Abortion law reform and the State’s interest in protecting unborn life
Ian Bassett

The English common law, on which New Zealand law is based, has for nearly 1000 years protected human life in all its forms, with only limited exceptions such as for self-defence. In 1939 in England in *R v Bourne*¹ McNaughton J stated:

“…before even Parliament came into existence, the killing of an unborn child was by the common law of England a grave crime: see Bracton, Book III (De Corona) fol. 121. The protection which the common law afforded to human life extended to the unborn child in the womb of its mother.”

The State in New Zealand has recognised by statute its responsibility in the protection of the life of the unborn child in a systematic manner for at least 140 years.

In 1977, however, the *Royal Commission on Contraception, Sterilisation and Abortion* recommended continued statutory protection of the life of the unborn child, qualified by a pregnant woman’s right to seek a lawful abortion in certain medical circumstances.

Accordingly, in 1977, Parliament amended the Crimes Act 1961 by inserting s187A into the Crimes Act, which stipulates that procuring an abortion (s183) can be lawful in certain medical circumstances, if the pregnancy is less than 20 weeks and for stricter medical circumstances if the pregnancy is more than 20 weeks. The Contraception Sterilisation and Abortion Act 1977 was also enacted which provided that two medical consultants were necessary to certify whether such medical circumstances existed before an abortion could be rendered lawful.

That has been the law since 1977. Subsequent to 1977 there have been many judicial statements affirming the State’s interest in protecting human life including as follows:

In England in 1993 by Sir Thomas Bingham MR² who stated:

“A profound respect for the sanctity of human life is embedded in our law and our moral philosophy, as it is in that of most civilised societies in the East and the West.” [emphasis added]

In England in 1993 by Lord Justice Hoffman³ who stated:

“I start with the concept of the sanctity of life. …What matters is that, in one form or another, they [the feelings/ beliefs of “sanctity of life”/ “intrinsic value in human life”] form part of almost everyone’s intuitive values. No law which ignores them can possibly hope to be acceptable. Our belief in the sanctity of life explains why we think it is almost always wrong to cause the death of another human being….” [emphasis added]

In New Zealand in 1993 by Thomas J⁴ who stated:

“Life, and the concept of life, represents a deep-rooted value immanent in our society. Its preservation is a fundamental humanitarian precept providing an ideal which not only is of inherent merit in commanding respect for the worth and dignity of the individual but also exemplifies all the finer virtues which are the mark of a civilised order. Consequently, the protection of life is, and will remain, a primary function of the criminal law. It was said by Blackstone to be the first regard of the English law
In New Zealand in 2008 by Miller J\(^5\) who stated:

[1] “A Royal Commission on Contraception, Sterilisation and Abortion reported in 1977 that it is wrong, except for good reasons, to terminate unborn life. Whether the unborn child is regarded as a full or an incipient human being, the decision to abort it “extinguishes the potentiality of life” and so must be regarded as “a most serious step”. The status of the unborn child should not be left to the mother and her doctor to determine, and to allow the mother an abortion on request “would be to deny to the unborn child any status whatever”. Such an approach would permit abortion “for reasons of social convenience”, which is morally wrong. Rather, the unborn child has a status that merits protection in law. That protection “should yield in the face of compelling competing interests”, in the form of serious danger to the mother’s life or physical or mental health.” [emphasis added]

[5] “… the legislature has recognised, through the abortion law, that the unborn child has a claim on the conscience of the community, and not merely that of the mother. It has recognised that interest by prescribing that abortions may be authorised by the certifying consultants only where they believe, in good faith, that continuance of the pregnancy would result in serious danger to the mother’s life or health.” [emphasis added]

Notwithstanding all of the above, Prime Minister Jacinda Ardern, by letter,\(^6\) advised Mr Andrew Little as the current Minister of Justice that “… we have been considering how to make changes to ensure that New Zealand’s abortion laws are consistent with treating abortion as a health issue that is a reproductive choice for women, rather than as a criminal issue.”

In the same letter Prime Minister Ardern requested the Minister of Justice to refer this matter “… to the Law Commission, under s7 of the Law Commission Act 1985, to review and report back within 8 months. The scope of any such review should be confined to looking at the provisions of the Crimes Act 1961 and related offences to ensure that such law and the accompanying procedural requirements are consistent both with treating abortion as a health rather than a criminal issue and are aligned with modern language. The offence for killing an unborn child should fall outside the scope of the review.”

By letter dated 27 February 2018 the Minister of Justice complied with the Prime Minister’s request by referring the matter to the Law Commission and requesting under s7(3) of the Law Commission Act 1985 “… advice on what alternative approaches could be taken in our legal framework to align with a health approach.”

The advice requested from the Law Commission is therefore of very limited scope, notwithstanding that the Law Commission was directed to seek input from appropriate health professionals and input from the public.

It would be of concern if the Law Commission, in its advice to the Minister of Justice, merely provided (as requested) “… advice on what alternative approaches could be taken in our legal framework to align with a health approach” and omitted to outline the obvious historical and policy justifications for the State interest in the protections of human life in the context of abortion.
Since February 2018 numerous media articles and reports have repeated the theme that “…abortion should be taken out of the Crimes Act…”, without attempting to address the critical questions for society, which are if, when, why and on what basis the termination of human life could be permitted or justified.

The reason why s182 of the Crimes Act provides that killing an unborn child is a serious offence and why s183 provides that procuring an abortion is also an offence is that both offences involve the taking of human life. That is why both offences are in the Crimes Act in the first place. It would also be of concern if the law reform proposal was to remove those statutory protections without broad public and reasoned debate.

Parliamentary sovereignty means that Parliament can legislate if it chooses to remove the statutory protections of human life in a particular context.

Lord Hoffman in England’s highest court, then the House of Lords, in 1999 in R v Secretary of State Ex parte Simms famously stated however: “…the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.”

There needs to be a reasoned general public debate about Prime Minister Ardern’s proposal, failing which the wider policy issues and the gravity of the proposed law change may pass unnoticed in the democratic process. Proponents of the proposed law change ought to provide coherent reasons and justify why they say the current statutory protections of human life should be removed in the context of abortion.

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Endnotes

1 [1939] 1 KB 687 at 690 (KB)
2 Airedale NHS Trust v Bland [1993] AC 789 at 808 (CA); [1993] 1 All ER 821 at 835 (CA)
3 Airedale NHS Trust v Bland (CA) supra at pp 826-827; [1993] 1 All ER 821 at 851 (CA)
4 Auckland Area Health Board v Attorney- General [1993] 1 NZLR 235 at 244 (HC); AAHB v AG is referred to in Bland HL supra AC at 863, 867.
5 Right to Life v Abortion Supervisory Committee [2008] 2 NZLR 825 (HC) commenced his judgment by referring to the 1977 Royal Commission (then chaired by then Court of Appeal Judge Sir Duncan McMullin) as above.
6 In late 2017 or early 2018 by undated letter.
7 [1999] 3 All ER 400 at 412 (HL)