
Obstetrician and Gynaecologist

Report on Opinion - Case 97HDC9291

Complaint

The Commissioner received a complaint about the services provided to the consumer by the provider, an obstetrician and gynaecologist. The complaint was that:

- *In early March 1997 the consumer consulted the provider about a termination of pregnancy (abortion). The provider did not fully explain the procedure or possible side effects of the operation to her.*
 - *The following day the consumer had an abortion at a private hospital. This operation was carried out without proper determination by two certifying consultants authorising the abortion under the Contraception, Sterilisation and Abortion Act 1977.*
 - *At no time was the consumer offered or referred to counselling.*
-

Investigation Process

The Commissioner received the complaint from the Medical Council of New Zealand on 20 October 1997 and an investigation was commenced on 21 November 1997. Information was obtained from:

The consumer

The provider, an obstetrician and gynaecologist

A general practitioner

Medical director of an accident and medical clinic

A pregnancy counselling service

The Commissioner also viewed the consumer medical records from three hospitals, an accident and medical clinic and a family care provider.

Additionally, the consumer's records were obtained from the Accident Rehabilitation and Compensation Insurance Corporation (ACC).

The Commissioner received information from the Abortion Supervisory Committee (the ASC), the Health Funding Authority, and advice from a specialist obstetrician and gynaecologist.

Obstetrician and Gynaecologist

Report on Opinion - Case 97HDC9291, continued

**Information
Gathered
During
Investigation**

In late February 1997 the consumer went to an accident and medical clinic. She underwent a pregnancy test, which was positive. An ultrasound in early March 1997 confirmed that she was between 15 and 16 weeks pregnant. The consumer had been recently married and did not wish the pregnancy to continue for health reasons (as she had back problems) and financial reasons. That day the consumer saw a general practitioner from a family care provider service about an abortion. The general practitioner (GP) examined the consumer and referred her to an obstetrician for an abortion. There is no record of the discussion between the GP and the consumer or copy of the referral letter from the GP to the obstetrician.

At 3.10pm five days later the consumer had a consultation with an obstetrician and gynaecologist (the provider), who examined her and confirmed her pregnancy and dates. At that consultation, the provider gave the consumer some written information relating to the procedure entitled "*The Abortion – What it's like*", which included a section labelled "*Possible Complications from Abortion*". The information described the surgical procedure in detail and listed some of the complications associated with an abortion. The list of complications included collection of blood clots, infection, incomplete abortion, perforation or damage of the wall of the uterus or other organs, a tear in the cervix, and excessive bleeding which may require a blood transfusion. The information warned that 1 out of every 250,000 women will die as a result of an abortion. The information also outlined the risks of failure to conceive again, increased risk of miscarriage and premature birth in future pregnancies. The list did not include repeated bleeding from an Arterio-Venous malformation (AV malformation) of the uterus. An AV malformation is an abnormal collection of blood vessels in the uterus, present at birth and which develops during the course of the woman's life. There was no information about any potential psychological effects following an abortion. The provider advised the Commissioner that:

"Before giving this [information] to a patient I normally describe the admission to hospital and outline that the procedure will be done under local anaesthetic and confirm with the patient that they understand that. [The consumer] read the form while sitting at my desk and I asked her to ask any questions or make any comments while doing so."

Continued on next page

Obstetrician and Gynaecologist

Report on Opinion - Case 97HDC9291, continued

Information Gathered The provider stated he did not recall if any questions or comments arose from the information provided to the consumer.

During Investigation The provider also advised that:

continued

"I take particular care to check with patients considering termination of pregnancy that... the patient does want to have the procedure done. She [the consumer] was asked clearly in my rooms and again when I first saw her in [the hospital where the abortion was performed] if she was sure of her decision... The nursing staff are requested to check the consent form but also check the verbal consent of the patient when admitted to hospital..."

The provider's notes of the consultation state, among other things, "Depressed/Sure of decision". The consumer advised the Commissioner that she had never been depressed and wanted the abortion because of a back injury and for financial reasons.

The consumer signed a consent form for the abortion dated early March 1997. The provider did not offer the consumer counselling at any stage.

The provider is a certifying consultant for the purpose of authorising an abortion. He telephoned the second certifying consultant who also agreed to authorise the abortion. The consultant did not interview or examine the consumer. Rather, the provider advised the Commissioner that a consultation by phone with a second certifying consultant is his normal practice if the patient has been referred to him by a doctor for consideration of an abortion. The basis of the consultant's assessment was therefore the provider's verbal advice.

The "Certificate of Certifying Consultants Authorising an Abortion" was signed by the provider and the consultant and dated the same day. In the box under the heading "*in our opinion an abortion is justified on the following ground*" there is the entry "*mental health*".

The following day the consumer went to hospital and was admitted at 9.30am. At approximately 11am the provider saw the consumer and dilated her cervical canal with a single dilapan rod. The provider stated that he confirmed with the consumer that she was sure she wanted to go ahead with the procedure.

Continued on next page

Obstetrician and Gynaecologist

Report on Opinion - Case 97HDC9291, continued

**Information
Gathered
During
Investigation
*continued***

The provider carried out the abortion under local anaesthetic. The operation commenced at 4.55pm and was completed at 5.10pm. The procedure was described in her notes as *uneventful*. The hospital notes record that the consumer was discharged at approximately 7.20pm.

The provider wrote to the GP at the family care provider service informing her about the operation and requesting that she resume the consumer's care. There is no indication that the consumer returned to see the GP.

Following the operation the consumer experienced severe ongoing physiological and psychological problems. From March to October 1997 she had severe vaginal bleeding and infections requiring blood transfusions, surgical intervention and antibiotic therapy.

In mid-March, early April, early and mid-August and mid-September 1997 the consumer required surgical intervention, by way of dilation and curettage (D&C), to control bleeding. In all but the last of these operations retained products of conception were removed. This condition was listed as one of the most common complications of abortion in the information given to the consumer by the provider in March 1997. The consumer also suffered depression and sought counselling from a counselling service.

At the end of September 1997 the consumer haemorrhaged severely. She was transferred to a different Hospital where an angiogram of the uterine artery diagnosed a uterine AV malformation as the cause of the bleeding. In early October 1997 at this hospital the consumer had a uterine artery embolisation for AV malformation resulting in the loss of half of her uterus. (Embolisation is a surgical process of injecting a chemical into a vessel to induce clotting and prevent bleeding). The embolisation successfully stopped the discharge and bleeding and the consumer's condition stabilised. The consumer has since been found to have developed endometriosis (abnormal growth of tissue in and around the uterus), although it is unclear whether this is as a result of the abortion. The consumer continues to suffer from depression.

Continued on next page

Obstetrician and Gynaecologist

Report on Opinion – Case 97HDC9291, continued

**Information
Gathered
During
Investigation
*continued***

The consumer made a medical misadventure claim to ACC in respect of these events. Two gynaecologists contacted by ACC advised that the consumer's chances of becoming pregnant again are "good" and "pretty good, 70-80%, essentially normal". However, a general practitioner who conducted an impairment assessment for ACC, advised ACC that he believed there was still some cause for concern.

The consumer's claim for medical misadventure was accepted by ACC in late September 1997. The Medical Misadventure Advisory Committee considered that retained products of conception following an abortion, requiring three D&C's, with further treatment expected was rare and severe and therefore qualified as medical mishap. ACC later accepted that the AV malformation was also a complication of the abortion. The consumer's entitlement to ACC Compensation was terminated in early July 1998.

The provider advised the Commissioner that an AV malformation is not regarded as a recognised complication of abortion. ACC's general practitioner advisor considered the AV malformation to be a rare complication of abortion. An obstetrician and gynaecologist advisor to ACC stated in a letter to ACC dated early May 1998:

"...We do not know whether [the consumer] had an AV malformation present prior to her termination of pregnancy... [or whether] the miscarriage brought it to the light... it is a possible consequence of abortion although extremely remote and the literature would be divided on whether it is cause and effect."

Obstetrician and Gynaecologist

Report on Opinion – Case 97HDC9291, continued

**Independent
Advice to
Commissioner**

AV Malformation

In addition to the above advice, the Commissioner also sought advice from a specialist obstetrician and gynaecologist. The advisor stated that AV malformation was a rare complication of abortion and he had never seen an AV abnormality in 20 years of practice. He advised that the abnormality is congenital and the abortion procedure would have scraped the surface and started the bleeding. The bleeding clots for a while and then recommences. He said that many women can live and die and not know they have this type of abnormality. The AV malformation is so rare that the advisor stated he would not include the risk of such a malformation in any pre operative explanation of risks to the consumer.

The advisor concluded that the history of repeated D&Cs is very common after an abortion and is not the fault of the consulting surgeon. The Commissioner was advised that it is impossible to explain all possible complications.

Professional Guidelines

The Commissioner sought information about guidelines used by the profession in determining grounds for abortion. The Abortion Supervisory Committee advised the Commissioner that:

“...the Committee has not set any such minimum guidelines or standards [for approval of abortions by certifying consultants], nor does the Committee consider it appropriate for it to do so. The grounds for the abortion are set out in s.187A of the Crimes Act 1961 and the procedures to be followed, as you point out, are set out in ss.32 and 33 of the Contraception, Sterilisation, and Abortion Act 1977...

You also ask whether “both certifying consultants have a legal obligation to examine a woman seeking an abortion”. I would bring to your attention the provisions of s32(5) of the Act where it would seem that there is no legal obligation for the certifying consultant to examine the woman. It is the Committee’s understanding that the provisions of s.32(5) are unlikely to have ever resulted in both certifying consultants not examining the woman.”

Obstetrician and Gynaecologist

Report on Opinion – Case 97HDC9291, continued

**Response to
Commissioner's
Provisional
Opinion**

In accordance with Section 63 of the Health and Disability Commissioner Act 1994 the Commissioner sent her provisional report to the Abortion Supervisory Committee and the provider for comment.

In early November 1999 the Chairperson of Abortion Supervisory Committee (ASC) advised the Commissioner that:

“The Committee considers it important to make the distinction between the various procedural steps set out in s.32 of the Contraception, Sterilisation and Abortion Act 1977 where a woman wishes to have an abortion and the consideration by the Certifying Consultants of the criteria in s.187A of the Crimes Act 1961 in that process. The Committee interpreted your original question [ie Whether the ASC has set minimum guidelines or standards for approval of abortions for certifying consultants?] to refer only to the medical consideration of the criteria. The Committee notes the passage in Wall v Livingston [1982] 1 NZLR 734 at 738 where the Court of Appeal said:

“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....

Secondly, the whole process of authorisation appears designed to place fairly and squarely upon the medical profession as represented in any particular case by the certifying consultants a responsibility to make decisions which would depend so very much upon a medical assessment pure and simple.”

Continued on next page

Obstetrician and Gynaecologist

Report on Opinion – Case 97HDC9291, continued

**Response to
Commissioner's
Provisional
Opinion
continued**

It is the Committee's opinion that it would be inappropriate for it to issue guidelines as to how the Medical Practitioner's come to their decision as to the application of s.187A. Indeed, if the committee were to issue guidelines, the Court would very likely declare them to be invalid – see New Zealand Private Hospitals Association v Accident Compensation Corporation [1988] 2 NZLR 645 at 651 where the Court of Appeal referred to an earlier decision of the Chief Justice in Attorney-General v Accident Compensation Corporation (Wellington A 453/79, 10 February 1992).

However, the Committee does supply Certifying Consultants with relevant information when they are appointed. To that end each Certifying Consultant is sent on appointment the following documents:

- 1. Notes for the guidance of Certifying Consultants in the use of forms of certification and reporting.*
- 2. Copies of the relevant legislation, namely the "Contraception, Sterilisation, and Abortion Act 1977" and an extract from the "Crimes Act 1961".*
- 3. The current list of appointed Certifying Consultants.*
- 4. A set of ASC3 forms (certificates of Certifying Consultants authorising an abortion) which incorporate the report from the Certifying Consultant to the Abortion Supervisory Committee for each consultation.*
- 5. Copies of the form of claim for reimbursement.*
- 6. The current list of hospitals licensed to perform abortions.*
- 7. Standards of practice for the provision of counselling.*
- 8. Dr A I F Simpson – Interpretation of "Reactive Depression" within the context of s.187A of the Crimes Act 1961.*

Continued on next page

Obstetrician and Gynaecologist

Report on Opinion – Case 97HDC9291, continued

**Response to
Commissioner's
Provisional
Opinion
*continued***

In addition, Certifying Consultants are provided with other background information as it is brought to the attention of the Committee. A recent example would be the paper on "Induced Abortion" produced by the Scientific Advisory Committee of the Royal College of Obstetricians and Gynaecologists, London which is supplied for information only. They are also sent copies of the Committee's Annual Reports to Parliament....

...it is not correct to say that "the ASC has advised me that it expects a woman will have been seen by at least one certifying consultant before the procedure is authorised." That could be read as suggesting that a woman may not in fact be seen by either Certifying Consultant before the abortion is authorised. What the Committee said was "it is the Committee's understanding that the provisions of s.32(5) are unlikely to have ever resulted in both Certifying Consultants not examining the woman." The Committee is clearly not able to say that that may not have occurred in the 200,000 abortions that have been performed in the last 22 years but it is the Committee's opinion it is most unlikely. An audit has also been taken on the 932 notification of abortions the Committee received in the first 15 days of October 1999, and in 839 (90%) of cases, one of the Certifying Consultants was also the operating surgeon. In the other 93 cases (10%), the operating surgeon was not a Certifying Consultant. The responsibility for operating surgeons rests with the licence holder and the management of the hospital or clinic. But before performing the abortion the operating surgeon is required to be satisfied, after considering the case, that it is one to which the appropriate paragraphs of s.187A apply."

Obstetrician and Gynaecologist

Report on Opinion - Case 97HDC9291, continued

**Code of
Health and
Disability
Services
Consumers'
Rights**

RIGHT 4

Right to Services of an Appropriate Standard

- 2) *Every consumer has the right to have services provided that comply with legal, professional, ethical, and other relevant standards.*

RIGHT 6

Right to be Fully Informed

- 1) *Every consumer has the right to the information that a reasonable consumer, in that consumer's circumstances, would expect to receive, including...*
- b) *An explanation of the options available, including an assessment of the expected risks, side effects, benefits, and costs of each option; and...*
 - e) *Any other information required by legal, professional, ethical and other relevant standards; and...*
- 2) *Before making a choice or giving consent, every consumer has the right to the information that a reasonable consumer, in that consumer's circumstances, needs to make an informed choice or give informed consent.*
-

Obstetrician and Gynaecologist

Report on Opinion - Case 97HDC9291, continued

**Relevant
Legislation**

The law relevant to the abortion procedure is contained in two statutes, the Contraception, Sterilisation, and Abortion Act 1977 and the Crimes Act 1961. Provisions of these two statutes which are relevant to this complaint are set out below.

Contraception, Sterilisation, and Abortion Act 1977

14. Functions and Powers of Supervisory Committee –

- (1) *The Supervisory Committee shall have the following functions:*
- (a) *To keep under review all the provisions of the abortion law, and the operation and effect of those provisions in practice...*
 - (e) *To take all reasonable and practicable steps to ensure that sufficient and adequate facilities are available throughout New Zealand for counselling women who may seek advice in relation to abortion...*
 - (h) *To keep under review the procedure, prescribed by sections 32 and 33 of this Act, whereby it is to be determined in any case whether the performance of an abortion would be justified;*
 - (i) *To take all reasonable and practicable steps to ensure that the administration of the abortion law is consistent throughout New Zealand, and to ensure the effective operation of this Act and the procedures thereunder...*

29. Abortions not to be performed unless authorised by 2 certifying consultants –

Subject to the provisions of this Act, no abortion shall be performed unless and until it is authorised by 2 certifying consultants.

Continued on next page

Obstetrician and Gynaecologist

Report on Opinion - Case 97HDC9291, continued

**Relevant
Legislation
continued**

32. Procedure where woman seeks abortion

- (1) *Every registered medical practitioner (in this section referred to as the woman's own doctor) who is consulted by or in respect of a female who wishes to have an abortion shall, if requested to do so by or on behalf of that female, arrange for the case to be considered and dealt with in accordance with the succeeding provisions of this section and of section 33 of this Act.*
- (2) *If, after considering the case, the woman's own doctor considers that it may be one to which any of paragraphs (a) to (d) of subsection (1), or (as the case may require) subsection (3), of section 187A of the Crimes Act 1961 applies, he shall comply with whichever of the following provisions is applicable, namely:*
 - (a) *Where he does not propose to perform the abortion himself, he shall refer the case to another registered medical practitioner (in this section referred to as the operating surgeon) who may be willing to perform an abortion (in the event of it being authorised in accordance with this Act)...*
- (3) *Where an operating surgeon to whom a case is referred under subsection (2)(a) of this section is satisfied, after considering the case, that it is one to which any of paragraphs (a) to (d) of subsection (1), or (as the case may require) subsection (3), of section 187A of the Crimes Act 1961 applies, he shall, if he is willing to perform the abortion, either –*
 - (a) *If he is himself a certifying consultant, refer the case to one other certifying consultant (who shall be a practising obstetrician or gynaecologist if the operating surgeon is not, and who shall not be the woman's own doctor) with a request that he, together with the operating surgeon, determine, in accordance with section 33 of this Act, whether or not to authorise an abortion; or...*
- (5) *As soon as practicable after a case is referred to him, each certifying consultant shall consider the case and shall, if requested to do so by the patient, interview her; and at any such interview she shall be entitled to be accompanied by her own doctor (if he agrees).*
- (6) *The woman's own doctor and the proposed operating surgeon shall be entitled (with the patient's consent) to make such representations and to adduce such medical or other reports concerning the case as he thinks fit to each certifying consultant...*

Continued on next page

Obstetrician and Gynaecologist

Report on Opinion - Case 97HDC9291, continued

**Relevant
Legislation
continued**

- (8) *Notwithstanding anything in this section, or in section 33 of this Act, no certifying consultant shall be obliged to determine any case without first interviewing and examining the patient.*

33. Determination of case

- (1) *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 (as the case may require) subsection (3), of section 187A of the Crimes Act 1961 applies, they shall forthwith issue in accordance with subsection (5) of this section, a certificate in the prescribed form authorising the performance of an abortion...*
- (5) *Where 2 certifying consultants determine that they should authorise an abortion, they shall... forward the said certificate to the holder of the licence in respect of the licensed institution in which the abortion is to be performed.*

35. Counselling

When the certifying consultants have made a decision in any case (whether they have decided to authorise or to refuse to authorise the performance of an abortion), they shall (in consultation, where practicable, with the woman's own doctor) advise her of her right to seek counselling from any appropriate person or agency.

37. Offences

- (1) *Every person who...*
- (b) *Performs an abortion otherwise than in pursuance of a certificate issued by 2 certifying consultants under section 33 of this Act, -*
commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding \$1,000...

Continued on next page

Obstetrician and Gynaecologist

Report on Opinion - Case 97HDC9291, continued

**Relevant
Legislation
continued**

40. Protection of persons acting in good faith –

No member of the Supervisory Committee, and no certifying consultant, shall be personally liable for any act done or omitted to be done by it or him in good faith in pursuance of the powers conferred on it or him by this Act.

Crimes Act 1961

s187A. Meaning of “unlawfully” –

- (1) *For the purposes of sections 183 and 186 of this Act, any act specified in either of those sections is done unlawfully unless, in the case of a pregnancy of not more than 20 weeks' gestation, the person doing the act believes –*
- (a) *That the continuance of the pregnancy would result in serious danger (not being danger normally attendant upon childbirth) to the life, or to the physical or mental health, of the woman or girl...*
- (4) *Where a registered medical practitioner, in pursuance of a certificate issued by 2 certifying consultants under section 33 of the Contraception, Sterilisation, and Abortion Act 1977, does any act specified in section 183 or section 186 of this Act, the doing of that act shall not be unlawful for the purposes of the section applicable unless it is proved that, at the time when he did that act, he did not believe it to be lawful in terms of subsection (1) or subsection (3) of this section, as the case may require.*
-

Obstetrician and Gynaecologist

Report on Opinion - Case 97HDC9291, continued

**Opinion:
Breach** In my opinion the provider breached Right 4(2), Right 6(1) and Right 6(2) of the Code of Health and Disability Services Consumers' Rights as follows:

Right 4(2)

Right to Counselling

The provider considered the consumer's case and, after consultation with the second certifying consultant, decided to authorise an abortion. The provider did not advise the consumer that she had the right to seek counselling from any appropriate person or agency, nor did the provider advise the consumer's doctor to refer her to an appropriate counselling service. Failure to advise the consumer of her right to seek counselling is a breach of section 35 of the Contraception Sterilisation and Abortion Act, which constitutes a legal standard for practice. Therefore, in my opinion this was a breach of Right 4(2) of the Code.

Rights 6(1) and 6(2)

Information about the Possibility of an Interview

Most women seeking an abortion would be unaware of the possibility (under Sections 32(5) of the Sterilisation Contraception and Abortion Act) of having an interview with the second certifying consultant unless it was specifically brought to their attention. Indeed, the consumer was unaware in this case. Further, the consumer was unaware that at such an interview she was entitled to be accompanied by her own doctor. The provider breached Right 6(1)(b) as he did not inform the consumer that she could request an interview.

Although the Contraception Sterilisation and Abortion Act does not require a certifying consultant to inform a patient of the possibility of requesting an interview, in my opinion a reasonable consumer in the consumer's circumstances would expect to have this information in order to make an informed choice about whether to see the second consultant. The consumer could not be expected to know the details of the Contraception Sterilisation and Abortion Act in this regard. In my opinion the provider's failure to inform the consumer was a breach of Right 6(2) as he denied her a choice in the matter.

Continued on next page

Obstetrician and Gynaecologist

Report on Opinion – Case 97HDC9291, continued

Opinion:
Breach
continued

Counselling

In my opinion the provider's failure to advise the consumer of her right to seek counselling in terms of section 35 of the Contraception Sterilisation and Abortion Act, as set out above, was a breach of Right 6(1)(e) of the Code.

Abortion services are by nature sensitive and a decision to undergo an abortion is a serious one. Therefore, the provider, as the certifying consultant, should have provided all relevant information about the procedure, including information about the availability of counselling. The provider should also have provided information about possible psychological side effects of the procedure and failure to advise the consumer is a breach of Right 6(1)(b).

Right 4(2)

Records

In my opinion the provider failed to meet professional standards with regard to his record-keeping. It is generally accepted that medical practitioners must keep accurate and sufficient records, not only for their own purposes, but also to ensure proper co-ordination with other providers should the need arise. In my opinion the provider's record of "*depressed; sure of decision*" was inadequate to meet this standard in these particular circumstances and constituted a breach of Right 4(2).

In acting as a certifying consultant under the Contraception Sterilisation and Abortion Act, the provider had certain legal obligations to fulfil. In particular, s.32(3) of the Contraception Sterilisation and Abortion Act required the provider to consider the case and, if satisfied that any of paragraphs (a) to (d) of s.187A(1) or s.187A(3) of the Crimes Act applied, to refer this case to one other certifying consultant. Under s.187 of the Crimes Act the provider had to be satisfied that in his opinion a continuation of the pregnancy was a "*serious danger*" to the physical or mental health of the consumer. These are weighty considerations and in my opinion when such decisions are being made pursuant to statutory authority a commensurate level of record keeping is required, not to dispute the provider's medical opinion, but rather, to demonstrate that appropriate medical assessment occurred.

Continued on next page

Obstetrician and Gynaecologist

Report on Opinion - Case 97HDC9291, continued

**Opinion:
Breach
*continued***

Failure to keep adequate notes and retain the referral letter means it is very difficult to show that decisions made in accordance with this statutory authority are made with proper determinations. The provider provided evidence of his usual practice when acting as a certifying consultant, but could not recall the specifics of this particular case. It remains unclear to me on the basis of information provided including the records, the process of assessment the provider undertook to be able to determine the consumer being depressed and the pregnancy being a "serious danger" to her mental health. The consumer advised me that she was not depressed and the provider advised me that his assessment of depression does not necessarily mean depressed in the strict sense of the word but that circumstances at the time make the patient depressed.

**Opinion:
No Breach**

In my opinion the provider did not breach Right 6(1) of the Code of Health and Disability Services Consumers' Rights as follows:

Explanation of Procedure and Possible Side Effects

The consumer stated that the abortion procedure was not explained to her. However, the information sheet she was given outlines the procedure in considerable detail. In my opinion this information provided a reasonable explanation of the procedure to be undertaken to allow the consumer to make an informed choice and give informed consent to the procedure.

The information the provider gave the consumer set out many of the risks associated with an abortion. These included the possibility of haemorrhage and the need for blood transfusion. The information set out the possibility of incomplete abortion requiring D&C as one of the most common complications of an abortion, occurring in 2% of cases. However, in my opinion – based on the ACC files and its finding of medical mishap – five D&C procedures would not be an expected side effect of an abortion. The provider did not advise the consumer about the possibility of an AV malformation or how such a malformation could be effected by an abortion. I was advised by a specialist obstetrician that an AV malformation is a rare occurrence.

Continued on next page

Obstetrician and Gynaecologist

Report on Opinion - Case 97HDC9291, continued

Opinion:
No Breach
continued

It is impossible for a doctor to explain to a consumer all the potential side effects of a procedure, nor does the Code of Rights require this. The Code requires a doctor to give the consumer information that a reasonable consumer in that consumer's circumstances would expect to receive, including an assessment of the expected side effects. The rarity of AV malformation and information on the consequences of an abortion on this malformation, is in my opinion not information the consumer could reasonably have expected to receive prior to the abortion.

The provider did not breach Right 6(1) of the Code in respect of this matter.

Determination for the Abortion

In respect of the consumer's abortion a "Certificate of Certifying Consultants Authorising Abortion" dated early March 1997 was signed by the two certifying consultants, stating that in their opinion the abortion was justified on the grounds of "mental health".

However, as reported above, the provider's record-keeping was inadequate and he was unable to elaborate on the specific reasons for his determination under section 33. Therefore I am unable to form an opinion on the consumer's complaint that the operation was undertaken without proper determination.

Other
Comments

Section 14(1)(f) of the Health and Disability Commissioner Act 1994 enables the Commissioner to make public statements on any matter affecting the rights of consumers. This investigation would not be complete without general discussion and comment on record-keeping and the role of the Abortion Supervisory Committee.

Continued on next page

Obstetrician and Gynaecologist

Report on Opinion - Case 97HDC9291, continued

**Other
Comments
*continued***

Record Keeping

In failing to keep good records a medical practitioner may be unable to satisfactorily answer a complaint by a consumer under the Code of Health and Disability Services Consumers' Rights. The Act and the Code of Rights have been enacted since the CSA and since *Wall v Livingston* was decided. The Health and Disability Commissioner legislation provides consumers with certain important rights when receiving health services. In my opinion, although the CSA does not require that the "face of the record" will include reasons, the face of the record should be distinguished from the provider's medical notes. It is most unwise for referring practitioners and certifying consultants not to keep an adequate medical record that demonstrate the assessment upon which they reached their decisions under relevant legislation. As has been demonstrated in this case, failure to do so opens providers up to being unable to defend complaints against them about whether they provided health services in a satisfactory manner.

Role and Functions of the Abortion Supervisory Committee (ASC)

The functions of ASC include the review of the abortion law (that is, the provisions of the Contraception Sterilisation and Abortion and the Crimes Act relating to abortions), its operation and practice, and a review of the procedure prescribed by sections 32 and 33 of the Contraception Sterilisation and Abortion Act. The ASC has not interpreted this to include the provision of guidelines or standards to be followed by certifying consultants when determining whether or not to authorise the performance of an abortion. The ASC advised that it does not consider it appropriate to do so, as the Contraception Sterilisation and Abortion Act and the Crimes Act set out the grounds for abortion and copies of each of these statutes are made available to each certifying consultant on being appointed. However in my view the establishment of guidelines is within the jurisdiction of the ASC and my investigation into this and other cases has indicated that merely making copies of forms and copies of the legislation available to certifying consultants on appointment is ineffective in ensuring that "*the administration of the abortion law is consistent throughout New Zealand*" as required by ss14(1)(i) Contraception Sterilisation and Abortion Act. Doctors are not lawyers and the complexity of the legislation governing abortions should be recognised.

Continued on next page

Obstetrician and Gynaecologist

Report on Opinion – Case 97HDC9291, continued

**Other
Comments**
continued

Guidelines Concerning Interview by Certifying Consultant

The role and functions of the certifying consultant is an area where guidelines would be useful to ensure consistency in practice. The legislation as it currently stands does not seem to require an interview with the consumer by either certifying consultant (See section 32(5) of the Contraception Sterilisation and Abortion Act). Nor does there appear to be any professional standards or guidelines on this matter. In my view the ASC's expectations of practitioners in this regard should be made clear.

Actions

I recommend that the provider takes the following actions:

- Apologises to the consumer for breaching Right 4(2) and Rights 6(1) and 6(2) of the Code of Rights. This apology is to be sent to the Commissioner who will forward it to a consumer.
 - Amends the information he provides to women at his pre-operative consultation to include information about the possibility of being interviewed by the second certifying consultant, the possibility of depression or other psychological problems and of a woman's right to seek counselling.
 - Ensures his notes are legible and include the details of his discussions with the women, and his assessment upon which he authorised the abortion.
-

Obstetrician and Gynaecologist

Report on Opinion – Case 97HDC9291, continued

Other Actions A copy of this opinion will be sent to the Abortion Supervisory Committee, the Medical Council of New Zealand, the Royal New Zealand College of Obstetricians and Gynaecologists, the Minister of Health and the Royal New Zealand College of General Practitioners.

Abortion Supervisory Committee

I recommend the Abortion Supervisory Committee takes the following actions:

- Considers drafting guidelines to assist consumers and the profession in this difficult area of the law. The Abortion Supervisory Committee may wish to commence this by a process of consultation with certifying consultants asking their views on whether guidelines would assist them in undertaking the statutory duties in a consistent way.
 - Any guidelines should include a flow chart of how the Contraception Sterilisation and Abortion Act and s.187(A) of the Crimes Act work, the need to meet professional standards of record-keeping, advice on their right to request an interview, the nature of the second certifying consultant's involvement and information on counselling.
 - Consults with the Minister of Health about these guidelines.
-