



A BRIEF HISTORY OF ABORTION LAWS IN NEW ZEALAND

New Zealand law was based on English law.

1803: Before the 19th Century in England, common law held that an abortion was permissible if carried out before quickening (fetal movements) i.e. at about 18 weeks gestation. In 1803 in the reign of George III, a repressive “law and order” measure made abortion a felony both before and after quickening, although the penalty before quickening was less severe. The maximum penalties were death or transportation to the colonies.

1861: The English 1861 Offences Against the Person Act revised penalties and also criminalized for the first time anyone who attempted to procure a miscarriage, whether or not the woman was actually pregnant. It was still an offence for the woman herself to procure an abortion. This Act is still current in Northern Ireland.

1866: New Zealand adopted the English law, an exact replica of the 1861 Offences Against the Person Act.

1893: New Zealand passed the Criminal Code Act, which reduced the penalty for the woman to a maximum of seven years imprisonment and life for others.

1908: The Crimes Act defined when a child becomes a human being and Section 182 relates to the “killing” of a child before or during birth. This section was primarily to protect the obstetrician who may have to sacrifice the child to save the mother.

1939: Dr Aleck Bourne, a prominent London gynaecologist brought a test case, after the rape of a 14 year old girl. Mr Justice Macnaghten helped define “unlawfully”. The defence was that the abortion had been carried out because continuing the pregnancy would make the girl a “physical or mental wreck”. The rape occurred in April 1938, the abortion in June 1938 and the trial in July 1938. The formal publication of the judges’ ruling was in 1939. The ruling influenced the interpretation of the law in New Zealand.

1961: The Crimes Act was revised with no changes to the section on abortion. During the 1960s public opinion on several issues became less repressive. A more liberal law was passed in the United Kingdom in 1967 which allowed socio-economic circumstances to be taken into account, but New Zealand did not follow suit. In Canada abortion was legalised in 1969.

1969-71: Court cases in Australia gave a more liberal interpretation to State laws which varied from one State to another. Mr Justice Menhennit in Melbourne in 1969 and Mr Justice Levine in Sydney in 1971 both gave a liberal interpretation to what was lawful. New Zealand women with means could now obtain a legal abortion in Victoria and New South Wales.

May 1974: Dr Rex Hunton, a community health physician initiated the Auckland Medical Aid Centre. In September 1974 the clinic was raided and police seized approximately 500 files. On 10 January 1975 the Court of Appeal ruled that the search warrant had been invalid but the files were used to bring the operating doctor, Dr Jim Woolnough to trial. (See below). He was subsequently acquitted. The clinic closed in December 1977 as a result of the Contraception Sterilisation and Abortion Act (CS&A Act) and did not reopen until August 1979 after a legal battle to obtain a licence.

August 1974: The Hospitals Amendment Bill (Wall Bill) was introduced in an attempt to restrict abortions to public hospitals. This was passed in May 1975 with Hight's amendment extending operations to licensed hospitals. A system of notification of abortions was introduced. In September 1975, Justice Speight ruled that the law was invalid because it related to the wrong section of the Crimes Act (Section 182).

1975: New Zealand trial R. v. Woolnough. Dr Woolnough was charged on twelve counts of procuring unlawful abortions. The first trial under Justice Speight resulted in a hung jury (21 August 1975). The second trial under Justice Chilwell resulted in acquittal (27 November 1975). The Court of Appeal upheld the not guilty verdict. Dr Woolnough held an honest belief that there was a danger to the physical or mental health of the 12 women.

1975-77: Due to intense public debate a Royal Commission of Inquiry on Contraception, Sterilisation and Abortion was established by the Labour Government under Prime Minister Rowling. The six member commission under Justice McMullin was appointed in June 1975 and deliberated for 21 months.

1976: The Gill Bill, introduced by National's Minister of Health, Air Commodore Gill, like the ill-fated Wall Bill, attempted to restrict abortions to public hospitals. National's George Gair moved that any action be deferred until after the release of the report of the Royal Commission.

March 1977: The report of the Royal Commission was published. It was very conservative and very controversial. It recommended 12-14 abortion panels throughout New Zealand. It did not trust women, doctors or the Health Department.

August - December 1977: National introduced the CS&A Bill. After many amendments and one all night sitting, it was passed on 15 December 1977. Parliament also amended the Crimes act and seven other Acts including the Guardianship Act relating to girls under 16 years being able to make a decision in their own right. Panels were discarded in favour of two "certifying consultants". The new procedures for obtaining an abortion came into effect on 1 April 1978 under the supervision of the new body, the Abortion Supervisory Committee (ASC).

July 1978: The new legislation proved unworkable. Many women had to travel to Australia for an abortion, assisted by feminist groups, SOS (Sisters Overseas Service). Due to public clamour, the ASC recommended changes to the Crimes Act,

with fetal abnormality to be included as a ground and deletion of the phrase “and the danger cannot be averted by any other means”. In the CS&A Act the procedures were altered so that a surgeon must first agree to operate. These three changes made the law workable.

1982: In *Wall v. Livingstone*, anti-abortionist Dr Melvyn Wall of New Plymouth challenged the decision of two certifying consultants who had authorised an abortion for a young girl. He lost and the Court of Appeal confirmed that he had no standing to represent the fetus.

October 1983: Two private members Bills, one liberal (Marilyn Waring) and one restrictive (Doug Kidd) were both defeated.

October 1989: Helen Clark, Minister of Health in the Labour Government, tried but failed to simplify the certifying procedures (any two doctors, one with obstetric or gynaecological expertise). However Parliament agreed by a substantial margin to repeal Section 3 of the CS&A Act relating to contraception and under 16 year olds. This removed restrictions on the provision of contraceptives to under-16-year olds and information and instruction on their use.

1980s and 1990s: Anti-abortionists tried via trespass cases to represent the fetus and restrict abortions but these have failed, including one which went to the Privy Council in London.

August 2001: Mifegyne (mifepristone) was approved for medical abortions by Ministry of Health.

April 2003: A High Court Judgment by Justice Durie clarified Section 18 of the CS&A Act with respect to “performing” medical abortions stating that women must take the medications in a licensed facility but women do not need to stay there between taking the two sets of tablets (48 hours apart) nor is it compulsory for them to stay in a licensed hospital or clinic until the fetus is expelled and the abortion is complete.

November 2004: The Care of Children Act was passed. Amendments to Section 37 by Judith Collins (National), Murray Smith (United Future) and Dale Jones (NZ First) were all defeated by a substantial margin. The amendments attempted to make parental notification a requirement for under-16-year old girls seeking abortion.

December 2010: In *Hallagan v. Medical Council of NZ* Justice Mackenzie determined that doctors with a conscientious objection need only advise the woman to see another doctor or Family Planning Clinic. [Section 174 Health Practitioners Competence Assurance Act 2003.]

May 2005 to August 2012: *RTL v ASC*, a protracted 7-year case challenging the role of the ASC. Considered in the High Court, the Court of Appeal and finally the Supreme Court. Majority 3-2 decision in favour of ASC. In favour Elias, Tipping, Blanchard; dissenting William Young and McGrath.

June 2015 to October 2015: *RTL v ASC* challenging the legality of the limited licence to perform early medical abortions in the Tauranga Family Planning Clinic.

May 2015 to July 2016: Justice and Electoral Committee considered petition of Hillary Kieft re care of under-16s. Counselling was recommended but no change in the law.

27 February 2018: Minister of Justice, Andrew Little, requests Law Commission to provide options on making abortion a health matter.

26 October 2018: Law Commission releases Ministerial Briefing Paper *Alternative approaches to abortion law*.

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14 November 2018