

## FOETAL HOMICIDE LAW REFORM IN WESTERN AUSTRALIA

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In February 2012 the WA Government announced its plan to introduce foetal homicide laws in Western Australia. The proposed laws would create a new offence of causing death or grievous bodily harm to an unborn child through an unlawful assault on its mother and would impose a maximum penalty of life imprisonment.<sup>1</sup> When announcing this policy the Attorney General stated that:<sup>2</sup>

The Government's proposed laws reflect our view that any act of violence against a mother-to-be is an especially serious offence ... Where an offender causes serious injury or death to an unborn child, the law must properly reflect the extreme emotional trauma such a loss can cause to the mother.

At the time of writing the proposed laws have not yet been introduced or debated in the Western Australian Parliament. The most recent update that has been provided to the Parliament was on 3 December 2014 when, in response to a parliamentary question about the status of the foetal homicide laws, the Attorney General indicated that 'a cabinet submission is currently being prepared'.<sup>3</sup> This follows an answer given by the Attorney General in Parliament on 18 September 2013 where he confirmed that a draft cabinet submission on the legislation had been received but that:<sup>4</sup>

I found that aspects of it were unsatisfactory and I sent it back for further work to be done. It is a very significant change to the law, and there are some arguments as to whether the law really requires change as a number of offences already cover the field to a very large extent. Any changes to the law must be made carefully and I just was not satisfied as to the form of the document that I had received at that stage. I intend to chase it up to see that it can be introduced at the earliest possible opportunity.

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<sup>1</sup> The Hon. Christian Porter MLA (Attorney General), *New foetal homicide laws planned for WA* (Ministerial Media Statements), 26 February 2012.

<sup>2</sup> Ibid.

<sup>3</sup> The Hon. Michael Mischin MLC (Attorney General), *Hansard (WA Legislative Council)*, 3 December 2014, p. 9194d-9195a.

<sup>4</sup> The Hon. Michael Mischin MLC (Attorney General), *Hansard (WA Legislative Council)*, 18 September 2013, p. 4290b.

This paper is designed to consider the questions raised by the Attorney General. Does the existing law in Western Australia require change, or do a number of offences already largely cover the field? If it does require change, what changes should be made? The paper will start by considering whether the criminal laws in Western Australia adequately deal with criminal incidents that involve the death of an unborn child, and whether the introduction of foetal homicide laws is a desirable reform. The paper outlines the current position under the *Criminal Code (WA)* in terms of the offences of both unlawful homicide and killing an unborn child, and concludes that the present provisions fail to deal appropriately with criminal offences that lead to the death of an unborn child. A number of reform proposals are then considered, and specific reference will be made to similar reforms that have been recently debated or introduced in other Australian jurisdictions. The paper will also then address a number of concerns that have been raised with regards to the proposed reforms. The conclusion that is reached by this paper is that reform is desirable, and that the simplest and most appropriate reform would be the introduction of an amendment identical to that previously introduced in Queensland to address this very issue of foetal homicide.

An important preliminary point to note concerns terminology. Throughout this paper the term ‘unborn child’ is used as an easily understood description and not in a technical sense to describe any particular stage of pregnancy, nor to imply legal personhood. The debate about when life begins and at what point an ‘unborn child’ should be identified as a ‘child’ is a controversial issue that is well beyond the scope of this paper.

## I THE CURRENT POSITION IN WESTERN AUSTRALIA

### A *Unlawful Homicide*

Under the *Criminal Code (WA)* an essential element of an unlawful homicide (whether murder or manslaughter) is that the victim is a ‘human being’. Section 269<sup>5</sup> provides that:

[a] child becomes a person capable of being killed when it has completed proceeded in a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not, and whether the naval-string is severed or not.

It is clear that an injury caused to an unborn child that leads to that child dying *after* it has been born will constitute an unlawful homicide under the existing legislation. This is expressly provided for under s. 271, which states:

<sup>5</sup> Note that references to legislative provisions in this article are references to the *Criminal Code (WA)* unless otherwise stated.

#### Death by acts done at childbirth

When a child dies in consequence of an act done or omitted to be done by any person before or during its birth, the person who did or omitted to do such act is deemed to have killed the child.

This is confirmed by the case of *Martin v R (No. 2)*.<sup>6</sup> In this 1996 case, the accused stabbed his wife while she was 28 weeks pregnant. She suffered massive blood loss as a result of the stabbing, which reduced the flow of blood to the foetus and led to substantial brain damage from which the child later died. The accused was convicted of manslaughter and appealed this conviction. The WA Court of Criminal Appeal upheld the conviction, finding that the accused could be liable for a homicide offence even though the baby was not a 'person capable of being killed' at the time that the injury was inflicted. As the homicide does not occur until the point at which the victim dies, a person can be criminally responsible for homicide where the injuries were sustained before birth, provided that the victim is a 'person capable of being killed' at the time of death and the requisite causal link can then be established between the injury and the death.

It is clear, however, that a person will not be criminally responsible for homicide where they cause injuries to an unborn child and the child is stillborn as a result. In this situation the child never becomes a 'person capable of being killed' under the s. 269 definition as it has not proceeded in a living state from the body of its mother. Given this, such an offence would not be considered an unlawful homicide in Western Australia under the Code.

This reflects the 'born alive rule' that operates at common law, which provides that 'the infliction of harm on a foetus will not constitute an offence against the foetus unless that foetus is born alive'.<sup>7</sup> This rule emerged in the 17<sup>th</sup> century and was described by Sir Edward Coke as follows:<sup>8</sup>

If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she delivered of a dead childe, this is a great misprision, and no murder; but if the child be born alive and dyeth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, in rerum natura, when it is born alive.

<sup>6</sup> (1996) 86 A Crim R 133.

<sup>7</sup> *R v King* [2003] NSWCA 399, per Spigelman CJ at [86]; *R v Iby* [2005] NSWCCA 178, per Spigelman CJ at [25]-[29].

<sup>8</sup> Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* (1817), at 50. For further discussion about the origins of this common law rule see, for example, Alison Tsao, 'Fetal Homicide Laws: Shield Against Domestic Violence or Sword to Pierce Abortion Rights?' (1998) 25 *Hastings Constitutional Law Quarterly* 457, at 460-461; Gerard Casey, 'Pregnant Woman and Unborn Child: Legal Adversaries?' (2002) 8(2) *Medico-Legal Journal of Ireland* 75, at 76-77; Clarke Forsythe, 'Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms' (1987) 21 *Valporaiso University Law Review* 563.

The born alive rule has gone on to become so entrenched in English law that it has been described as being ‘now unassailable in England’<sup>9</sup>.

Within Australia, the rule has been described by Spigelman CJ in *R v Iby*<sup>10</sup> as ‘a long-established common law rule’. The ‘born alive rule’ was outlined in the charge to the jury by Barry J in *R v Huttly* as follows:<sup>11</sup>

Murder can only be committed on a person who is in being, and legally a person is not in being, until he or she is fully born in a living state. A baby is fully and completely born when it is completely delivered from the body of its mother and it has a separate and independent existence in the sense that it does not derive its power of living from its mother. It is not material that the child may still be attached to its mother by the umbilical cord: that does not prevent it from having a separate existence. But it is required, before the child can be the victim of murder or manslaughter or infanticide, that the child should have an existence separate from and independent of its mother, and that occurs when the child is fully extruded from the mother’s body and is living by virtue of the functioning of its own organs.

In *R v Iby* it was held that the ‘born alive’ rule is satisfied by any indicia of independent life.

Interestingly, Spigelman CJ in *R v Iby* observed that the rule is ‘a product of primitive medical knowledge and technology and of the high rate of infant mortality characteristic of a long past era’, and that there is ‘a strong case for abandoning the born alive rule completely’.<sup>12</sup> However, in that particular case the appeal against conviction for manslaughter was dismissed, with it being held that the presence of a heartbeat for two hours, even in the absence of evidence of brain activity or independent breathing, was sufficient to satisfy the ‘born alive’ rule.

### B *The specific offence of ‘Killing an Unborn Child’*

An alternative in Western Australia may be to charge an accused who causes fatal injuries to a child *in utero* with the offence of killing an unborn child under s. 290 of the *Criminal Code (WA)*. Section 290 provides that:

‘Any person who, when a woman is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that, if the child had been born alive and had then died, he would be deemed to have unlawfully killed the child, is guilty of a crime, and is liable to imprisonment for life’.

On its face this provision would appear to operate as a type of homicide

<sup>9</sup> Ian Kennedy and Andrew Grubb, *Medical Law* (3<sup>rd</sup> ed, 2000), at 1487.

<sup>10</sup> [2005] NSWCCA 178, at [3].

<sup>11</sup> [1953] VicLawRp 48; [1953] VLR 338, at 339.

<sup>12</sup> *R v Iby* [2005] NSWCCA 178, at [63].

offence protecting the unborn child. The effectiveness of this provision, however, turns squarely on the interpretation of the phrase 'when a woman is about to be delivered of a child'. This was noted by Justice Murray in *Martin v R (No 2)*:<sup>13</sup>

The meaning of the phrase 'when a woman is about to be delivered of a child' is uncertain. Does it mean at or about the time of birth? If so, why is it so limited, or is it a case that a woman is regarded as being about to be delivered of a child at any time while she is pregnant and carrying a live foetus?

Similarly, in its *Review of the Law of Homicide: Final Report* the Law Reform Commission of Western Australia found that the current wording of s. 290 required clarification.<sup>14</sup> This issue had also been raised in the earlier *Murray Review*.<sup>15</sup> In the *Review of the Law of Manslaughter in New South Wales* conducted by The Hon. Mervyn Finlay QC in April 2003 it was noted that the adoption of a narrow interpretation of the phrase 'when a woman is about to be delivered of a child' had led to the dismissal of at least one charge under s. 290 in Western Australia, namely in the case of *Booth*.<sup>16</sup> This report further noted an additional two cases in which the Office of the Director of Public Prosecutions (WA) declined to pursue charges under s. 290 due to perceived difficulties in proving that the pregnant women were 'about to be delivered of a child'. It also noted that there was no record of any conviction for the offence of killing an unborn child under s. 290 in Western Australia at the time of the report in 2003.<sup>17</sup> This still appears to be the case.

The fact that charges have not been laid under s. 290 in a number of cases over the past decade involving the death of an unborn child would suggest that, in practice, a narrow and cautious interpretation of 'when a woman is about to be delivered of a child' has been adopted in Western Australia. For example, in *The State of Western Australia v Jeffries*<sup>18</sup> the accused was charged with aggravated grievous bodily harm after assaulting his *de facto* wife, who was 19 weeks pregnant. The child was stillborn, and the post mortem concluded that the child had died as a direct result of the assault. The accused was charged in relation to the assault on his *de facto* wife, but no separate charges were laid in relation to the stillborn child. The accused was ultimately convicted of aggravated grievous bodily harm in relation to this *de facto* wife and (following

<sup>13</sup> (1996) 86 A Crim R 133.

<sup>14</sup> Law Reform Commission of Western Australia, *Review of the law of homicide: Final Report* (September 2007), at 24.

<sup>15</sup> MJ Murray, *The Criminal Code: A general review* (1983), at 185.

<sup>16</sup> *Booth* (unreported Court of Petty Sessions decisions) referred to in: MD Finlay, *Review of the Law of Manslaughter* (April 2003), at 78.

<sup>17</sup> MD Finlay, *Review of the Law of Manslaughter* (April 2003), at 78-79.

<sup>18</sup> [2007] WASCA 255.

a successful State appeal against sentence) was sentenced to 3 years imprisonment.

The same approach can be seen in the more recent case of *Austic v The State of Western Australia*.<sup>19</sup> The accused stabbed Stacey Robyn Thorne to death, and was found guilty of wilful murder. His female victim was 22 weeks pregnant with their child; however no separate charges were laid in relation to the death of this unborn child. The death of the child was acknowledged only in that it was considered to be ‘the most serious aggravating factor’ in the offending against the female victim.<sup>20</sup>

This was also the case in *Butler v The State of Western Australia*.<sup>21</sup> In this case the accused strangled his wife and burned her body. She was eight months pregnant at the time. He was convicted of wilful murder in relation to the death of his wife, and was sentenced to life imprisonment with a minimum term of 19 years. As in *Austic*, the death of the unborn child in this case did not result in separate charges, but was instead seen as a factor that elevated the seriousness of the offence committed against the female victim.

These case examples suggest that s. 290 of the *Criminal Code (WA)* is extremely limited in scope and will only potentially extend to cases in which the female victim is very close to full term in her pregnancy, or possibly even engaged in the delivery process through being in actual labour. The case of *Butler v The State of Western Australia* in particular, in which the female victim was eight months pregnant, suggests that s. 290 is only thought by prosecuting authorities to be potentially relevant in cases where a woman is at full term and is literally about to deliver her child.

Is there a need to reform the laws on this issue in Western Australia? Cases such as *Jeffries*, *Austic* and *Butler* highlight the desirability for reform in this area. The case that really focused public attention on this issue, and was a key driver in the push for foetal homicide reforms in Western Australia, was the *Silvestro* case. Matthew Silvestro, who had a history of domestic violence, pleaded guilty to dangerous driving causing grievous bodily harm in the Joondalup Magistrates Court in February 2012. He had driven the car that he was travelling in with his eight months pregnant former partner (Vanessa De Bari) and their two year old child directly into the path of another vehicle in October 2009. While the two year old child survived, De Bari spent over eight months recuperating from her injuries in hospital and suffered permanent brain damage, and the unborn child that she was carrying died *in utero*. Silvestro was ultimately fined \$8000 and disqualified from driving for two years. The charge of dangerous driving causing grievous bodily harm in the *Silvestro* case was based around the injuries sustained by De Bari. No separate charge

<sup>19</sup> [2010] WASCA 110.

<sup>20</sup> *Austic v The State of Western Australia* [2010] WASCA 110, at [184].

<sup>21</sup> [2010] WASCA 104.

could be laid in relation to the death of the unborn child due to the fact that it died *in utero* and was not therefore considered a person under the *Criminal Code* in Western Australia.

The fact that the existing criminal laws in Western Australia do not allow for separate charges to be laid directly in relation to the death of the unborn child in these types of cases means that the full gravity of the offence that has been committed and the full extent of the loss that has been suffered has not been appropriately acknowledged by the criminal justice system. Simply providing for the death of the unborn child to be taken into account in sentencing as part of the injuries sustained by the pregnant female, which appears to be the current state of the law in Western Australia, does not seem to fully recognize that a separate loss that has occurred<sup>22</sup> or to sufficiently acknowledge the profound grief that will be suffered by the family who have lost their unborn child. This is particularly apparent in a case such as *Silvestro* where the pregnancy was so far advanced that the unborn child would have in all likelihood survived if it had been spontaneously born at that same point in time, absent the injuries that were inflicted by the offender.

The introduction of foetal homicide laws in Western Australia is therefore, in principle, a welcome reform. The key question then becomes how such a reform should be framed in order to ensure that the deficiencies in the existing legislative framework are addressed, without creating any unintended consequences in what is a particularly sensitive policy area.

## II POSSIBLE AMENDMENTS AND RECENT DEBATES

Both the *Murray Review* and the Law Reform Commission of Western Australia in its *Review of the Law of Homicide: Final Report* considered the question of reform in this area and recommended that s. 290 of the *Criminal Code* should be amended so that it would apply when a 'woman is pregnant with a child capable of being born alive'.<sup>23</sup> They further recommended that 's. 290 should be reviewed in consultation with the medical profession to clarify the application of the section and to establish a statutory period of gestation

<sup>22</sup> Whether that loss is described as the loss of a child or of something that does not yet have that status, it does not seem unreasonable to say that what has been lost can be described as separate and distinct from any other injuries sustained by the pregnant female and, unlike any other physical injuries sustained by the female, a loss that is suffered directly also by the father of the unborn child.

<sup>23</sup> It should also be noted that a review was also recently conducted in New South Wales, see: The Hon. Michael Campbell QC, *Review of Laws Surrounding Criminal Incidents Involving the Death of an Unborn Child* (October 2010). It was concluded that the NSW law did respond appropriately to criminal incidents involving the death of an unborn child and that no amendments were required, noting however that there are significant differences in the development of the criminal law in New South Wales and Western Australia in this respect.

beyond which a child is presumed to be capable of being born alive'.<sup>24</sup> The difficulty with this proposed amendment is that it replaces one definitional question with another, by swapping the difficulties of establishing 'when a woman is about to be delivered of a child' for the equally difficult task of establishing when a "woman is pregnant with a child capable of being born alive'.

A simpler, and more effective, solution may be found by introducing an equivalent provision to s. 313(2) under the *Criminal Code (Qld)*. Section 313 of the *Criminal Code (Qld)* is entitled 'Killing unborn child'. Section 313(1) is identical to the existing s. 290 of the *Criminal Code (WA)*. Section 313(2) goes on to establish a more expansive offence, stating:

Any person who unlawfully assaults a female pregnant with a child and destroys the life of, or does grievous bodily harm to, or transmits a serious disease to, the child before its birth, commits a crime.

The maximum penalty provided for an offence under s. 313(2) in Queensland is imprisonment for life. The advantage of this provision is that it achieves the important outcome of acknowledging the death of the unborn child as a separate loss distinct from the harm inflicted upon the mother, whilst avoiding within the categorization of the offence itself difficult definitional questions about when life begins and when an unborn child is considered to become a child under the criminal law. Drafting the provision in this way does raise the practical question of whether the offence could technically be committed upon a pregnant woman from the very moment of conception, with this issue being addressed specifically below.

The question of foetal homicide reform has also been recently raised in both New South Wales and South Australia. In New South Wales the issue was debated in Parliament with the introduction of the *Crimes Amendment (Zoe's Law) Bill 2013 (No. 2) (NSW)*, which became known as 'Zoe's Law'.<sup>25</sup> The issue came to attention in New South Wales following the case of Brodie Donegan, who was 32 weeks pregnant when she was hit by a drug-affected driver while walking in 2009. Her unborn baby, Zoe, was stillborn as a result. The driver was charged only in relation to the injuries caused to Brodie Donegan (with baby Zoe being listed as amongst those injuries) and ultimately served a nine month prison term.<sup>26</sup> The failure to recognize the death of baby Zoe as a separate offence was described by Brodie Donegan as a gap that 'should be filled', stating that '[w]e still couldn't reconcile that we were having a funeral for

<sup>24</sup> Law Reform Commission of Western Australia, *Review of the law of homicide: Final Report* (September 2007), at 25.

<sup>25</sup> A related Bill had been earlier introduced into the NSW Legislative Council by Fred Nile, but was never voted on and lapsed on the prorogation of Parliament.

<sup>26</sup> Chris Spence MLA, *Second Reading Speech: Crimes Amendment (Zoe's Law) Bill (No. 2) 2013*, NSW Legislative Assembly, 29 August 2013.

the death of a baby that the law wasn't charging for' and that '[t]o me, she was more important than my injuries ... the loss of her was harder to recover from than my injuries'.<sup>27</sup>

The proposed legislation was drafted in very different terms to the foetal homicide provisions introduced in Queensland. *Zoe's Law* provided that where the foetus of a pregnant woman was of at least 20 weeks gestation or had a body mass of at least 400 grams (where the period of gestation could not be reliably established) it was to be considered an 'unborn child'. It went on to state that for a range of specified offences (being primarily criminal offences involving the infliction of grievous bodily harm) 'an unborn child is taken to be a living person despite any rule of law to the contrary' and provided that grievous bodily harm to an unborn child 'is taken to include the destruction of the unborn child'.<sup>28</sup> The practical effect of this would be to maintain the *status quo* for any foetus under 20 weeks' gestation (with the destruction of or harm to that foetus being considered grievous bodily harm to the pregnant woman) but to provide that for any foetus of at least 20 weeks' gestation a separate charge could be brought 'as an offence to the foetus itself'<sup>29</sup>. The Bill went on to expressly exclude from its ambit 'anything done in the course of a medical procedure or medical treatment' and 'anything done by, or with the consent of, the pregnant woman concerned'<sup>30</sup>. This proposed reform was passed by the Legislative Assembly but ultimately lapsed in the Legislative Council.

*Zoe's Law* is a more complicated provision than s. 313(2) *Criminal Code (Qld)*. The key difference between the NSW and Queensland reforms are that the proposed NSW legislation expressly establishes and relied upon foetal personhood (*albeit* exclusively 'for the purposes of an applicable offence') in a way that the Queensland provision does not. The key difference is that the Queensland provision is grounded in the need for an unlawful assault against a pregnant female to occur before the offence can be established. While the section does refer to an 'unborn child' the offence is inextricably tied to the mother in a way that suggests this is a descriptive rather than legal term, and that the unborn child referred to is not an independent legal person in its own right against whom offences can be committed. This is a fine dividing line. The unborn child is recognized by the Queensland provision as more than nothing, but not entirely as something within its own right. It is effectively given a form of identity only through the necessary connection to its mother.

<sup>27</sup> Quoted in Chris Spence MLA, *Second Reading Speech: Crimes Amendment (Zoe's Law) Bill (No. 2) 2013*, NSW Legislative Assembly, 29 August 2013.

<sup>28</sup> See proposed Section 8A(2) outlined in the *Crimes Amendment (Zoe's Law) Bill 2013 (No 2) (NSW)*.

<sup>29</sup> Chris Spence MLA, *Second Reading Speech: Crimes Amendment (Zoe's Law) Bill (No. 2) 2013*, NSW Legislative Assembly, 29 August 2013.

<sup>30</sup> See proposed Section 8A(4) outlined in the *Crimes Amendment (Zoe's Law) Bill 2013 (No 2) (NSW)*.

By contrast, the proposed NSW legislation expressly states that ‘an unborn child is taken to be a living person’, a recognition of personhood that is sought to be avoided under the different framed Queensland offence.

The potential implications of this will be discussed further below, but the proposed NSW legislation does seem to raise greater concerns than the Queensland legislation in relation to potential unintended consequences. In addition, *Zoe’s Law* raises the significant question of whether the line is appropriately drawn at the point of 20 weeks gestation (or where there is a body mass of 400 grams)<sup>31</sup>. By providing for legal personhood the question of when that personhood is granted, and thus when the law considers that life begins, becomes a question of legal significance that must be expressly answered by the terms of the statute. This is not the case under the Queensland provision.

The debate in New South Wales may, however, be ongoing with a Notice of Motion being given on 28 April 2015 in the NSW Legislative Council by Fred Nile of his intention to introduce the *Crimes Amendment (Zoe’s Law) Bill 2015 (NSW)*. At the time of writing this does not appear to have been listed for debate, and the text of the Bill was not available online.<sup>32</sup>

There has also been parliamentary debate in South Australia, with Family First MLC Robert Brokenshire introducing the *Criminal Law Consolidation (Offences Against Unborn Child) Amendment Bill 2013 (SA)* into the SA Legislative Council on 20 February 2013. As with other Australian jurisdictions, the proposed reforms were introduced followed an individual case example that highlighted the perceived shortcomings of the existing criminal law. In South Australia this was the criminal case brought against John James Ceruto, who was sentenced to six years and 10 months imprisonment after causing a car crash in Woodville Park that killed his pregnant fiancée, Lisa Smith, and their unborn child (with the pregnancy stated to be in the ‘advanced stages’<sup>33</sup>). Ceruto was sentenced after pleading guilty to one count of aggravated causing death by dangerous driving and one count of driving without a licence, with no

<sup>31</sup> A line which would, for example, have meant that separate charges could have been laid in the case of Baby Zoe but which would not have resulted in any change in a case such as *The State of Western Australia v Jeffries* [2007] WASCA 255 where the baby was stillborn 19 weeks into the pregnancy. The reason for this particular threshold being chosen in NSW was to align the legislation with corresponding provisions in the *Births, Deaths and Marriages Registration Act 1995 (NSW)* that require the registration of the birth of a stillborn child where the child is of at least 20 weeks’ gestation or has a body mass of at least 400 grams at birth (where the period of gestation cannot be reliably established) and a number of other legislative and administrative provisions that use this stage of development as a qualifying criteria.

<sup>32</sup> See *Crimes Amendment (Zoe’s Law) Bill 2015, Current session bills*, accessed on 10 June 2015 at: <<http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/131a07fa4b8a041cca256e610012de17/a01ef77090344154ca257e3c00223016?OpenDocument>>

<sup>33</sup> *R v Ceruto* [2014] SASCFC 5.

separate charge laid to specifically recognize the loss of the unborn child.<sup>34</sup>

The proposed legislation claimed to be an expanded version of the Queensland law, and indeed did appear to be more expansive in its potential scope. The key effect of the *Criminal Law Consolidation (Offences Against Unborn Child) Amendment Bill 2013 (SA)* was to be the creation of new offences where a person ‘causes serious harm to a pregnant woman which causes her unborn child to die’ or ‘causes serious harm to a pregnant woman which causes serious harm to her unborn child’.<sup>35</sup> These new offences were to be located in Division 7A of the *Criminal Law Consolidation Act 1935 (SA)* which provides in s. 21 for a definition of ‘serious harm’ that includes harm that endangers life, results in ‘serious and protracted impairment of a physical or mental function’ or results in serious disfigurement.

The key difference between this drafting and s. 313(2) in Queensland are that the South Australian provisions make no reference to lack of consent as being an element of the offence. This is a significant touchstone of the Queensland legislation when addressing some of the common criticisms of foetal homicide law reform discussed below. This opens up the possibility that the proposed South Australian legislation, if considered purely on its own terms<sup>36</sup>, could be seen as allowing criminal charges to be laid in cases of otherwise lawful abortions. Unlike *Zoe’s Law* in New South Wales (which similarly did not use the consent of the pregnant female as a touchstone when defining the offence) there was nothing in a later sub-clause of the *Criminal Law Consolidation (Offences Against Unborn Child) Amendment Bill 2013 (SA)* that attempted to expressly exclude this possibility.<sup>37</sup> The South Australian Bill was ultimately negated at the Second Reading stage following a vote in the Legislative Council on 27 November 2013.<sup>38</sup>

From considering amendments that have been proposed by previous law reform reports and amendments that have been considered or introduced in other Australian jurisdictions it is this author’s view that the most effective option for Western Australia would be to introduce a provision mirroring the Queensland legislation. The introduction of a new s. 290(2) in Western Australia to mirror the existing s. 313(2) in Queensland is an amendment that

<sup>34</sup> See *R v Ceruto* [2014] SASFC 5; The Hon S.G. Wade, *Hansard (Legislative Council, South Australia)*, 27 November 2013, at p.5964.

<sup>35</sup> See proposed ss. 31A (1) and (2) outlined in *Criminal Law Consolidation (Offences Against Unborn Child) Amendment Bill 2013 (SA)*. Note also that there was also a similar provision (proposed s. 19A(4)) extending the offence of causing death or harm by use of vehicle or vessel to death or harm caused to an unborn child.

<sup>36</sup> See discussion below regarding *Preston v Parker* [2010] QDC 264, where the Court took the view that the legislation had to be read in context with State laws specifically providing for lawful abortions.

<sup>37</sup> See proposed ss. 8A(4) & (5) which attempted to exclude this possibility in the *Crimes Amendment (Zoe’s Law) Bill 2013 (No. 2) (NSW)*.

<sup>38</sup> See *Hansard (Legislative Council, South Australia)*, 27 November 2013, at p. 5970.

would remove doubt as to the application of s. 290 to an unborn child and would significantly expand the operation of the existing section. The amendment provides the simplest and clearest way of ensuring that the distinct and inherent value of the life of the unborn child is recognised under the criminal law in Western Australia, and would ensure that an offender would be directly punished for the taking of this life.

One of the problems of the existing legislation is that it only allows for the death of the unborn child to be recognized as an aggravating feature of the offending against the mother. The proposed amendment would recognize the death of the unborn child as a separate offence. It also does this while avoiding the definitional difficulties and uncertainties that arise under the current provision and that would also likely arise under the amendment previously proposed by the Law Reform Commission of Western Australia. The Queensland amendment is also drafted in a way that manages to most effectively address the common criticisms aimed at this type of legislation, as discussed below.

### III COMMON CRITICISMS OF FOETAL HOMICIDE REFORMS

The most common criticism that is aimed at foetal homicide provisions are that they will undermine abortion rights by potentially allowing for criminal charges to be laid in relation to otherwise lawful abortions. For example, Dr Leslie Cannold from Reproductive Choice Australia stated that she opposed the proposed change of laws in Western Australia as they were ‘a precursor to restricting abortions’<sup>39</sup> and both the NSW Bar Association and the Australian Medical Association of NSW opposed *Zoe’s Law* due to concerns that it may harm women’s access to abortion.<sup>40</sup> These fears are not necessarily unfounded with, for example, the Right to Life Association WA President, Peter O’Meara, indicating that his preference would be for the proposed WA reforms to go further and that ‘he believed the foetal homicide laws were the beginning of changes which would see abortion outlawed’.<sup>41</sup>

This is where the precise drafting of the proposed provision becomes so important. The introduction of foetal homicide provisions do not inevitably undermine a woman’s existing reproductive rights and can be expressly drafted

<sup>39</sup> Aleisha Orr, ‘Foetal homicide laws a good start: Right to Life’, *WA Today*, 27 February 2012. Accessed at: <<http://www.watoday.com.au/wa-news/foetal-homicide-laws-a-good-start-right-to-life-20120226-1tw9g.html>>.

<sup>40</sup> Mandie Sami, ‘Doctors and lawyers call on MP’s to abandon Zoe’s law’, *PM with Mark Colvin (ABC)*, 12 September 2013. Accessed at: <<http://www.abc.net.au/news/2013-09-12/doctors-and-lawyers-call-on-mps-to-abandon-zoes-law/4954720>>.

<sup>41</sup> Aleisha Orr, ‘Foetal homicide laws a good start: Right to Life’, *WA Today*, 27 February 2012. Accessed at: <<http://www.watoday.com.au/wa-news/foetal-homicide-laws-a-good-start-right-to-life-20120226-1tw9g.html>>.

so as not to impact upon existing legislation providing for lawful abortions. Indeed, it is possible to support the introduction of foetal homicide laws whilst also supporting a woman's right to choose, as in fact is the case with Brodie Donegan, the mother of baby Zoe.<sup>42</sup>

In fact, this very issue was addressed in Queensland in *Preston v Parker*<sup>43</sup> with reference to s. 313(2) *Criminal Code (Qld)*. The appellant in this case was convicted of one charge of trespass when he remained on the steps of a medical clinic (obstructing the entrance to the premises) after being given two move on directions by the police. One of the submissions made by the appellant in his appeal against this conviction was that ss. 273 and 290 of the *Criminal Code (Qld)*<sup>44</sup> entitled him to lawfully block the entrance in an attempt defend the lives of the unborn children being terminated at the clinic. The appellant specifically referred to s.313(2) of the *Criminal Code (Qld)* in support of his submission that the law recognized that life begins before birth and that those involved in performing abortions (presumably including both the pregnant women themselves and those working in the clinic) should be able to be charged with the homicide of an unborn child.<sup>45</sup>

Judge Irwin concluded that the arguments raised on the basis of s. 313(2) were 'without foundation'.<sup>46</sup> This was for two reasons. Firstly, the offence created by s. 313(2) has as an essential element the unlawful assault of a pregnant female, meaning that the lack of consent of the female to the force constituting the assault is an element of the offence. Where an individual female consents to force being applied, as is the case where a lawful abortion is taking place at the request of the pregnant female, no offence under s. 313(2) arises. Secondly, Irwin DCJ found that where the alleged unlawful assault is an abortion 'it must be considered in the context of s. 282 of the Code which provides the circumstances in which a surgical operation may be lawfully performed on an unborn child for the benefit of its mother's life'.<sup>47</sup> That is, the

<sup>42</sup> See Chris Spence, 'Second Reading Speech: Crimes Amendment (Zoe's Law) Bill (No. 2) 2013', *Hansard (Legislative Assembly, NSW)*, 29 August 2013.

<sup>43</sup> [2010] QDC 264 (24 June 2010).

<sup>44</sup> **Section 273: Aiding in self-defence**

In any case in which it is lawful for any person to use force of any degree for the purpose of defending himself or herself against any assault, it is lawful for any other person acting in good faith in the first person's aid to use a like degree of force for the purpose of defending the first person.

**Section 290: Duty to do certain acts**

When a person undertakes to do any act the omission to do which is or may be dangerous to human life or health, it is the person's duty to do that act: and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.

<sup>45</sup> See *Preston v Parker* [2010] QDC 264 (24 June 2010), at [47]-[49].

<sup>46</sup> *Preston v Parker* [2010] QDC 264 (24 June 2010), per Irwin DCJ at [262].

<sup>47</sup> *Ibid*, at [233].

assault involved will not be unlawful if the force is inflicted as part of a lawful abortion. There is no reason to think that this approach would not similarly be followed in Western Australia if an identical statutory provision was adopted.

Drafting a foetal homicide provision in terms of an offence containing unlawful assault as an element has the effect of making the lack of consent to the infliction of force a necessary part of the offence. This necessarily excludes abortions carried out with the consent of the pregnant woman from the scope of the provision. In addition, as was seen in *Preston v Parker*, any provision would need to be read, not in isolation, but in context. In Western Australia this would mean acknowledging that s. 199 *Criminal Code (WA)* provides for circumstances in which it is lawful to perform an abortion. These two factors in themselves would be sufficient to ensure that the introduction of a provision identical to s. 313(2) *Criminal Code (Qld)* would not restrict the availability of lawful abortions in Western Australia. However, for the avoidance of doubt, it would also be possible to insert a sub-section to expressly confirm this point if thought necessary to allay any concerns that the community may have on this question.

A related criticism of foetal homicide provisions are that they provide an opportunity to restrict women's rights during pregnancy and to criminalize behaviour by pregnant women that may cause harm to their unborn child. It is argued that recognizing the foetus as having a legal status separate to its mother creates 'a tension between a women's rights and those of her foetus.'<sup>48</sup> For example, the Women's Legal Services NSW expressed concern that *Zoe's Law* 'could be used to impose restrictions on the behaviour of pregnant women'<sup>49</sup> and pointed to studies that have documented arrests and forced interventions on pregnant women in the United States based upon 'personhood' measures that establish separate constitutional rights for fertilized eggs, embryos, and fetuses.<sup>50</sup>

Again, this is not necessarily an unfounded concern. For example, when the proposed WA reforms were announced by the WA Attorney General, the President of the Australian Medical Association (WA) suggested that criminal penalties should also be introduced for mothers who endanger their unborn babies by taking drugs or drinking excessively and cases 'when people choose to proceed with a homebirth when it's clear that there is an extreme danger to the

<sup>48</sup> Alexandra Barratt, 'Zoe's Law could take NSW backwards in women's rights', *The Conversation*, 6 November 2014.

<sup>49</sup> Women's Legal Services NSW, *Foetal Personhood Bill ("Zoe's Law")*. Accessed at: <<http://www.wlsnsw.org.au/law-reform/past-campaigns/zoes-law/>>.

<sup>50</sup> See Lynn M. Paltrow and Jeanne Flavin, 'Pregnant, and No Civil Rights', *The New York Times*, 7 November 2014; Lynn M. Paltrow and Jeanne Flavin, 'Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health' (2013) 38(2) *Journal of Health Politics, Policy and Law* 299.

baby'.<sup>51</sup>

As with the question of abortion rights, this ultimately comes down to the precise drafting of the proposed foetal homicide provision. A carefully drafted foetal homicide provision can be expressly limited to its own terms and need not establish foetal personhood in a way that has broader implications that would allow potential interventions against pregnant women. For example, s. 313(2) *Criminal Code (Qld)* was introduced in 1997 and there has been no indication that it has been successfully used in the eighteen years since to introduce broader rights of foetal personhood or to restrict the rights of pregnant women in unintended ways.

One reason for this might, again, be the importance of the Queensland offence being based on an unlawful assault being committed against the pregnant female. This necessarily makes a lack of consent a constituent element of the Queensland offence, making it clear that the criminal offence does not extend to those acts done with the consent of the pregnant female. This would necessarily include anything that she does to herself, and would prevent s. 313(2) being applied to criminalize the type of behaviour canvassed by the President of the Australian Medical Association (WA).

Secondly, the Queensland provision (unlike for example *Zoe's Law* in NSW) does not actually define an unborn child as a 'living person' (even, as in *Zoe's Law*, if only for the purposes of the applicable offences). In this way, it should not be strictly seen as a 'foetal personhood' provision. Instead it provides limited recognition of specific circumstances in which the law acknowledges a precise type of loss that was previously felt to be insufficiently acknowledged. As was noted in *R v Waigana* the section must be interpreted in context, which makes clear that the use of the word 'child' in s. 313(2) 'is obviously a reference to the life form with which the female is pregnant'.<sup>52</sup> This does not necessarily require any legal conclusion as to whether that life form should be granted recognition beyond the specific terms of the individual provision, nor does it inevitably confer or require any further rights of personhood.

It should further be noted that the law does, in other circumstances, already recognize unborn children, and has done so without inevitably extending the scope of foetal personhood to all other areas of the law. For example, a stillborn child of at least 20 weeks' gestation is recognized as a 'child' under s. 4 of the *Births, Deaths and Marriages Registration Act 1998 (WA)* and the birth of that child is legally required to be registered.<sup>53</sup> Indeed, Western

<sup>51</sup> Kate Campbell, 'Charge reckless mums: doctor's union', *The West Australian*, 27 February 2012. Accessed at: <<https://au.news.yahoo.com/thewest/wa/a/13017489/charge-reckless-mums-doctors-union/>>.

<sup>52</sup> (2012) 225 A Crim R 20 (18 July 2012).

<sup>53</sup> See s. 13 of the *Births, Deaths and Marriages Registration Act 1998 (WA)*.

Australia only recently announced that it would be joining Queensland and New South Wales in legally recognizing stillborn babies lost between 12 – 19 weeks' gestation by allowing parents to apply for a recognition of loss certificate.<sup>54</sup> In announcing this reform the WA Attorney General stated that eligible parents would be able to 'apply for a certificate which acknowledges *their baby's life*' (emphasis added) with the certificate designed to 'acknowledge the emotional trauma and devastation which early pregnancy loss brings'.<sup>55</sup> The same concerns about the acknowledgement of the foetus as a distinct life potentially placing women's rights at risk do not seem to have been raised following the announcement of this proposal in Western Australia.

Finally, an important question that needs to be considered when introducing foetal homicide reforms is whether they should apply to all pregnancies, or only when the pregnancy has reached a certain stage of advancement. Different jurisdictions have taken different approaches to this question. For example, *Zoe's Law* expressly provided that the relevant offence would only apply to a foetus of at least 20 weeks' gestation, whereas the s. 313(2) *Criminal Code (Qld)* makes no reference to a minimum stage of pregnancy.

If Western Australia were to adopt the Queensland provision, would this then mean that the foetal homicide offence could extend to an unborn child at any stage of pregnancy, even potentially from the very moment of conception? The answer to this must necessarily be yes, although this author would argue that this is not inconsistent with orthodox principles of criminal law and, further, that its effect would be qualified in practice by both evidentiary issues and the application of existing sentencing principles.

Again, some guidance on this point may be taken from Queensland where the issue was briefly considered in *R v Waigana*<sup>56</sup>. The defendant in this case was charged with killing an unborn child under s. 313(2) *Criminal Code (Qld)*. The prosecution case was that the defendant assaulted his *de facto* wife when she was 15 – 18 weeks pregnant, leading to the miscarriage of the pregnancy. A no case to answer submission was made at the conclusion of the prosecution case, with one of the submissions being that, at the time of the assault, the foetus was not a 'child' within the meaning of s. 313(2). It was submitted that the established legal meaning of 'child' was 'an unborn child capable of being born alive' and that effectively s. 313(2) is limited to dealing with situations involving a foetus of sufficient age to be capable of living independently of the

<sup>54</sup> The Hon. Michael Mischin MLC, *Recognition for children lost early in pregnancy (Media Release)*, 10 May 2015. Accessed at: <<http://www.mediastatements.wa.gov.au/pages/StatementDetails.aspx?listName=StatementsBarnett&StatId=9449>>.

<sup>55</sup> *Ibid.*

<sup>56</sup> (2012) 225 A Crim R 20 (18 July 2012).

body of its mother, which the expert medical evidence suggested was a minimum of 24 weeks old. Justice Henry rejected this argument, noting that the section itself contained no express or implied qualification as to the age of the unborn child to which it referred and that 'the legislature, in amending section 313 by introducing section 313(2) in 1997, specifically considered and rejected both the inclusion in section 313(2) of the qualifying words 'capable of being born alive' and the inclusion of a provision at section 313(3) deeming evidence of pregnancy for 24 weeks to be prima facie evidence the unborn child was then capable of being born alive'.<sup>57</sup> Justice Henry concluded that s. 313(2) potentially applied to all pregnancies, with no minimum requirement as to the gestation period and no requirement that the unborn child must be capable of existence independently of the mother.

The practical consequence of this interpretation is that the Queensland section can potentially apply from the moment of conception, and indeed this was raised during the course of submissions in this case. Without expressing any concluded view on what he considered to be a 'philosophical argument' that related to a much earlier phase of pregnancy than the actual case before the Court, Justice Henry observed:<sup>58</sup>

It is self-evident that the degree of difficulty in proving the cause of damage to the unborn life form during pregnancy is greater earlier in the pregnancy. However that is of no apparent relevance to the interpretation of the section. The sufficiency of evidence of causation is simply a matter for consideration on a case by case basis'

This is a highly practical approach to the issue. Where the pregnant female is at an extremely early stage of the pregnancy commonsense suggests that it will likely be more difficult to prove the requisite causal connection between the unlawful assault and the injuries sustained by the unborn child to the required standard of criminal proof. Similarly, ordinary sentencing principles will allow judges to differentiate between cases on an individual basis in terms of the seriousness of the offence, with it being likely that the stage of the pregnancy will be one of the relevant considerations in determining an appropriate sentence to reflect the seriousness of the offence in any individual case.

Finally, the idea that an individual could potentially be charged with a foetal homicide offence when they did not actually know that the female they assaulted was pregnant (or, indeed, even when the female herself may not have known) does not represent a clear departure from accepted principles of criminal law. The idea that you 'take your victim as you find them' is well established in Australian criminal law. For example, under s. 23B *Criminal Code (WA)* it is expressly provided that where death or grievous bodily harm is

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

caused by an act involving a deliberate use of force that ‘would not have occurred but for an abnormality, defect or weakness in the victim’ a person is not, for that reason alone, excused from criminal responsibility. While the question of knowledge will not therefore affect the threshold question of whether a foetal homicide offence has been committed, it may well be a relevant consideration when it comes to assessing the objective seriousness of the offence and deciding upon the sentence to be imposed in an individual case.

#### IV CONCLUSION

Recent cases such as *Jeffries*, *Austic*, *Butler* and *Silvestro* have shown that the existing criminal laws in Western Australia do not extend to separately recognizing the death of a child *in utero* in cases of criminal violence committed against both the mother and child. The failure to recognize this separate life that has been lost means that the criminal law is not adequately recognizing the seriousness of the offending behaviour in these types of cases, and is not fully reflecting the loss that has been inflicted on the families of the victims. Adopting an amendment along the lines of s. 313(2) *Criminal Code (Qld)* would address this gap in the existing laws by ensuring that the loss of an unborn child in cases of criminal violence is appropriately recognized by our criminal justice system, while also being drafted in such a way as to address many of the common criticisms that are raised concerning foetal homicide law reform. Such an amendment would be a desirable and appropriate reform, and its introduction is overdue in Western Australia.