

Abortion law in Aotearoa New Zealand

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ABSTRACT

This article outlines the history of abortion law in Aotearoa New Zealand from colonial times to the present. The struggle for law reform has been long and difficult, with marches and rallies, protests and placard-waving, and firebombing of abortion clinics. Aotearoa New Zealand elections have been fought on this issue. Abortion was regulated here under the Crimes Act until 2020. Finally, after 150 years, procuring an abortion in Aotearoa New Zealand is no longer a crime, it is a women's healthcare issue along with others relating to women's reproductive health, including obstetric, contraceptive, sexually transmitted disease and other gynaecological care. The new law promotes autonomy, reproductive health, patient safety and health equity. The abortion struggle serves as an illustration of our changing political and social landscape, with a public move from conservative towards more liberal values. However, the issue continues to divide people, and events in the United States have shown how quickly change can occur, with their Supreme Court overturning *Roe v Wade* and states now banning abortions. We should not be complacent.

Throughout history, many women have found themselves unhappily pregnant through a variety of circumstances. Until recent times, the choices to address this were limited, and consequences were often dire. Procuring an abortion in Aotearoa New Zealand is no longer a crime, it is a woman's healthcare issue along with others relating to women's reproductive health, including obstetric, contraceptive, sexually transmitted disease and other gynaecological care. It promotes autonomy, patient safety and health equity. The abortion struggle serves as an illustration of our changing political and social landscape, with a public move from conservative towards more liberal values. This article is a bare-bones account of the evolution of our abortion law in Aotearoa New Zealand.

In Great Britain, prior to the nineteenth century abortion was only prohibited after quickening (when a woman first feels movement inside her womb, at about 18 to 20 weeks gestation).¹ In 1803, the *Offences Against the Person Act* made all abortion illegal. "To procure the miscarriage of any women then being quick with child" incurred the death penalty, regardless of whether the child was born alive or dead.² Inducing an abortion before quickening was less serious, with punishments including fines, flogging or transportation not exceeding 14 years. However, determining whether quickening had actually occurred relied on a woman reporting that she had felt movement, and it may not have been in her best interest to say so.

In 1837 the *Act* was amended, abolishing the death sentence, but increasing the maximum penalty for procuring an abortion to transportation

for life, whether or not quickening had occurred, and regardless of whether the woman was actually pregnant.³ A further amendment in 1861 made the woman herself liable for prosecution if she attempted to procure her own abortion, with a maximum penalty of life imprisonment. Abortionists and women who self-induced abortions were criminals under the law, and women who sought abortions were accomplices to the crime.⁴

Aotearoa New Zealand inherited its legal system from Great Britain. European settlement of Aotearoa New Zealand started in the 1830s, and the colony adopted British law in 1840. In 1867 the British statute was replicated as the *New Zealand Offences Against the Person Act*.⁵ Punishment of abortion procured by any means, including self-induced, was up to life imprisonment or "transportation beyond the seas", although of course Aotearoa New Zealand was already "beyond the seas"! In reality, unless there were fatal consequences, most abortions did not come to the attention of the courts.

In 1893, all indictable offences in Aotearoa New Zealand were codified as the *Criminal Code Act*.⁶ The maximum term of imprisonment for a woman who tried to procure an abortion on herself, even if she was not actually pregnant, was reduced from life to 7 years. Men who supplied the means to procure an abortion by buying an abortifacient or paying an abortionist faced whipping or flogging.⁷

However, because Victorian morality condemned women having children out of wedlock, and impoverished married women found themselves unable to feed yet another child, many women had little

choice than attempt self-abortion, or visit an illegal abortionist. Use of traditional methods such as hot baths, physical exertion, drinking gin or deep massages of the lower abdomen were unlikely to be effective. Chemists and herbalists did a brisk trade in potions and pills touted to bring on a missed period, made from compounds such as oil of juniper and parsley oil, which were relatively safe, but with little evidence that they worked. More toxic compounds including pennyroyal, ergot, quinine and lead may have been more effective, but were easily overdosed and potentially lethal. When these methods failed, illegal abortionists were sought out.⁸ If abortion was not an option, another choice was to pay someone to take the child, with “baby farmers”, usually women, looking after a number of children, who were sometimes neglected or even deliberately murdered.⁹

The *Crimes Act 1908* succeeded the *Criminal Code Act 1893*, with little change to the abortion law, except that if someone caused the death of a child before or during its birth to preserve the life of the mother, then no crime was committed.¹⁰ While abortion was now permitted when the mother’s life was deemed to be in serious danger, in reality few doctors would perform the operation, hence back-street or self-induced abortions were still the norm.

After the first World War, criminal abortions causing sepsis requiring hospital admission were a growing problem.¹¹ In 1937, a government Committee of Inquiry into septic abortion estimated that about 4,000 illegal abortions occurred in Aotearoa New Zealand each year. It concluded that although abortion was mainly due to economic hardship and unmarried pregnancies, relaxing the law was not recommended—the focus should be on increasing the birth rate.¹²

A 1938 test case in Britain led to a ruling that if a doctor believed that continuing a pregnancy would render a woman “*a physical or mental wreck*”, then abortion was justified to save her life.¹³ However, the abortion debate came to a standstill during World War II, and when the soldiers returned, Aotearoa New Zealand experienced a baby boom. Finally, in 1961 a clause was added to the New Zealand *Crimes Act* stating that procuring an abortion before 20 weeks gestation was lawful if “*the person doing the act believed that the continuance of the pregnancy would result in serious danger... to the life, or to the physical or mental health, of the woman or girl*”.¹⁴ Theoretically, getting a legal abortion was a little easier. National Women’s and other

hospitals set up “termination committees” comprising senior gynaecologists plus co-opted others such as psychiatrists.¹⁵ However, few abortions were approved.

The debate intensified in the 1970s, and there was a rise in action groups both for and against abortion. The New Zealand Society for the Protection of the Unborn Child (SPUC) was established in 1970, and its membership grew rapidly, mostly but not exclusively Roman Catholic.¹⁶ Their strategy was to enlist MPs as members and encourage their general membership to engage in mass letter-writing to their MPs. Later that year the Abortion Law Reform Association of New Zealand (ALRANZ) was also formed, lobbying that contraception should be freely available to all who needed it, and that abortion should be a decision between a woman and her doctor. They focussed on disseminating evidence to counter misleading rhetoric.

In 1974 the first Aotearoa New Zealand abortion clinic, the Auckland Medical Aid Centre (AMAC), was opened, with trained counsellors and an experienced Australian abortionist operating and training other medical practitioners. SPUC reacted swiftly. The prime minister and the police were supplied with affidavits from senior SPUC members, alleging that the clinic provided a poor-quality and illegal service. Armed with these affidavits, the police raided the clinic and removed and read all 500 clinical records. Despite outrage from the medical profession, police subsequently arrived unannounced at some of the women’s homes or workplaces to interview them, in the presence of family or colleagues who were unaware that they had had an abortion. Subsequently, in February 1975 the lead abortionist at AMAC, Dr Jim Woolnough, was charged with 12 counts of illegally procuring an abortion.

Concurrently, Dr Gerard Wall, a Labour MP and SPUC member, introduced a private member’s Bill into Parliament to amend the *Hospitals Act*, restricting abortions to public hospitals. This was clearly designed to close down AMAC. An amendment changed the requirement to a hospital run by a hospital board, or any licensed hospital approved by the director-general of health. The “Wall” Bill was rushed through Parliament without proper scrutiny by Select Committee, and enacted in May 1975. However, in anticipation of the law change, the Auckland Medical Aid Trust had purchased Aotea Private Hospital, and AMAC was able to continue to provide their services there. Subsequently on appeal, it was ruled that the new law

amended the wrong section of the *Crimes Act*. The judge ruled that it was an “ill-drafted piece of legislation”, and that the *Act* was invalid.

Woolnough’s case proceeded through depositions to a trial in August 1975 with a hung jury, a second trial in November 1975 where he was acquitted, and an appeal by the prosecution that was dismissed by the Court of Appeal in July 1976. AMAC continued to provide a service throughout, including weathering a fire-bomb attack of Aotea Hospital in April 1976.

Prior to the November 1975 general election, SPUC conducted active campaigns against MPs who had voted against the *Hospital Amendment Bill*.⁶ The Catholic Church became actively involved, advising their congregations to vote on the basis of the candidate’s attitude towards abortion.¹⁷ The outcome of the general election was the defeat of the Labour Party. National Party’s Robert Muldoon, who vocally opposed abortion, was elected prime minister. It is unknown to what extent the abortion issue influenced these results. A nation-wide survey conducted immediately post-election found a substantial majority of New Zealanders favoured easier access to abortion, and wanted a referendum on the topic.¹⁸ There were 78 pro-life MPs in the new Government (23 National and 35 Labour) compared with 39 pro-abortion (9 National and 20 Labour), unrepresentative of the Aotearoa New Zealand public.¹⁹

During this time, a Royal Commission on Contraception, Sterilisation and Abortion, set up by the prime minister in June 1975, was investigating whether current law on abortion met the needs of society, and whether any law changes should be made in regard to abortion.

In August 1976 Air Commodore Frank Gill, the Minister of Health, proposed the *Health Amendment Bill* to revisit Wall’s failed *Hospital Amendment Act*. “Gill’s Bill” required women seeking legal abortions to appear before a committee of an obstetrician and gynaecologist and at least one other doctor. This Bill faced widespread opposition from the medical profession, and was viewed by the pro-abortion lobby as an attempt to pre-empt the report from the Royal Commission. At its second reading in September 1976, National MP George Gair managed to pass an amendment which deferred it for 12 months until after the Royal Commission had reported, on the condition that no further clinics would be opened before that time. The *Bill* lapsed.

The Royal Commission conducted public hearings with oral submissions.²⁰ The Commission was

clearly anti-abortion. SPUC employed two Queen’s Counsel who aggressively attacked those making pro-abortion submissions. The Commission sat for nearly 2 years at a cost of a quarter of a million dollars, and released their report in April 1977.²¹ They agreed with SPUC proponents that human life begins at conception. They recommended changes to the *Crimes Act*, including the setting up of a statutory committee to oversee the working of abortion law, and the establishment of panels to decide whether an abortion being sought was justified under the law. Each panel was to comprise two doctors and a non-voting social worker, and operate under the oversight of the statutory committee. The aim was a reduction in the number of abortions taking place.

Dismayed by the recommendations, which would make abortion law even more restrictive than the status quo, pro-abortion groups demonstrated in force and ALRANZ lobbied Parliament. SPUC launched a huge public campaign with full-page advertisements in newspapers,²² had brochures delivered to all households nation-wide, and called for pro-life supporters to write to the prime minister and other ministers of Parliament.¹⁹

The *Contraception, Sterilisation and Abortion Bill* was introduced into Parliament in August 1977, based on recommendations from the Royal Commission. The Bill was rushed through with no discussion regarding abortion at Select Committee, and was passed under urgency in December. Getting an abortion was now much more difficult. Women seeking consideration for abortion must be referred by their GP to two certifying consultants, one of whom must be an O&G specialist, and neither to be the operating doctor. An Abortion Supervisory Committee was established to appoint and regulate the certifying consultants and decide which institutions would be licenced to provide abortions. Neither socio-economic hardship, rape, incest, the health of the mother nor carrying a grossly abnormal baby that would be born with serious handicaps were grounds for an abortion. On a positive note, the *Bill* specified that hospital boards were to fund abortions.

The passing of the 1977 *Contraception, Sterilisation and Abortion Act (CSA)* led to the abrupt closure of AMAC. Across the country, feminist groups raced to set up the Sisters Overseas Service to help women travel to Australia to have their abortions. There was public outcry, and calls for the *Act* to be repealed, but this was unsuccessful. However, there were some amendments made to the *Crimes Act* in December 1977 and to the

Crimes and CSA Acts in July 1978. The clause “*and the danger cannot be averted by any other means*” was removed, and foetal abnormality was a legal ground for abortion but only up to 20 weeks gestation. Abortion of a pregnancy resulting from incest was also lawful. The pregnancy being due to rape or occurring at either extremity of child-bearing age remained not being legal grounds for abortion in themselves, although these factors could be taken into consideration.

The Abortion Supervisory Committee gave licences to a number of public hospitals to perform abortions, but they declined AMAC’s application, which meant that the clinic had to remain closed. The Committee struggled to appoint the necessary number of certifying consultants, and it became clear that the *Act* was not working. Eventually, in 1979, an appeal by AMAC to be granted a licence was successful, and the clinic opened again.

SPUC protested the clinic reopening with rallies and calls to further amend the law. AMAC was regularly picketed. Staff faced threatening phone calls and protestors outside their homes, waving placards and planting wooden crosses in their gardens. However, slowly public clinics were set up by Auckland, Wellington and Christchurch hospitals, and by the mid-1980s, Aotearoa New Zealand women were served by one private and three public abortion services. Over the next two decades, the four main clinics (Auckland Medical Aid Centre, Epsom Day Unit, Parkview and Lyndhurst) provided the vast majority of abortions in Aotearoa New Zealand.

During this period, Aotearoa New Zealand saw unprecedented protests for and against abortion, with petitions, rallies and marches on Parliament. There was a further arson attack at AMAC in 1984, and Epsom Day Hospital suffered fire-bombing in 1985 and 1987. At Parkview in Wellington, patients and staff had to make their way past protesters waving banners to get to the front door. Lyndhurst in Christchurch was firebombed in May 1985 before it even opened its doors,²³ and suffered a further arson attack in October 1989. In 1999, a man tunnelled under the perimeter fence, broke through under the floorboards, and was in the process of planting a bomb when he was apprehended by the police.

Over time things quietened down, and by the 1990s abortion took less of a front-seat role in politics. Abortion providers found ways to make the law work, and most women who needed an abortion could get one.

Although Aotearoa New Zealand had led the

way with the women’s right to vote, it was more conservative regarding abortion than many other countries. Laws had been passed in England in 1967 and Australia in 1969 justifying abortion if a woman’s mental health would suffer from a continued pregnancy. Importantly, in 1973 the United States Supreme Court hearing *Roe v Wade* recognised abortion as a constitutional right.

Over the years SPUC attempted to introduce more restrictive laws, such a Bill proposing that all foetuses be officially registered in the national Registrar of Births, Deaths, and Marriages (requiring death certificates for all miscarriages), and one requiring that girls under the age of 16 must notify their parents before having an abortion, but these did not progress.

Aotearoa New Zealand society became much more broadminded, with the passing of the *Homosexual Law Reform Act* in 1986, decriminalising consensual sexual conduct between men,²⁴ contraceptives able to be freely provided to those aged under 16 under amendment to the *CSA Act* in 1990²⁵ and decriminalisation of prostitution in 2003. However, the abortion legislation persisted. Providers had found ways to work around a bad law. A law change might make the situation worse, and for many years those who were pro-abortion had little desire to rock the boat.

During the 2010s, a wave of international abortion reform law changes in countries such as Canada, India and Brazil led to a renewed campaign by Aotearoa New Zealand abortion rights advocates to decriminalise abortion. ALRANZ and other abortion rights groups argued that abortion was a health and reproductive rights issue.

By 2017 a poll found that a majority of New Zealanders supported legalisation of abortion. The Law Commission drafted some proposals to help realign abortion law towards a health approach. The turning point was the second leader’s general election debate in September 2017. Labour leader Jacinda Arden clearly articulated her stand on abortion when she told Prime Minister Bill English that in her opinion, abortion should not be in the *Crimes Act*. She became prime minister in October 2017.

The *Abortion Legislation Act 2020* was enacted on 24 March 2020, the day before Aotearoa New Zealand went into Alert Level 4 lockdown due to the COVID-19 pandemic. It removed abortion from the *Crimes Act*. The Abortion Supervisory Committee was abolished, and its responsibilities given to the Minister of Health and to the

Director-General of Health. Any qualified health practitioner may now provide abortion services up to 20 weeks gestation. When a woman is more than 20 weeks pregnant, an abortion can only be provided where clinically appropriate, and after consultation with another qualified provider. Certifying consultants are no longer required, premises do not need licencing and women may self-refer. The health practitioner must advise the woman that counselling is available, but she can decline to make use of this service.

The increased number of providers, especially for early medical abortion, and no requirement for licenced premises has increased access across the country, and development of training programmes and clinical guidelines have reduced national variation and facilitated more standardised, equitable care.

Moving from crime to care has been a long journey, but is it over? In 2022 the United States (US) has experienced the undoing of their liberal abortion laws. The Supreme Court overturned the *Roe v Wade* ruling,²⁶ which had previously decriminalised abortion nation-wide.²⁷ Individual states have now passed laws to ban abortions. Further, on 7 April 2023, Texas-based federal judge Matthew Kacsmaryk ruled to suspend the Food and Drug Administration (FDA)'s approval of mifepristone, which had been approved by regulators 23 years ago and is used in about half of abortions in the US. He argued that FDA had been wrong to approve mifepristone. This would remove the option of an early medical abortion in states where abortion is still legal. Legal authorities were concerned that this could undermine

the FDA's drug-approval authority.

This decision would further reduce access to abortion for US women. About 35 million women of reproductive age (55% of the US total) live in a county that has an abortion provider. Without medication abortion using mifepristone, this number could drop by as much as 2.4 million women, or 51% of the US total.²⁸ The Department of Justice appealed this decision. On 21 April the Supreme Court preserved the status quo of the FDA approvals, so use of mifepristone for early medical abortions remains.²⁹ Further attempts to prevent abortion services in states where it is still legal can be anticipated.

Could this happen here? This is unlikely, as in Aotearoa New Zealand legal abortion is enshrined in our law, whereas *Roe v Wade* was merely a judicial ruling. Further, Aotearoa New Zealand is a much more secular nation, and much less politically polarised than the US. However, we cannot be complacent.

The abortion struggle serves as an illustration of our changing political and social landscape. This was a remarkable period in our history, and there are many tales of extraordinary events and courageous acts. Moral crusaders, activists, legislators, abortion providers and many others on both sides of the debate put their reputations and sometimes their lives on the line to do what they thought was right. These human stories can be found in my book *From Crime to Care: the History of Abortion in Aotearoa New Zealand*, 2023, <https://www.nationwidebooks.co.nz/product/from-crime-to-care-the-history-of-abortion-in-aotearoa-new-zealand-9780473663063>.

COMPETING INTERESTS

Nil.

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