TIPPING J:

The principle thrust, or a principle thrust of *Wall v Livingston* was that the responsibility for this important judgment is placed, fairly and squarely, I think, their

Honours said, on the medical people and there are internal indicators within the Act that, that central proposition was not intended to be undermined either directly or indirectly. It seems to me, with respect, that the appellant, although he doesn't really, doesn't really face up to the proposition, he's really asking to depart from *Wall v Livingston* to an appreciable extent, I would have thought, just having reminded myself in the last few minutes of what *Wall v Livingston* said.

MS GWYN:

That's exactly so your Honour and what *Wall v Livingston* emphasised repeatedly is that the certifying consultant's decision is, I think at one point they use the phrase, "A medical assessment, pure and simple," and it doesn't become something different if the Committee's doing it –

TIPPING J:

And I see they cite from Lords – or Lord Justice, as he then was, Scarman about a similar approach in England.

MS GWYN:

In the *Paton* case, yes.

TIPPING J:

Yes.

MS GWYN:

Yes and –

TIPPING J:

Well there's a reference here to *R v Bourne* [1939] 1 KB 687, case of course and then to another case called *Smith*, not specifically *Paton* but I'm sure you're right that *Paton* comes into it.

MS GWYN:

Yes and to pick up on the other point that your Honour Justice Tipping has made. With respect, what the appellant is seeking to have the Committee do is less than clear. In response to a question from your Honour Justice Tipping this morning where you asked my learned friend, "Are you alleging that the Committee can look at clinical decisions?" Mr McKenzie said, "Yes," and your Honour said, "To see if

certifying consultants are observing the law, a kind of quasi-criminal investigation?" and Mr McKenzie responded, "To see whether certifying consultants are acting consistently with the tenor of the Act".

But the point is that at various points, the appellant – I think it shies away from saying what is it that the Committee ought to be able to do and for what purpose and that's highlighted too in the statement of claim, the third amended statement of claim which is in volume 1 of the case on appeal, at tab 6, at paragraph 28 which is page 84 on the bottom page numbers.

There, the appellant alleges, "In carrying out statutory functions, exercising statutory powers, the Committee's empowered by section 36 of the Act to require certifying consultants to provide reports to the Committee on any case which the performance of an abortion is authorised, including the grounds on which the abortion has been authorised and the justification for the performance of the abortion, provided only that the name and address of the patient is not given".

It appears from that reference but also from my friend's answer this morning that what the Committee does have in mind, although at other times it shies away from it, is that the Committee should be empowered to ask about and review the individual clinical decisions made by a certifying consultant in individual cases.

TIPPING J:

While we're on the statement of claim Ms Gwyn, would you mind just looking at paragraph 19 on page 81 of the same volume because it seems to me that we've got close to the nub of it there, where the allegation by the Right to Life party is, "In making the general statement set out in the preceding paragraph," that's "has no control or authority" statement, "the Committee has relied on the observation of the Court of Appeal in *Wall v Livingston* but has mistakenly failed to recognise that the statement was not put forward as one of general application," etc, etc. Well, I would need a lot of persuasion that it wasn't put forward as one of general application. I would have thought the tenor of the discussion in *Wall v Livingston* is general, at least at this point. It is not governed by the particular circumstances of the *Wall v Livingston* case which was, of course, a prospective case, wasn't it, where they were trying to stop it in advance of it happening?

MS GWYN:

Yes, yes.

TIPPING J:

But I don't quite see how that limits the general statements that are referred to at the bottom of 738 and the top of 739 of *Wall v Livingston*. I'm just saying this for Mr McKenzie's benefit really because he'll need to persuade me that the proposition that this is a case-specific set of observations is sound because I, on the face of it, don't think it is and I'm sorry to have distracted you with that long spiel but –

MS GWYN:

No, no, not at all your Honour and in fact if one looks at the judgment in *Wall v Livingston* which is at tab 9 in the appellant's bundle of authorities –

TIPPING J:

Because the whole thrust of your client's case is, we reckon we're precluded from doing this because of *Wall v Livingston*. That's essentially it, isn't it?

MS GWYN:

Yes.

TIPPING J:

We might have come to the same conclusion anyway but it's reinforced by *Wall v Livingston.*

MS GWYN:

Wall v Livingston provides us with the legal authority, we're not lawyers, yes.

TIPPING J:

Mmm, mmm.

MS GWYN:

In *Wall v Livingston* at tab 9 and it's at page 738 of the judgment, at the foot of the page and, as I understand it, this is the passage that the appellant relies on to say that the statements in this case relate only to the prospective kind of cases and there the Court of Appeal said: "The Supervisory Committee has a responsibility for the general oversight of the work of certifying consultants, in the way in which the

purposes of the Act are working out in practice but what is important and of significance in this case is that the Supervisory Committee is given no control or authority or oversight in respect of the individual decisions of consultants".

WILLIAM YOUNG J:

That must be a reference to prospective control though, isn't it, in context? I mean, I've looked at that.

TIPPING J:

Well, it depends what they meant by "in this case". I think it means in a situation where the judgement of a clinician is under attack, not in a prospective situation but that's a matter of interpretation.

WILLIAM YOUNG J:

It does refer to the power to revoke appointments.

MS GWYN:

It doesn't say, in this case the Committee is given no control or authority or oversight.

TIPPING J:

But if you look at the three things that they specifically refer to in support of their proposition, none of them are prospectively limited, they are general.

MS GWYN:

"Special attention has been given in the Act to the preservation of anonymity of the patient. Secondly, the whole process of authorisation appears designed to place fairly and squarely upon the medical profession as represented by the certifying consultants, a responsibility to make decisions which will depend so very much upon a medical assessment pure and simple. Thirdly, there are – " Perhaps the third one –

WILLIAM YOUNG J:

The third one, though, I –

McGRATH J:

Well, that is prospective, isn't it?

MS GWYN:

– is the one –

WILLIAM YOUNG J:

It's entirely prospective, isn't it?

MS GWYN:

– is the one that gets to prospective.

McGRATH J:

Yes.

MS GWYN:

But, in my submission, the first are clearly of more general application.

TIPPING J:

Well, I don't think the third one is necessarily prospective. People who come back and look at it later might see it quite differently because they're not on the spot at the relevant time. I agree, it's capable of being read prospectively.

MS GWYN:

Yes but, I think certainly, the first two are of more general application and the introductory words for that passage, in my submission, what the Court is saying is –

TIPPING J:

Well, then you go onto line 25, "The statutory silence", et cetera.

MS GWYN:

Yes.

TIPPING J:

– is, I would have thought, with respect, in no way limited by prospective considerations.

MS GWYN:

No, I accept that, that's correct your Honour and –

TIPPING J:

I'd always understood the reference to "in this case", at the foot of 738, to be a reference to "in a case of this type", in other words, where a challenge is made to a certifying consultant's judgement, or attempted to be made, one should say.

MS GWYN:

And the way I've read it your Honour, is that the Court is saying the Supervisory Committee has no control or oversight and it details that and then what it's saying is "and that's particularly important in this case". It's not saying it's only relevant in this case.

TIPPING J:

And then at the bottom, line 40 on 739, all of this apparently was freely accepted by counsel for Dr Wall. So it is a fine point to really read all this down by reason of the reference to "in this case" but that is the argument.

MS GWYN:

I think that must be so your Honour.

WILLIAM YOUNG J:

Except that it was a case that was prospective.

TIPPING J:

Yes, of course, of course. No one can challenge that but I don't know that anyone has ever understood this before as limited to prospective assessments.

ELIAS CJ:

I suppose if they have a function, a supervisory function, they have it ex post facto as well as prospectively, or is it the other way around?

WILLIAM YOUNG J:

They can't have it prospectively. I don't think anyone suggests it's prospective.

TIPPING J:

No, you can't –

ELIAS CJ:

Well, but why not?

WILLIAM YOUNG J:

Well, how can they? Well –

ELIAS CJ:

Why not, on the argument that's being put to us, that they have ample powers to keep under supervision the application of the legislation? I don't see that there's a distinction.

WILLIAM YOUNG J:

They don't have power to stop anything. They can –

ELIAS CJ:

Why not? It's only *Wall v Livingston* but if – on the statute, what's the argument?

WILLIAM YOUNG J:

I don't think the Abortion Supervisory Committee could issue an injunction or give an executive order that an abortion not be carried out.

ELIAS CJ:

Well, but we know that there are no grounds and therefore we're knocking you off the list of certifying consultants. I don't see that there's a principled basis, based on the statutory language, to draw a distinction between prospective and retrospective effect.

MS GWYN:

I think it's a possible consequence of the appellant's argument in this case that if the Committee has the powers contended for that those could, absent *Wall v Livingston*, be exercised prospectively as well as retrospectively.

In the written submissions at paragraphs 83 and following, we detail what it might mean in practice to say that the Committee is able to scrutinise the decisions of certifying consultants and form its own view about their lawfulness which is the way in which the ground of appeal is formulated and the submission there is that while the language might dress it up as some kind of administrative or legal audit, what it

would require is for the Committee which is a non-expert committee, it has – two out of three people are medical practitioners but with no specified speciality and in fact the current chair of the Committee is a pathologist but what it would require is for the Committee to review, in each case, a clinical decision to authorise a medical procedure and it's the point that I made earlier, that as *Wall v Livingston* says, this is a medical assessment pure and simple when it's in the hands of the certifying consultants and it's no less a medical assessment if the Committee is required to review each decision in a particular case.

TIPPING J:

What I've pondered on is, if an individual doctor got a letter from the Committee saying, please explain yourself in such and such a case, presumably all the doctor is obliged to say, in the light of what's said at line 25 of page 739 of *Wall v Livingston*, "I satisfied myself that this came within whatever it is because...". I don't know whether this is common ground or not, where their Honours said the certifying consultant, as opposed to the operating person, doesn't have to file anything by way of a report, nor do they have to give reasons, other than apparently to just simply say where it fell under 187A, is that right?

MS GWYN:

That's correct, your Honour. What the certifying consultant must say is which ground under section 187A the case falls under but is not required –

TIPPING J:

What would happen if Mr McKenzie's client is right and the Committee could write to the doctor, how far would the doctor have to go to justify themselves? Could he be subject to – well, he couldn't be subject to cross-examination or anything because all he has to do is file a report. I don't know how the thing would be administrable, frankly.

MS GWYN:

Exactly, your Honour and –

ELIAS CJ:

Well effectively, reasons would be required –

TIPPING J:

But you – how much –

ELIAS CJ:

– in the absence of a statutory requirement.

TIPPING J:

– would you have to say, because you don't have to make the records available, we've established that I think. Would you have to go behind the statutory ground and say, the patient presented with this, this, this and this and I discussed this, in other words, in effect, go through the whole process of how you had reached your diagnosis, or your conclusion?

ELIAS CJ:

Judgement.

TIPPING J:

Judgement.

MS GWYN:

That's the kind of material that would be necessary if the Committee itself were to review the certifying consultant's decision and, as we detail in the written submissions, that would require not only for the certifying consultant to provide the kind of detail that the Act doesn't require of him or her in terms of the section 32 and 33 procedure but it might also require information from – well, it would require information from two certifying consultants, possibly also the patient records from the woman's own doctor, if he or she was not one of the certifying consultants and, in an ideal world, of course it will also require the Committee to have access to the patient herself, to be able to interview her and the Committee doesn't have the kinds of powers that would enable it to require that sort of information, in contrast with the Health and Disability Commissioner and the provisions under the Health Practitioners Competence Assurance Act. The Health and Disability Commissioner, in particular, has powers to compel the provision of information including documents or things and to summon witnesses for examination. The Committee has no such powers.

It might be helpful at this point to look at what information does the Committee require or seek from certifying consultants, because the Committee does in fact

exercise its section 36 power but I think the appellant's complaint is that it doesn't exercise it in a particular way or to seek particular information. The first form that I've already referred to is that that's provided for under section 45 of the Act.

ELIAS CJ:

Where are we to look?

MS GWYN:

That's in the agreed bundle, volume 3, sorry, volume 3 of the case on appeal at tab 55. And you'll see that –

ELIAS CJ:

Is this the section 45 form?

MS GWYN:

This is a section 45 notice, so it's a requirement that the medical practitioner who performs the abortion makes a record of it and the reasons for it, and provides that to the Supervisory Committee. So you'll see there the information that's sought: the hospital, the name of the certifying consultants, the name of the operating surgeon, and then certain data about the woman without identifying her. And then at 6, the grounds for performing the abortion and the reference there is to, to one of the section 187A grounds.

ELIAS CJ:

This is by the person performing the operation.

MS GWYN:

Yes it is and I want, I want to –

ELIAS CJ:

Don't they, doesn't the, don't they rely on the, on the consultants?

MS GWYN:

They do, your Honour, and perhaps I've done it in the wrong way round but I wanted to take you also the material that the –

ELIAS CJ:

No but I'm just wondering why the form doesn't say the grounds or just refer, cross-refer there.

MS GWYN:

I think what happens in practice, your Honour, is that at question 6, the grounds for performing the abortion, that will pick up the ground that's contained in the certificate that the certifying consultants send to the hospital.

ELIAS CJ:

I see.

MS GWYN:

And I will take your Honour to that. Then over the page, question, well, slightly different grounds when the pregnancy's over 20 weeks, contraception, what procedure was used, complications, and so on. So that's the section 45 form but then with the leave of the Court –

TIPPING J:

Could you just excuse me, I must, might have dropped a point. In this form where it refers in paragraph 6 to the various grounds, you tick a box and then you have to specify. Does that mean you have to elaborate?

MS GWYN:

Not necessarily.

TIPPING J:

Do you see what I mean?

MS GWYN:

Yes I do, I do take your question, your Honour. As I mentioned, I think what happens in practice is that, that section of the form, number 6, is picked up from the certifying consultants form which I will take your Honours to.

TIPPING J:

Ah I see, I thought I probably had missed the point. But you do have to specify something?

MS GWYN:

Well it depends how – yes, it depends how it's filled out. Maybe it's a reference to the certificate.

TIPPING J:

But it does seem, and this is contrary to your argument, that some detail has to be given.

MS GWYN:

This is the point that my learned friend was making in relation to Dr Simpson's two reports. Dr Simpson, the purpose of his reports was to update the diagnostic nomenclature for mental health conditions but in his advice, he also suggested that the Committee ask certifying consultants to specify the detail there –

TIPPING J:

What, let's say reactive depression or whatever the current terminology is?

ELIAS CJ:

This isn't completed by the certifying consultants.

MS GWYN:

No, no it isn't and perhaps to answer your question if I take you to the form that is completed by certifying consultants -

ELIAS CJ:

Well it leaves, leaves hanging what is the specification there. Is it a reference to the certificate or do you lift off the certificate whatever has been –

MS GWYN:

The latter, your Honour –

ELIAS CJ:

– written on it.

MS GWYN:

– the latter. And with the Court's leave I will, would like to hand up a copy of the forms that are completed by the certifying consultants. These were before the Court

of Appeal in their unphotocopied form and it's much clearer for the Court to see how they work and I understand that my friend has no objection.

TIPPING J:

So this, you're saying, is just parroting what the certifying consultant has said.

MS GWYN:

At question 6, yes, yes.

TIPPING J:

At question 6, I see.

McGRATH J:

It does go beyond the content of this form, what section 45 has authorised, doesn't it?

MS GWYN:

Yes it does. It picks up some information as does the form that your Honours are being handed which assists the Committee in filling, fulfilling some other of its statutory functions, so for example, at section 14, 14(1)(g), for example the Committee has a function to obtain, monitor, analyse, collate, and disseminate information relating to the performance of abortions, so in the course of the section 45 form and the form that I just handed up, the Committee does collect some of that statistical data.

And the form that I've handed to the Court, as your Honours will see, it's in part certificates 3A and B, which are the forms specified for certifying consultants in the regulations, but it also collects, during the course of the process, additional information and so the process for the certifying consultants is set out on the cover sheet.

And then if you open the page, you'll see first that the provisions of section 187A of the Crimes Act are set out on that whole page, opposite the form that the certifying consultant is to complete. And the red page, you'll see at the top, section 36, the reference and in section A and section B, the first certifying consultant is being asked to, to provide information that is more than the information specific to what is the ground on which this abortion is being authorised, so socio-demographic and

pregnancy history, and then at section C, the grounds under section 187A are listed and the certifying consultant is to tick one of those grounds.

TIPPING J:

And then that's where it comes to the diagnosis, "Refer to guidelines." So there's some guidelines, are there, somewhere? Do you see where I'm referring to?

MS GWYN:

I see where you're referring to your Honour and I'm –

ELIAS CJ:

Aren't the guidelines the Crimes Act because it says, "Guidelines. Be sure of your responsibility. The back of the certificates carry notes for guidance". Oh, "Excerpts from the Crimes Act are overleaf". So there must be some – "The back of the certificates carry notes for guidance". Oh I see, yes.

MS GWYN:

The notes on the next page are the process.

ELIAS CJ:

Yes, yes, that's just, yes, it's the process.

TIPPING J:

But interestingly, the before and after 20 weeks, simply has, in each case, mental health, mental health but the criteria before and after are materially different.

MS GWYN:

They are your Honour but for the guidance of the consultant, those are set out in full on the left-hand page.

TIPPING J:

That difference could be of some interest. One is serious danger to mental health, the other is prevent serious permanent injury to mental health.

MS GWYN:

Yes. Yes, you're right.

TIPPING J:

One is distinctly more – a higher threshold than the other, should one say, as one would expect.

MS GWYN:

Yes. They are different in detail and, and as your Honour will see, they are set out in full so that those are before the certifying consultant when he or she fills out the form and, and obviously when he or she is seeing the patient concerned.

TIPPING J:

So when he or she ticks the relevant box, they can be deemed to have been certifying that whatever the language is, whether it's before or after 20 weeks, is satisfied?

MS GWYN:

Yes.

TIPPING J:

But yet they have to give a diagnosis.

MS GWYN:

Well –

TIPPING J:

Because that's Dr Simpson's contribution to this.

WILLIAM YOUNG J:

They don't have to give a diagnosis, but on the, on the basis of Dr Simpson's recommendation, the Committee has said, "We, we would like you to," or, "We'd prefer if you did give a diagnosis," and Mr Newall, in the passage that my friend took the Court to this morning, indicated that most certifying consultants are now doing so.

ELIAS CJ:

The actual certificate, the one that gets sent off to the clinic, is form 3A, isn't it?

MS GWYN:

Yes.

ELIAS CJ:

And that doesn't seem to have a tick the box.

TIPPING J:

And they have to set out –

ELIAS CJ:

They have to set out –

MS GWYN:

It's set out, it's set out in the box in the middle of the page.

TIPPING J:

Presumably it's intended that they simply there refer –

MS GWYN:

That they would capture what –

TIPPING J:

– to the statutory language.

MS GWYN:

– what – yes.

ELIAS CJ:

Yes.

MS GWYN:

Yes, as your Honour the Chief Justice notes, it's the 3A form. So the first form goes to the Abortion Supervisory Committee. The section 3A form goes to the licensed institution where the abortion is to be performed and then the purpose form, which is the second certifying consultant's report, also goes to the Abortion Supervisory Committee. So the Committee is able to link up the first and second certifying consultants' reports.

BLANCHARD J:

How much detail goes into the section 36 form where there is the space for the specification?

MS GWYN:

That's a question, your Honour, that Mr Newall responded to in, in the affidavit that my learned friend took the Court to this morning, where he says that most certifying consultants are now specifying more detail there, but he doesn't, he doesn't say what kind of detail is probably...

Mr Newall does talk in several of his affidavits about how these forms are received and processed by the Committee, and that's in volume 2 of the case on appeal. In his second affidavit, which is tab 14, at paragraph 11, the point I've just touched on, in response to Professor Simpson's opinion, "I confirm that most certifying consultants have changed their practice to take note of the recommendation". And then in –

WILLIAM YOUNG J:

So in fact – now, on the whole, they go more than tick the – what the Court of Appeal said in *Wall v Livingston*?

MS GWYN:

Yes.

WILLIAM YOUNG J:

And why do they have to do that? Because they're required to in section 36?

MS GWYN:

No, not because they're required to but because Professor Simpson recommended it.

WILLIAM YOUNG J:

But this – sorry, but this is a section – this is a form that's issued under the authority of section 36.

MS GWYN:

The top bit is Sir, yes.

TIPPING J:

The bit that goes to the Committee.

ELIAS CJ:

What's the CME? Is that the certificate? Because they say – he says in paragraph 12, "The recording practice will be included".

MS GWYN:

Oh, it's continuing medical education.

ELIAS CJ:

Oh. I see.

WILLIAM YOUNG J:

But on the first page of the form it's the first certifying consultant's report. That goes to the Committee doesn't it?

MS GWYN:

Yes, it does.

WILLIAM YOUNG J:

And that contains, beside mental health, that a circle be ticked and then some, not much, space but some space for the detail of the diagnosis.

MS GWYN:

Yes, it does.

WILLIAM YOUNG J:

So the reason why doctors have to give the reason for the diagnosis is because they're required to do so under section 36.

MS GWYN:

The Committee has taken the view that they're not required to give that detail as they're not required in the form 3A certificate but, but the Committee has, as a matter of practice –

ELIAS CJ:

But the form 3A certificate does require grounds to be given.

MS GWYN:

Yes it does, but that may be no more, your Honour, than, than a reference to the, the statutory ground rather than a detail of the diagnosis.

ELIAS CJ:

Well – Yes. I –

WILLIAM YOUNG J:

But that's given just by putting a tick beside mental health you identify the statutory ground. The "specify" must go more than, must be more than simply a repetition of that tick.

MS GWYN:

Yes.

TIPPING J:

But in *Wall v Livingston*, the Court of Appeal said you don't have to give reasons other than simply what statutory ground you're acting under.

MS GWYN:

Yes, in –

TIPPING J:

So presumably the request for a diagnosis is gratuitous.

MS GWYN:

And that's, that was my response to his Honour Justice Young, that the Committee has taken the view that although certifying consultants aren't required by law to give that further detail, they will seek it. And most certifying consultants have been –

WILLIAM YOUNG J:

Where did the Court of Appeal statement come from? What was it based on?

ELIAS CJ:

In W*all v Livingston*?

WILLIAM YOUNG J:

Yes. What was it based on? That the certifying consultant only has to give the legal ground, if I can put it that way.

MS GWYN:

It, it's based, I think, your Honour, on the statutory form.

WILLIAM YOUNG J:

Where's that?

TIPPING J:

No, it's based, they say, it's, "all reinforced by the absence of any direction in the Act or regulations requiring any reason to be given ... other than..."

WILLIAM YOUNG J:

Okay. But were they –

McGRATH J:

What page is that in *Wall v Livingston*?

TIPPING J:

739, line 26.

WILLIAM YOUNG J:

So where is the requirement – I suppose, to take it a step at a time, where's the requirement in the regulations or the Act to actually give the legal ground?

MS GWYN:

Section –

ELIAS CJ:

Are these forms, by the way, made under the regulations? Are they specified?

WILLIAM YOUNG J:

No, that's section 36. Section 36 is what they say.

ELIAS CJ:

Yes.

McGRATH J:

They're just requirements in terms of the power to enquire.

TIPPING J:

I think it comes implicitly from section 33.

MS GWYN:

Yes, I was just trying to find the relevant part of section 33 your Honour.

TIPPING J:

It says, "If, after considering the case, the certifying consultants are of the opinion that the case is one to which any of paragraphs (a) to (d) of subsection (1) or subsection (3) of section 187A...". So that implicitly suggests that they only have to satisfy themselves to that extent.

WILLIAM YOUNG J:

And they have to sign the certificate –

MS GWYN:

A certificate in the prescribed form –

WILLIAM YOUNG J:

– in the prescribed form.

MS GWYN:

– and then at 5 –

ELIAS CJ:

In the prescribed form and the prescribed form does require –

MS GWYN:

The prescribed form is in the regulations which is at tab 2, form 3A and 3B which is –

WILLIAM YOUNG J:

All right but the Court of Appeal wasn't addressing section 36.

MS GWYN:

No.

WILLIAM YOUNG J:

And there was no occasion to because it wasn't about the Abortion Supervisory Committee conducting a review of consultants – the performance by consultants of their functions?

MS GWYN:

That's correct your Honour.

WILLIAM YOUNG J:

And yet now, on the face of it, so consistently on the face of it you've issued what is really a section 36 requirement that does seem to require more than the legal ground.

MS GWYN:

I'm not sure that I can advance it any further Sir, other than to say, as I said before, that the Committee has taken the view that it can't require certifying consultants to provide the further detail –

WILLIAM YOUNG J:

Is there anything in here as to which parts of the form are voluntary and which are mandatory? Which are required fields or which are –

ELIAS CJ:

The form –

BLANCHARD J:

Where do we find that?

WILLIAM YOUNG J:

This is the first – this is this page here.

BLANCHARD J:

Where's the prescribed form?

ELIAS CJ:

Tab 2 of the legislation. The notes to that seem to indicate that the Regulations are only requiring reference to the grounds specified in the Act so it may be that the Regulations govern, as a matter of legislation.

WILLIAM YOUNG J:

Well yes. Maybe under the proposition that's been put, which is of assistance to you, is that the Regulations constrain what section – what can be required under section 36.

ELIAS CJ:

Yes, yes.

MS GWYN:

Well yes Sir and I think that was a point that was recognised by the Court of Appeal that to impose a requirement under section 36 that went beyond that would be inconsistent.

ELIAS CJ:

In *Wall v Livingston*. That's what they said?

MS GWYN:

No, sorry, the Court of Appeal in this case your Honour.

ELIAS CJ:

All right but –

WILLIAM YOUNG J:

What's the point of section 36? What on earth then, if it is constrained by this form, presumably the Committee can't ask for a specified – a certifying consultant anything which isn't already provided under the form, so –

ELIAS CJ:

In respect of the grounds of the – for giving the abortion but there's plenty of information surely that the Committee, in terms of its functions, is entitled to obtain in a report from the consultants but not in relation to the judgment that the consultants make.

MS GWYN:

Exactly your Honour and it's the kind of socio-demographic in pregnancy history information that is set out in the left-hand column of that form that goes to meeting some of the Committee's requirements under section 14.

WILLIAM YOUNG J:

What's wrong with construing sections 33 and 36 on the basis that section 33 sets out what must be required, provided in every case and section 36 as entitling the Committee to require additional information? Is there anything textually wrong with that proposition?

MS GWYN:

I think it has the potential to undermine the whole framework of the Act which is that the decision under section 33 is a clinical decision, that's for the certifying consultants alone. So there's that textual constraint on –

WILLIAM YOUNG J:

So when section 36 permits a report to be required of a consultant as to the performance by the consultant of his functions in relation to cases. What do you see that sort of report as encompassing?

MS GWYN:

Well the sort of information that could be, and this is covered in one of Mr Newall's affidavits, that the sort of information that could be extracted from this form, for example, are: has the certifying, either of the certifying consultants not specified one of the statutory grounds, have they written in something that's not covered by the Act so the purpose is for the Committee to be able to assure itself that each certifying consultant has specified the ground on which the abortion is authorised –

ELIAS CJ:

Well suppose they could enquire as to process matters not touching on the judgment made by the consultants.

MS GWYN:

Yes.

ELIAS CJ:

They could enquire perhaps whether the woman had been seen by both consultants or –

MS GWYN:

The form certainly asks whether the patient has been interviewed and examined and, of course there's no obligation to do so, but it seeks that other information and your Honour is right that there are other process obligations, I mean, not least of which is, have two certifying consultants considered the particular case in issue. So all of those sorts of matters are able to be deduced by the Committee from the form and Mr Newall, it's his third affidavit at volume 2, tab 15, notes that if the form is incomplete or been filled out incorrectly then it will be returned for completion and he notes that the, at paragraph 7, that the information contained on the forms is entered into the database, the forms are filed, and the case number on the top right-hand side allows the form to be linked with the same form that's sent in by the other certifying consultant and with the ASC form that's sent in by the operating surgeon.

McGRATH J:

Ms Gwyn, the certificates in the Regulations are given solely to the institution. Is that right?

MS GWYN:

Yes.

McGRATH J:

They don't go to the Committee.

WILLIAM YOUNG J:

Yes, I think they do.

McGRATH J:

In any formal way?

WILLIAM YOUNG J:

I think it does go to the Committee, doesn't it?

McGRATH J:

I'm talking about that.

WILLIAM YOUNG J:

Oh, that.

McGRATH J:

The certificates in the Regulations.

WILLIAM YOUNG J:

Right.

McGRATH J:

They go to the Committee but the other one is a report under section 36 and that goes to the Committee whereas the form required by the Regulations goes to the institutions?

MS GWYN:

You are right Your Honour. That's the brown one, yes.

McGRATH J:

So that's the brown one and it's also the one that's schedule – the schedule and the Regulations, they're the same thing presumably?

MS GWYN:

Yes, yes.

McGRATH J:

Hopefully.

BLANCHARD J:

Just looking at the section 36 certificate, and the specification, can you give us an idea of how typically that would be filled in? I assume that it's the result of the diagnosis that is stated. In other words, the particular issue with mental health, some form of, perhaps, a reference to some sort of depressive state, without any explanation of how that has been arrived at.

MS GWYN:

Yes, your Honour. There isn't any evidence before the Court on that particular question but I imagine that it would be, for example, the Simpson advice talks about the different categories of depressive illness.

BLANCHARD J:

Yes, so it would be one of those.

MS GWYN:

I would expect so Sir but as I say there is no evidence before –

BLANCHARD J:

From which no one would be able to raise a question about the diagnosis –

MS GWYN:

Not on the face of it, no.

BLANCHARD J:

– simply looking at the page because the methodology wouldn't be referred to. Just a matter of curiosity, the line above says, "Anomaly confirmed by test, enter yes or no". What is an anomaly?

WILLIAM YOUNG J:

It's foetal abnormality, isn't it?

MS GWYN:

Yes, I think you're right. Your Honour, Justice Young is correct, yes.

BLANCHARD J:

Well that's opposite mental health (aa).

WILLIAM YOUNG J:

No, it's (aa) which is –

BLANCHARD J:

Oh it's (aa) of 187? 187A, right.

MS GWYN:

Yes, yes it's section 187A(aa), "That there is a substantial risk that the child, if born, would be so physically or mentally abnormal as to be seriously handicapped".

ELIAS CJ:

Where do they collect information about the part of – to enable them to understand the distribution of abortions around New Zealand? Is that what they get from the clinics, rather than from the certification process?

MS GWYN:

Yes, your Honour because your Honour's right, that on the certification there's nothing to indicate the city or district but on the form, the section 45 form, ASC form 4, there's the name of the hospital and clinic and I thought there was – no there's the name of the hospital and clinic and the names of the certifying consultants, so while there isn't direct provision of an address or a locality, certainly from that information, the Committee could glean where it occurred, what region.

ELIAS CJ:

Where do you want to take us?

MS GWYN:

That might be a convenient point, your Honour, to go to grounds B and C of the appeal. And in the written submissions, this begins at page 26. And before I go briefly to the detail of those submissions, I did want to address the Court on Justice Miller's findings because there is a question as to whether they were indeed findings or not.

WILLIAM YOUNG J:

You're appealing against judgments, not findings. I mean, his, his, I suppose his findings might, to some extent, have been reflected in the order for costs but beyond that, it's got nothing to with, doesn't bite on anything, does it?

MS GWYN:

Well it bites on, certainly bites on costs, or has bitten on costs, but it's also referred to in his, his Honour's relief judgment. So although his Honour declined, his Honour Justice Miller declined to give declarations, he did say in his judgment on relief which is in the case on appeal, volume 1, at tab 10. At paragraph 10, where his Honour's talking about the non-compliance by the Committee, he says, "I found the Committee's failed over many years to exercise some of its statutory powers" and then the last sentence, he says, "It is not possible to say how many unlawful abortions have been performed as a result of the Committee's misunderstanding of its functions". And my submission is simply that it's a clear inference there that his Honour did regard himself as having made a finding about the unlawfulness of abortions having been performed.

ELIAS CJ:

It's a curious way to put it, isn't it, because the abortions are lawful because the only basis is that they've been certified, that's the only requirement to make them lawful.

MS GWYN:

Yes.

TIPPING J:

Well to make them unlawful, there has to be a lack of good faith, belief in the grounds.

MS GWYN:

Yes.

TIPPING J:

So it's really, indirectly, I suppose, you could say whatever terminology that it's implying, that some have been done in bad faith. Because it's a crime only if you don't have a good faith belief –

MS GWYN:

That a ground has been satisfied.

TIPPING J:

– that the ground exists.

ELIAS CJ:

It's a bit curious, the process that's been adopted in this case, because it's – if that is really what is being put forward, then one would have thought there'd have to be an attack, a direct attack on, on the, on the abortions themselves.

MS GWYN:

And that's a point that the Court of Appeal in this case made, or the majority made very strongly, that there is no allegation of good faith – of a lack of good faith in any particular case. There are no particular instances pleaded in relation to particular abortions or particular certifying consultants, which is why the, the question of whether or not these are findings has an impact for certifying consultants.

WILLIAM YOUNG J:

Paragraph 10, is, is, it's listed as one of the factors which might have justified a grant of relief but in fact he doesn't grant relief. Para 11 starts, "However on the other hand" or "However other factors militate strongly against relief" so it's not carried through into an order he makes.

MS GWYN:

It's carried through into an order Sir but, in my submission, it does indicate that his Honour regarded himself as having –

WILLIAM YOUNG J:

But that doesn't give you a right of appeal. Isn't that elementary, that there's no right of appeal against a finding that, that doesn't lead anywhere? I mean if I, as a High Court Judge say, if I am wrong, I would have held that, if I'm wrong, I would have held a, b, c, and d, well that doesn't give the defendant a right of appeal against my…

ELIAS CJ:

If it might, however, if the sort of remark that, if it had been made in an inferior tribunal could have given rise to judicial review, then it may be that it would come within the appeal provisions. I'm not sure, I'm just –

McGRATH J:

Yes I'm not sure too. Ms Gwyn, I suppose you've focused very much on the last sentence in paragraph 10, of course the last sentence of paragraph 9 is perhaps not entire – doesn't sit entirely comfortably with the last sentence in paragraph 10.

MS GWYN:

And perhaps, your Honour, that does highlight the difficulty that it's not, there is an ambiguity, I accept, in relation to what Justice Miller found.

McGRATH J:

It really is to how determinative he was, it seems to me.

MS GWYN:

Yes, yes.

McGRATH J:

But that's quite apart from Justice Young's point, of course. But there he's, he sort of seems to be putting it in the way that he was fairly careful, I would have thought, to put it in his principle judgment.

MS GWYN:

Yes Sir, although he was perhaps less careful in the costs judgment which is at tab 11, at paragraph 6, where for the purposes of costs, Justice Miller said, the last two sentences of paragraph 6, "The applicant succeeded on the central question, whether the respondent had misinterpreted its statutory functions. Both parties also contested the question, whether the abortion law is being complied with, and the applicant also succeeded on that aspect of the case". So again –

BLANCHARD J:

But we haven't got the costs judgment directly before us, have we?

MS GWYN:

Yes Sir, it's in the case on appeal book –

BLANCHARD J:

No, no, no. No, I meant –

ELIAS CJ:

There's no appeal from it.

McGRATH J:

Yes, challenge, yes.

BLANCHARD J:

There's no appeal in relation – it –

WILLIAM YOUNG J:

Well wasn't there? Because the costs award was reversed in the Court of Appeal.

MS GWYN:

Yes Sir, it was part of the overall appeal to the Court of Appeal.

BLANCHARD J:

Yes but it's not here. It just seems to me –

McGRATH J:

Well Mr McKenzie won't think so –

BLANCHARD J:

– that this is a classic instance of something that is not actually appealable being treated as a separate ground of appeal in the Court of Appeal and thus we took it on here. It's one thing for the Court of Appeal to say well, here's our decision on the powers of the Committee, by the way, Justice Miller made certain remarks below and we say we don't agree with those remarks, if that's their view. It's quite another to treat it all as though it's an actual ground of appeal.

TIPPING J:

And what did they do? Did they quash the remarks or declare –

WILLIAM YOUNG J:

Declared they were of no effect, I think.

TIPPING J:

Declared they were of no effect. Novel piece of jurisprudence for a superior Court Judge.

WILLIAM YOUNG J:

Oh sorry, no, better be fair, it's page, it's para 137 of the judgment from the Court of Appeal. It's 136, probably are the...

BLANCHARD J:

Conclude they are of no lawful effect. Well actually that's probably, strictly speaking, correct. They weren't appealable.

WILLIAM YOUNG J:

Yes.

BLANCHARD J:

Because they didn't determine anything.

MS GWYN:

Well, yes and no Sir. Perhaps in and of themselves they didn't determine anything but as the respondent says, in its written submissions, to some extent his Honour Justice Miller approached the case the other way round. So he looked particularly at the abortion statistics, concluded from the statistics that something was amiss and then, in my submission, that formed the basis of his conclusion that the Abortion Supervisory Committee was therefore not fulfilling its function under the Act. So they did, in that sense, form the basis of his ultimate conclusions.

BLANCHARD J:

It's a step along the way in his reasoning but you can't appeal steps along the way in reasoning. We said that in a case called *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55, [2008] 1 NZLR 13 a few years ago.

MS GWYN:

Yes, your Honour and I am familiar with that case.

TIPPING J:

An excellent decision, if I may say.

WILLIAM YOUNG J:

Is it fair to say that, and I think it is, but correct me if I'm wrong, that Justice Miller didn't say anything that went any further than what your own Committee on occasion has said? In fact, he came up rather short of what your Committee differently constituted, I know, has on earlier occasions said.

ELIAS CJ:

It's of no lawful effect.

WILLIAM YOUNG J:

Yes but just in terms, I mean, I know that there's a sort of a slight tone of complaint about it but –

MS GWYN:

I do –

WILLIAM YOUNG J:

– your own Committee has actually gone further than he has, hasn't it?

MS GWYN:

No, I'm not sure that – I don't think that that is quite so your Honour because when one –

ELIAS CJ:

A pronouncement by a High Court Judge on a matter of law is not quite the same thing.

WILLIAM YOUNG J:

This isn't pronounced on a matter of law. This is a comment on how the abortions have been certified and whether that's in conformity with the legislation and he raised it as a question. I agree, he raised it rather pointedly as a question but the Committee has basically gone much further than that and reached express conclusions, hasn't it?

MS GWYN:

I think there are two differences, your Honour. The first is, is the point that her Honour the Chief Justice makes, that there is a difference between something that a High Court Judge says in a, a public judgment, and there's a question about whether members of the public made that distinction between, is this a finding or is this simply an observation, but also in terms of what past Committees have said, without going to the detail of the particular comments relied on, if one looks at them in context, most of them are made in the context of the Committee's function to report to Parliament and, and –

WILLIAM YOUNG J:

But if it's true –

MS GWYN:

– and recommend –

WILLIAM YOUNG J:

If something's true for one reason, it's equally for another, isn't it? I mean, they can't say, "Well, we were just sort of exaggerating because we wanted the law changed". They were saying –

MS GWYN:

No, I don't –

WILLIAM YOUNG J:

There's an issue as to whether there's a divergence between law and practice. That's, broadly, the issue.

MS GWYN:

The Committee says a, says a number of things, one of which is, "We think the law should be amended," and it specifically says that under its function in terms of reporting on –

WILLIAM YOUNG J:

Was it in a report or was it in a – something else that the chairman or chair said that referred to the grounds as pseudo-legal grounds?

MS GWYN:

There was one statement from a past chair of the Committee which was made outside of the annual report to Parliament but most of the references relied on by the appellant are things that are contained in the Committee's annual reports to Parliament where the Committee is saying, "In reviewing how the law is operating, we have this to say," and it says on repeated occasions, "We recommend that the law ought to be reviewed and –

WILLIAM YOUNG J:

To catch up with practice.

MS GWYN:

It doesn't say quite that.

WILLIAM YOUNG J:

I'm just – but that's the drift of it, isn't it?

MS GWYN:

It notes how the law is operating and on various occasions and you'll see particularly in relation to the Select Committee examination of the Committee, it sets out various respects in which it thinks, on the basis of its experience, the Act might be amended and Parliament has, particularly in its response to that Select Committee report but more generally, Parliament has chosen not to amend the law, notwithstanding those annual reports over a 20 or more year period from the Committee. I'm very conscious of the time.

ELIAS CJ:

How much longer would you like to be Ms Gwyn, we could take a short adjournment perhaps, if it would help?

MS GWYN:

Only another five or 10 minutes your Honour, if that's convenient.

ELIAS CJ:

Yes, carry on then.

MS GWYN:

I'm at page 29 of the written submissions and if I could just touch briefly on the statistics issue, if you like, and the reliance that was placed by Justice Miller on the statistics and to make several observations about the use of the statistics.

At 144.1, we note that there is little evidence before the Court about the stages that precede a woman's appointment with a second certifying consultant, or the numbers of women who choose not to proceed with an abortion after seeing both certifying consultants and there are a couple of things in the evidence that are relevant to that point.

The first is in volume 6 of the case on appeal, the Committee's 2010 report at tab 4 and at page – the page numbering on the bottom 1225, under the heading, "Interpretation of Abortion Statistics," and the Committee itself there notes its frustration about understanding when interpreting the reason for the high number of approvals for abortions given by the second certifying consultant and it notes there that the process that women go through, they're offered decision counselling, an assessment from a first consultant, then a referral to a second consultant giving women a final opportunity for reflection and as they note there, what that process demonstrates is that by the time of referral to the second certifying consultant the consideration of abortion for the patient is both clinically appropriate and within the law.

So in a sense it shows that a high percentage being approved by the second certifying consultant, demonstrates that the process is working. As they note in that last sentence, what is not currently reflected in the statistics are those women who after seeing two certifying consultants choose not to proceed with an abortion.

Then there is another reference in the evidence which is in Mr Newall's evidence and the relevant document is in volume 5 of the case on appeal – I'm sorry your Honours, it's in volume 2 at tab 14. Mr Newall, you see there at paragraph 9, he refers to a table showing for each of the years 2004 to 2006, the number of consultants claimed for by a first certifying consultant and the total number of women proceeding and that annexure is in volume 3 at tab 61, and you'll see there that for each of the years 2004 through to 2006 it shows the number of first certifying consultants who have authorised an abortion and then the number of terminations of pregnancy and in each case the differential is approximately 1500.

So women who have seen a first certifying consultant but then in the intervening period, whether through counselling or through the second consultation, have not proceeded with the termination…

Other difficulties with the High Court Judge's use of the statistics are set out in the pages of the submissions that follow and a particular point to note, at 114.3, is the Judge's emphasis on Christchurch and the point – and this is set out and detailed there, that many women have to travel to the larger centres to see a second certifying consultant. So to look only at one certifying consultant signing off on a second certificate, is not – doesn't give an accurate picture.

And at 114.4, in relation to the comparative data from other countries, in fact there was no evidence before the High Court as to the comparative social and legal contexts of statistics.

ELIAS CJ:

Well, all I suppose the mental health incidence which one reads, that we have very high level of mental health disorder –

MS GWYN:

Your Honour's absolutely right. There's none of that, none of that information was before the Committee or is in, in the evidence here, and the Committee has noted in, in its 2011 supplementary report that the international or the data from other countries has to be treated with some caution in any event because the reporting regimes differ. So there was no information before the Court as to what reporting of, of abortions was required in each country and the Committee particularly notes that.

Finally, on the statistics, I won't take your Honours through the other aspects of the submissions which are set out in full, but my learned friend this morning did refer to paragraph 117 of the respondent's submissions and appeared to, to believe that the, that in that paragraph, the Committee seeking to advance an argument that had been rejected in the Courts below. In fact, the point of that paragraph is in response to the appellant's own assertion that the Committee has not previously attacked the value of the abortion statistics and it's simply to make the point that the use and relevance of the statistics has been at issue from inception of this case.

At 118, I refer to comments of previous Committees and, again, I won't go through the written submissions, other than to, to make the general point that what the appellant is seeking here is forward-looking relief, and it's important, in my submission, that evidence of what the Committee does or does not do in relation to its statutory powers should be essentially contemporary or establish a pattern of conduct over the years from which continuing conduct could logically be inferred and, in my submission, the very dated evidence that has been presented by the appellant does not meet that standard.

Before I conclude, there is just one correction to the written submissions that I wanted to make and that's at paragraph 57 and there's a reference there to the *City Realties* case and a gremlin in the editing of the submission but the sentence that

starts, “Secondly,” there’s an incorrect reference there. It should read, “Secondly and perhaps most significantly, section 18 of the Securities Act, as it was,” and then delete the words in brackets, “equip the Commission with a range of investigative powers including powers,” and then delete “of inspection” through to “and powers” and then after “summon witnesses,” add in “require the production of documents”. So I’m sorry, there was a wrong statutory reference but that corrects it and also delete footnote 47.

ELIAS CJ:

Deleted.

TIPPING J:

Ms Gwyn, before you finish, could you please help me with this one thing that I just found a little puzzling. In his Honour’s cost judgment, the Judge says, this is paragraph 6, page 68 of that, this particular: “Both parties also contested the question whether the abortion law is being complied with”. Now, having looked at the statement of claim and the relief sought, I found that rather a curious proposition. Was the hearing consensually expanded to address such a wide topic because the statement of claim and the relief sought really mirrors the contentions in the formal pleading and the appellants don't seek any relief in relation to a declaration that the law isn’t being properly complied with or anything remotely like that.

MS GWYN:

Your Honour’s quite right and it wasn’t – the scope of the hearing was not expanded to deal with that question. It arose only indirectly at the hearing in relation to the Judge’s questioning about the statistics but the Judge’s conclusions or observations, however you characterise them, in his judgment about whether the law was being complied with, weren’t specifically canvassed in submissions.

TIPPING J:

Well presumably then, the case wasn’t prepared, one assumes, on either side, certainly on the respondent’s side, on the premise of such a general allegation.

MS GWYN:

That's correct Sir and as the Court of Appeal observed, there were no specific allegations about specific abortions or specific certifying consultants. There was no

evidence about that and therefore the Committee was not in a position to rebut any specific allegations of unlawfulness.

TIPPING J:

Yes, well thank you.

WILLIAM YOUNG J:

But wasn't – I thought, from what Mr McKenzie said this morning, that this evidence was material to what relief might be granted.

MS GWYN:

The?

WILLIAM YOUNG J:

The questions as to whether the procedures in the Act were being complied with were material to what, if any, relief should be granted. Is that not right?

MS GWYN:

I'm not sure that I understand that submission, your Honour.

WILLIAM YOUNG J:

Well, the statement of claim sought a number of orders, a declaration, (a), (b), declaration and then (e) a mandatory order, (e), this is on page 94, at the bottom of volume 1: "A mandatory order requiring the Committee to enquire," and isn't this material relevant for the purpose of deciding whether there was cause to make such an order?

MS GWYN:

This statistical evidence?

WILLIAM YOUNG J:

Yes.

MS GWYN:

That, as it, as it transpired, was the appellant's submission, and the respondent's submission in response, as in the written submissions today, is that the statistical data on its face tells another –

WILLIAM YOUNG J:

But that's a different issue. I mean, one issue is was the issue joined on whether there was occasion to think that something wrong might be going on. So was that raised in the High Court or did it just come as a bolt from the blue in the High Court Judge's judgment?

MS GWYN:

No, your Honour's correct. But it's the use of the statistics and the, and the conclusions.

TIPPING J:

But the whole underlying premise of the plaintiff's case, presumably, is that something's not going on right.

MS GWYN:

Yes.

TIPPING J:

But what struck me was that they were really rather dancing tiptoe-like round that central issue and attacking it, if you like, on a powers basis –

MS GWYN:

Yes.

TIPPING J:

– rather than putting it directly on the table. Now, that may have been – I'm not reflecting on whether that was good, bad or indifferent but that was what came through from the statement of claim and it's fairly subtle, I would have thought, to say oh well, you know, we can get all this stuff in and invite findings, simply to justify a mandatory audit.

MS GWYN:

Your Honour is correct. The way in which the pleadings advance it is, in a sense, the way it was advanced at hearing.

TIPPING J:

If they wanted to put that squarely on the table, one would have thought they would have had to plead, and face the consequences of such a pleading.

MS GWYN:

Yes. Yes, your Honour.

TIPPING J:

But I may be old fashioned Ms Gwyn.

ELIAS CJ:

Well I'm also wondering whether this paragraph 6 of the costs judgment doesn't have some implications for the view that the findings were – didn't give rise to an appealable point because, in a way, this seems to be an explanation of what was contained in the earlier judgment.

MS GWYN:

Yes and that was certainly my submission on this paragraph your Honour, that his Honour appeared to believe that he had made a – or reached a conclusion on the question of whether the abortion law was being –

WILLIAM YOUNG J:

Well the better argument is not what he thought but the better argument is that his finding as to costs reflected his conclusions that you take exception to.

TIPPING J:

Well that is signalled clearly by the word "accordingly".

WILLIAM YOUNG J:

Yes. So that –

ELIAS CJ:

Yes, that's clear but it's also the case that the plaintiffs didn't succeed in getting the relief they sought because it's – in part it's because of a discretionary determination by the Judge, whereas he seems to be indicating that he agreed with the – that the abortion law was not being complied with.

MS GWYN:

And that's certainly how I have read that portion of the costs judgment your Honour.

TIPPING J:

It's a bit like the *Erebus* case, I suspect, in part anyway.

McGRATH J:

That was a breach of natural justice.

TIPPING J:

Yes but wasn't there an issue – what allowed an appeal to go forward in some respects was an issue of cost? I may be misleading myself.

MS GWYN:

It was part of the appeal.

TIPPING J:

That was part of the appeal?

MS GWYN:

Yes.

ELIAS CJ:

That was the coathanger.

TIPPING J:

That was the coathanger, yes. I'm not sure. We'll have to look at that.

BLANCHARD J:

In your grounds of appeal to the Court of Appeal you say the Court –

ELIAS CJ:

Where are we, sorry?

BLANCHARD J:

The notice of appeal to the Court of Appeal given by the Abortion Supervisory Committee. It's page 100 I think, at the top of, under tab 4 of volume 1 on the case on appeal.

MS GWYN:

Yes, your Honour?

BLANCHARD J:

Do you – your ground is the Court, that's the High Court, erred in law in assuming it had jurisdiction to consider the question, "Are certifying consultants obeying the abortion law". What were you actually driving at there in referring to "jurisdiction"?

MS GWYN:

It's – the question Sir that's touched on in the written submissions before this Court that in a judicial review where the certifying consultants were not parties to the review and nor were they called as witnesses that the Court had no jurisdiction to reach a finding that they were, in effect, flouting the law in the way in which they authorised abortions.

WILLIAM YOUNG J:

But there was no finding.

MS GWYN:

Well –

ELIAS CJ:

Except in the costs judgment.

MS GWYN:

Except in the costs –

WILLIAM YOUNG J:

Well yes but that's probably a loose recapitulation of what had earlier been said.

ELIAS CJ:

Well it is striking though that on the submissions put forward by the appellant really one wonders why this wasn't an application under the Declaratory Judgments Act simply. So it is a bit broad, the claim that's been brought, and it's perhaps not surprising that there are stray bits in the judgments.

McGRATH J:

Declaratory relief can be sought –

ELIAS CJ:

I know declaratory relief is sought –

McGRATH J:

– in judicial review under the statute of course.

ELIAS CJ:

– yes, yes, no I understand that.

WILLIAM YOUNG J:

The primary relief sought was declaratory but there was one claim for the mandatory order.

MS GWYN:

Yes, yes, that's correct your Honour. The Court doesn't have –

TIPPING J:

It was consequential though on a satisfactory finding on the powers?

MS GWYN:

Yes.

ELIAS CJ:

Yes. Which was a question of statutory interpretation.

MS GWYN:

Yes. The Court doesn't have before it, although I do have copies if the Court wanted me to make them available, doesn't have copies of the form of the declarations that

were sought by the appellant at the relief hearing because they differ somewhat from those that are contained in –

ELIAS CJ:

Oh, in the statement of claim?

MS GWYN:

They are. As his Honour Justice Miller says in the relief judgment, what was sought was very extensive but I have copies of those if –

WILLIAM YOUNG J:

But they would've reflected, presumably as best they could, the approach of the Judge in the primary judgment?

TIPPING J:

With some optimism.

WILLIAM YOUNG J:

Yes, yes, but I mean presumably they would have been drafted by reference to what the Judge had said in the final judgment because the –

MS GWYN:

Not closely I don't think. No doubt my friend would want to address you on that.

ELIAS CJ:

I don't think we need to have that because it all becomes pretty hypothetical, doesn't it?

MS GWYN:

In that case, your Honours, unless you have further questions those are the submissions for the respondent.

ELIAS CJ:

Thank you Ms Gwyn. We'll take a short adjournment.

COURT ADJOURNS: 4.06 PM

COURT RESUMES: 4.26 PM

MR McKENZIE QC:

If your Honours please. The respondent's submissions have indicated, I think, the difficulties that face the Court in interpretation of the statute and as we saw from those submissions, the certifying consultants have no, there's no statutory, direct statutory power in section 33 to require them to report on their exercise of their authorising decision to the Committee.

Section 33(5) is the power to report to the institution concerned. It was apparent that there's no provision in the Act which forbids reasons being given or asked for from consultants in relation to the authorising decision. That is a construct from the Court of Appeal in *Wall v Livingston* which of course affected the other Courts, it need not affect this Court. With respect, the regulations that Ms Gwyn referred to as authority are, of course, subsidiary to the way in which the Act itself should be construed and the scheme of the Act interpreted. So they provide limited assistance, in my respectful submission, to the respondent in that respect.

As against that, of course, there are the broad words of section 36 and, indeed, as Ms Gwyn showed, it is on section 36 that the Committee relies in requiring consultants to report to it upon the exercise of their authorising function. It is significant, I submitted earlier, that section 45, when dealing with the operating surgeon and the provision of reports, makes it clear that a simple statement of the ground on which the abortion is carried out being provided to the Committee is not to limit the application of section 36. That section is of broader application, indeed, of general application, limited only by subsection (2).

WILLIAM YOUNG J:

Where in practice does the certificate that the certifying consultants sign go? Justice McGrath inferred, I think, that it went to the institution.

MR McKENZIE QC:

There are several forms, your Honour. One of them goes to the institution. That's the certificate which is the institution's authority to carry out the abortion procedure.

WILLIAM YOUNG J:

Does it also go to the Committee, or not?

MR McKENZIE QC:

There's a separate form that goes to the Committee. I think I'm correct in that respect.

WILLIAM YOUNG J:

Is that in this, in this document?

MR McKENZIE QC:

That's in that bundle of, bundle of forms, yes.

TIPPING J:

It's got it here, on the –

McGRATH J:

But that's not the form required by the regulation, is it?

WILLIAM YOUNG J:

This is the report –

McGRATH J:

Form 3A.

MR McKENZIE QC:

No, the Committee relies on section 36 at the head of the form for its authority in relation to provision of that.

WILLIAM YOUNG J:

In form 3A, which is in there, it just –

ELIAS CJ:

3A and 3B.

WILLIAM YOUNG J:

– goes to the, just goes to the institution.

McGRATH J:

Yes so they have nothing to do with section 36, which is, of course – is a provision that the Committee may make requirements. This is under the regulations.

MR McKENZIE QC:

It is also under the authority, your Honour, of section 33, subsection (5) because that requires the certifying consultant to provide the certificate to the institution. So there's statutory authority for that.

McGRATH J:

So if you could just explain to me how it – oh section 33, sorry.

MR McKENZIE QC:

Subsection (5), yes.

ELIAS CJ:

What's the difference between form 3B and 3A? Is that where there's only one –

McGRATH J:

Yes.

ELIAS CJ:

Oh to the third certifying consultant.

MR McKENZIE QC:

Yes.

ELIAS CJ:

Yes, the third opinion, I see.

MR McKENZIE QC:

And that's only in the case where the two consultants don't agree.

McGRATH J:

That's right, Mr McKenzie, but can we say that the Regulations are giving effect to what the Act, section 33(5), requires but that is something that has no bearing, no relationship with section 36, does it?

MR McKENZIE QC:

I accept that your Honour, that's correct, and of course there's no reason why the Regulations can't provide the authority for the provision of the report but it's, the question is to, whether or not additional information or reasons may be given to the Committee outside of that report. The Regulations, in my submission, are not authority for that proposition, if they're expressed in a limited way.

McGRATH J:

Yes, they, I certainly understand that, the force of that submission.

MR McKENZIE QC:

Yes. So the, the submission is that section 36, in those circumstances, does provide the, could empower the Committee to seek the information which it is reluctant or in fact considers it has no power to seek and that was graphically indicated by the answer to the question as to whether or not the Committee could require consultants to provide the import on the diagnosis and severity of the danger to the woman's health, as proposed by Dr Simpson. Now, Ms Gwyn was very reluctant, indeed did indicate that the Committee was not, did not have authority; it simply could request consultants. That is a surprising submission, given the width of section 36, in my respectful response, and indicates that, that section should be read much more widely than the Committee is prepared to do.

Those difficulties in the way in which the provisions are being read perhaps indicates, again, the need to apply the interpretation principle that, that counsel advocated in the opening submission, and that, that should lead the Court, if there is ambiguity and doubt in this respect, in the direction of providing greater safeguards for the unborn child.

But then in similar, to a similar effect really and I need not enlarge on this because I think the point has already been made, that the, the questions that were raised in relation to the current newspaper story in England and the answers from the Committee indicate really the way in which the Committee is reading down the powers that it has under section 36. The Committee is best placed, of any of the health institutions, to act promptly and quickly in relation to seeking reports from certified consultants on an issue of that kind and the kinds of questions that were posed to counsel were indicative of the approach that the Committee could promptly

take in that situation to defuse the situation – to defuse such reports if there be no substance in them, or to look further where that is necessary.

Section 36 again, with respect, given the width, on the face of it, of that provision, would empower the Committee to act in that way which provides the necessary safeguards to ensure that the operation of the Act, the proper operation of the Act and indeed, that is entirely consistent your Honours, with the statutory powers and functions that the Committee has under section 14(1)(a) "to keep under review the operation and effect of the abortion law in practice," and that's an example of that law in practice.

Section 14(1)(i), the Committee's function of ensuring "the effective operation of the Act," again, an indication of that and then the wide power to require reports from certifying consultants under section 36.

So it is consistent, in my submission, with the scheme and approach of the Act for the Committee to be seen as being empowered to respond appropriately to an issue such as has recently arisen in England. It is not handicapped in the way that, that Committee sees itself.

Then I really need to address the Court and I'll endeavour to be brief on *Wall v Livingston*, given the significance that, that case has posed in questions to Ms Gwyn.

The case needs to be read, of course, in the context of its own factual situation and I need not remind the Court of that, which was Dr Wall seeking to have judicial – the Court judicially review a certifying decision. It was the authorising decision that was challenged in that case and it was in the context of such an application that the Court found that Dr Wall had no standing and also made the observations that it did at pages 738 and 739. So, in my submission, the words at the foot of page 738 can properly be read as referring to the facts of that case. What is important, of significance, in this case.

It should be noted that they follow the statement by the Court on the wider responsibilities of the Supervisory Committee. It's general oversight of the work of certifying consultants throughout New Zealand but in this case, that oversight, the Court says, is qualified; the Committee has no control or authority or oversight, using

that same word in respect of the individual decisions of consultants and that, in my submission, must be read as referring to the individual decision in relation to the authorising of an abortion in the individual case. That is indicated by the points that follow; the deliberate absence of any review process inside the Act, of course, is directed – a review process for the abortion decision itself, the authorising decision. There is no review process. It is directed to that situation.

There's reference then to the anonymity of the woman patient. That of course applies in other contexts as well. It doesn't really assist in determining what the Court required here but secondly and this is significant, the Court refers to the whole process of authorisation. It's authorisation that is in issue here, nothing else, with respect and that is the decision that the Court in *Wall v Livingston* had in mind and that is the decision that is placed fairly and square upon the medical professional. They make that authorising decision and they make it alone.

But that does not preclude and the judgment in *Wall v Livingston*, in my submission to the Court, does not preclude the approach taken by Justices Miller and Arnold and by the appellant in this case, that the Committee is empowered to review the decision in practice of authorising consultants after the fact and to seek appropriate reports on clinical matters and other details where that is – where, in the discretion of the Committee, that is needed.

So that decision, with respect, must be read in the context of its own facts and not given a wider application. This Court, of course, is not bound by what was said by the Court of Appeal, a very respected Court of Appeal at that time, in a very different fact situation which has now come before this Court.

Then finally, I come to Ms Gwyn's submissions in relation to the way in which Justice Miller's judgment was worded and again, repeat really in response, the earlier submission that Justice Miller went no further than the Committee itself had done. He drew the inferences, as has earlier been submitted, that were drawn by the Committee itself and, with respect, to seek to confine those inferences purely to a law reform context is not convincing.

I would invite the Court to look again at the 2000 annual report. Yes, those comments were made by the Committee when commenting on the need for reform of the law but what the Committee did in that case was to give its view as to what was

the practice currently that required reform and in doing so, the Committee was commenting and indeed putting forward a factual view as to the current way in which the law was being applied and in its view the very irregular or misleading, to use the Committee's word, way in which authorising decisions were made. So that those comments cannot be confined to simply a law reform context. Made in that context they were comments on the actual working of the abortion system, which the Committee had a responsibility for.

Then it was acknowledged by the Committee's counsel before Justice Miller that the statistics did put the Committee on enquiry and that is recorded by Justice Miller at paragraph 57 of his judgment. Well I won't read that to the Court but the Court can see there that Justice Miller, having recorded that approach on the part of the Committee, doubtless felt that he was entitled to make the comments that he did.

Your Honours will also notice in that passage from the judgment where his Honour discusses the statistics, that he refers to some of the arguments that were put to your Honour this afternoon by Ms Gwyn. Paragraph 54. I readily accept Ms Gwyn's submissions that the statistics must be interpreted with care and it makes the point that was made by the Committee's counsel that only a sample of pregnant women involved, that the certifying – that the statistics do not record those women who elected not to proceed, perhaps, after counselling or before the consultants reach a decision.

So the points that were made now were taken into account by his Honour and its perhaps unfair to attribute to his Honour knowledge now of what was contained in a later report of the Commission in 2011 on the weight to be given to international comparisons in terms of the statistics and particularly so having regard to the Committee's acknowledgement.

Then it needs to be recognised that the statistics didn't stand alone but, as was submitted earlier, were accompanied by inferences and comments on those statistics made by the Committee itself in its reports and, perhaps, I could interpolate there that the Chief Justice asked me what the latest report was and I have checked and indeed it was the 2005 report where the Committee last referred to this respect in which its powers were limited. That, of course, was at the time that the litigation was initiated and it's not surprising that subsequent reports therefore do not raise the issue, except by reference to this litigation.

Then a further factor there, in terms of the, the support to the, the view of the statistics taken by Justice Miller is that the former chair of the Committee in the report of 2000, which is the first document in volume 3, tab 32, the Committee's chair who was currently chair at the time those comments were made, gave her view at some length, on the way in which the authorising decisions were being made at the current time or the time of that statement.

It is, with respect, would be unfair for, for this Court to, following the Court of Appeal, to be critical of the Judge in those particular circumstances, and, as submitted earlier, the reputation of consultants is really not at issue having regard to the extent to which this matter was in the public forum through reports of the Committee itself already.

Then, further, the statistics were a matter of challenge on very similar grounds before Justice Wild on the strike out application before him at the early stage of this litigation, and it's at paragraph 113 of his judgment I placed before the Committee earlier – before your Honours earlier.

Ms Gwyn submits that the plaintiff's pleading of abortion statistics is irrelevant to its claim and its selective and misleading references to extrinsic materials and inaccurate paraphrasing of the CSA Act are abuses. They're very strong statements recorded there. I do not accept that. There is not bright line between the provisions of adequate particulars supporting allegations, on the one hand, and the illegitimate and unnecessary pleading of evidence on the other. I do not regard the amended statement of claim, when viewed overall, as an improper pleading.

Now, that could've been the subject of appeal, but the Committee, if it had felt strongly about the matter, having been raised in those terms, it's recorded there was no appeal from that particular ruling on the part of his Honour and the litigation proceeded to Justice Miller. It is, with respect again to his Honour, it would be going much too far for this Court now at this stage in the proceeding to seek to wind the clock back and to be critical of the admission of those statistics.

Then, as to the relevance of the statistics, the, the issues that were discussed with Ms Gwyn, and I perhaps need not elaborate on these, but there were perhaps three matters here. One was that the statistics were, were pleaded and, indeed, dealt with by his Honour on the basis that they, they were facts or, or matters which reflected on the way in which the abortion law was being, was being carried out in

New Zealand, that the Committee ought to have been put on notice and lead it to examine carefully what action it could take. And the Committee was, of course, asked on a number of occasions, as was submitted earlier, to take action in view of the, the statistical and other reported material that was put before it.

Then, secondly, the pleading pleaded that the Committee had failed to exercise the statutory power available to it, the power of discretions available to it, to deal with matters that were apparent to it by reason of the statistical information and the reports of the – the comments in the reports of the Committee. And it was pleaded that by not acting, the Committee was thwarting and frustrating the purpose of the legislation.

Julius v. Bishop of Oxford and *Padfield*'s case were prominent in argument at earlier stages of this litigation so that, that evidence was important in relation to that particular way in which the litigation was constructed and that particular allegation was the one that, in relation to which mandatory orders were sought, that the Committee should in fact exercise the powers that were available to it and that direction to that effect should be made by the Court.

Now that, of course, Justice Miller was not prepared to grant but there was the third factor in relation to the relevant statistics and that was in relation to discretionary relief and as your Honours have observed in interchange with Ms Gwyn, Justice Miller, after referring to the statistics in the relief judgment, then moves on to say well, as against that, put into the balance other factors, which led him to decline to make declaratory orders but the reports of the Committee and the way in which it had responded to matters of which it was aware were part of the mix before his Honour, taken into account in determining whether or not declarations should issue so that that material, with respect, was relevant to the Court even although at the end of the day it did not weigh finally with his Honour in that respect.

Your Honours, that concludes the matters of reply that I wish to put before your Honours, perhaps apart from one deficiency that I should draw to your Honours' attention. I've noticed that one of the documents has not been included in a complete form in the bundle but is commented on by Mr Orr in his affidavit, that's in volume 2 and that's at paragraph 22 with his reference to the Justice and Law Reform Committee Inquiry in 1996 and its recommendation at page 23, that the Abortion Supervisory Committee continue to investigate finding an effective method

of auditing the procedure in sections 32 and 33 of the Act. Now unfortunately that page does not seem to be included but if it will be of assistance to your Honours I will see that it is provided to the Court.

ELIAS CJ:

Well perhaps that can come in to the registrar and they can take copies from it.

MR MCKENZIE QC:

Thank you.

ELIAS CJ:

Thank you Mr McKenzie. Thank you counsel for your submissions. We will reserve our decision in this matter.

COURT ADJOURNS: 4.53 PM