

Chapter 7 Child Destruction

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INTRODUCTION

7.1 Reform of abortion law raises several associated legal issues which are considered in this chapter and Chapter 8. The offence of child destruction must be considered in any change to abortion laws because of the overlap between it and the abortion offence in section 65 of the Crimes Act, which covers the entire period of a pregnancy.¹

THE OFFENCE

7.2 Section 10 of the Crimes Act, which is headed 'Offence of child destruction', states:

- (1) *Any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act unlawfully causes such child to die before it has an existence independent of its mother shall be guilty of the indictable offence of child destruction, and shall be liable on conviction thereof to level 4 imprisonment (15 years maximum).*
- (2) *For the purposes of this section evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be prima facie proof that she was at that time pregnant of a child capable of being born alive.*
- (3) *Where upon the trial of any person for the murder or manslaughter of any child or for infanticide or for any offence under section sixty-five of this Act the jury are satisfied that the person charged is not guilty of murder manslaughter or infanticide or of any offence under the said section sixty-five (as the case may be) but are satisfied that he is guilty of the indictable offence of child destruction, the jury may find him guilty of that indictable offence and he shall be liable to punishment accordingly.*
- (4) *Where upon the trial of any person for the indictable offence of child destruction the jury are satisfied that the person charged is not guilty of that indictable offence but are satisfied that he is guilty of an offence under section sixty-five of this Act the jury may find him guilty of that offence and he shall be liable to punishment accordingly.*

7.3 This section makes it a criminal offence for a person to intend to destroy the life of an unborn child capable of being born alive by *unlawfully* using any means to achieve this result. Section 10(2) of the Crimes Act creates the rebuttable presumption that a woman who has been pregnant for 28 weeks or more is carrying a child capable of being born alive. This does not preclude a finding on the facts of a particular case that a woman who has been pregnant for less than 28 weeks is carrying a child capable of being born alive.²

7.4 Sections 10(3) and (4) provide for alternative verdicts. Section 10(3) permits a jury to find a person guilty of child destruction when the person has been charged with murder, manslaughter, or infanticide. Section 10(4) permits a jury to find a person guilty of the offence of unlawful abortion under section 65 when the person has been charged with child destruction.

7.5 The Victorian offence of child destruction was drawn from the Infant Life Preservation Act, enacted in England in 1929. The offence was originally created in England to deal with lethal acts intentionally performed during childbirth where there was doubt about whether the child was born alive. To convict a person of murder, manslaughter, or infanticide, the prosecution must prove the child was born alive. If that is in doubt, the offence of child destruction can be charged as an alternative.

7.6 The offence is an anachronism, developed to cover a potential former, rather than current, problem: the calculated and intentional killing of a child in the process of childbirth to avoid punishment for infanticide or murder. Punishment could, theoretically, be avoided due to a gap between abortion and homicide laws.

7.7 The offence creates a lack of clarity in Victorian law, which has three different aspects. First, an unlawful abortion³ that occurs at a stage when a fetus is capable of being born alive falls within the ambit of both section 65 (abortion) and section 10 (child destruction) of the Crimes

Act.⁴ The reach of those offences may not be the same because the Menhennitt ruling about the meaning of the word ‘unlawful’ in section 65 may not apply to the child destruction offence.⁵ Secondly, the offence has been interpreted, and used, in Victoria as applying in circumstances far removed from abortion: that is, when harm has been caused to a viable fetus following an assault on a pregnant woman. Thirdly, the offence requires the fetus to be ‘capable of being born alive’, which is a concept that has a contested meaning. It draws in the complexities of the common law ‘born alive’ rule and confuses the lines between child destruction, abortion, and homicide offences.

BACKGROUND TO THE OFFENCE

- 7.8 The common law does not recognise a fetus as a ‘person’ until it is a ‘reasonable creature in being’, that is, a being separate and independent of the mother. Before that it was considered ‘part of the viscera of the mother’.⁶
- 7.9 Under the common law a child was not considered alive, and therefore capable of being murdered, until ‘fully born’ and ‘independently functioning’. Fully born meant that the entire body of the child had left the body of the mother.⁷ The presumption was that a child was born dead, unless there was clear evidence of life independent from the mother.
- 7.10 This common law rule was developed when stillbirth was common due to complications in the pregnancy or during childbirth. In the developing world, where medical care is not routinely available or not of a high standard, infant and maternal mortality are still high.⁸ The requirement of proof of live birth was a natural development in those circumstances. The high standard of medical care available in the developed world means that stillbirth is now relatively rare.⁹
- 7.11 A criminal prosecution requires proof beyond reasonable doubt. Therefore any prosecution for killing a person first requires proof that a life existed to be taken: ‘A child’s death is no concern of the law of homicide if it occurs before or during birth’.¹⁰
- 7.12 There was initially confusion about whether independent functioning required ‘independent circulation’, and whether that meant not only breathing but detachment from the umbilical cord.¹¹
- 7.13 The born alive rule was clarified in Victoria by Justice Barry in the case of *R v Hutty*. A baby had to be completely delivered from the mother’s body and ‘living by virtue of the functioning of its own organs’.¹² The common law principle that a fetus is not a person, with legal rights, until born is a fundamental part of our legal system. The born alive evidentiary rule has evolved with medical advances, and was recently confirmed as part of Australian common law in the case of *Iby*.¹³ The finding in that case was that any sign of independent life was sufficient to satisfy the rule.¹⁴

1 *Crimes Act 1958* s 65.

2 See, eg, *C v S* [1988] 1 QB 135; *Rance v Mid-Downs Health Authority* [1991] 1 QB 587.

3 That is, an abortion that does not comply with the Menhennitt ruling as to the circumstances in which therapeutic abortion is lawful.

4 See, eg, *C v S* [1988] 1 QB 135 and *Rance v Mid-Downs Health Authority* [1991] 1 QB 587, cases that involved the equivalent provision in the UK *Infant Life Preservation Act 1929*. Case law and commentary in England relating to the equivalent offence clearly demonstrates that the offence of child destruction can apply to late abortions.

5 This is discussed further under The Offence in Victoria.

6 J Barry ‘The Child en Ventre sa Mere’ (1941) 14 *Australian Law Journal* 351, 353 quoted in Kristin Savell, ‘Is the “Born Alive” Rule Outdated and Indefensible?’ (2006) 28 *Sydney Law Review* 625, 627.

7 *R v Poulton* (1832) 5 Carr, 172 ER 997 (1832) See also Glanville Williams, *The Sanctity of Life and the Criminal Law* (1958) 19.

8 Every year 60 million women give birth at home with no skilled care. More than 500000 women die from complications of pregnancy and childbirth, 4 million newborn babies die every year before they are a month old, and 3 million are stillborn. Nearly all maternal and newborn deaths occur in the developing world: Save the Children, *State of the world’s mothers 2006—Saving the lives of mothers and newborns* (May 2006) 3 <www.savethechildren.org/publications/mothers/2006/SOWM_2006_final.pdf> at 20 February 2008.

9 This was discussed in *R v Iby* (2005) 63 NSWLR 278, 284 where the natural rate of stillbirth was stated to be approximately 0.5% of total births.

10 P Skegg, *Law, Ethics, and Medicine: Studies in Medical Law* (1988) 20.

11 *R v Enoch and Pulley* (1833) 5 Carr, 172 ER 1089 (1833); *R v Ann Crutchley* (1837) 7 Carr, 173 ER 355; *R v Trilloe* (1842) Carr and M 650, 174 ER 674. And see discussion in *Ibid* 20–23.

12 *R v Hutty* [1953] VLR 338.

13 *R v Iby* (2005) 63 NSWLR 278.

14 *R v Iby* (2005) 63 NSWLR 278, 288.

PROBLEMS WITH THE OFFENCE

- 7.14 The English Infant Life Preservation Act¹⁵ created the offence of child destruction, from which the Victorian offence was developed. It originated from a private member's Bill introduced by Lord Darling after judicial comment in a criminal trial.¹⁶ In June 1928 Justice Talbot said: 'It is a felony to procure abortion and it is murder to take the life of a child when it is fully born, but to take the life of a child while it is being born and before it is fully born is no offence whatever'.¹⁷
- 7.15 House of Lords debate in 1928 on the Infant Life Preservation Bill—the offence was later designated 'child destruction' by parliamentary draftsmen—does not provide certainty about the intention of the Bill. Some members were strongly of the view that the provision was not intended to have any effect upon abortion law, but to fill a perceived gap *between* abortion law and the laws of homicide and infanticide. Others saw destruction of the child before it was fully born as akin to abortion, and if not undertaken by the woman herself, most likely to be done by abortionists.¹⁸
- 7.16 Three concerns were raised during debate on the original Bill in 1928, which are still relevant in Victoria today.¹⁹

A NON-EXISTENT PROBLEM

- 7.17 The first was that the 'mischief' intended to be overcome by the offence did not exist, rather it was feared that it would arise with publication of the existence of the perceived gap. During parliamentary debate it was argued that the offence was unnecessary because there were no instances 'in the whole history of the administration of Criminal Law', including coronial inquiries, where an improper act had been done to a child during birth by anyone but the mother.²⁰ Women who killed their children in those circumstances were quite appropriately charged with infanticide. The offence of child destruction requires a degree of intention and wilfulness that is generally not present in cases of women killing children during or shortly after birth.
- 7.18 Infanticide was a relatively new offence when the debate occurred, having been created in 1922.²¹ It was introduced to recognise two things particular to that type of killing, and to provide for a penalty of life imprisonment rather than a sentence of death.²² First, it recognised the 'disturbance of mind': 'The malice was generally less in this class of murder because... of the general state of health and mind of the perpetrators of them'.²³ Secondly, it acknowledged the particular circumstances of infanticide: 'Generally, there was not that malignity in these cases which characterises other forms of murder. As the statistics showed, this crime was mostly committed by illegitimate mothers to hide their shame'.²⁴
- 7.19 The mischief section 10 was enacted to deal with has not eventuated. Rather, the child destruction provision has only been used for completely different criminal behaviour. It appears to have been used only once in England, and not at all in Victoria for its original purpose which was to deal with acts performed during childbirth, or for late abortion.²⁵ Instead, in England and Victoria, it has been used in cases involving attacks on women in the later stages of pregnancy with intent to harm the fetus.²⁶

CRIMINALISING MEDICAL DECISIONS

- 7.20 The second concern raised about the Bill was that extending the offence to people other than the mother opened up the possibility of midwives and doctors being charged over a decision to save the mother rather than the child, which Lord Atkin considered 'inadvisable' and 'unnecessary'. He argued that the offence would place the onus on the doctor to prove that he acted in good faith and the action was necessary, rather than the prosecution having to prove that the doctor did not act in this manner. 'It appears to me that doctors have been harried quite enough by litigation and to add this burden to the cares of an ordinary practitioner is perfectly horrible'.²⁷ The proviso that the offence of child destruction was not committed when an act was done in good faith, with the intention of saving the life of the mother,

was considered inadequate because it still allowed midwives and doctors to be charged, and required argument that the act was done for that reason.

- 7.21 Lord Atkin thought the perceived gap in the law was more appropriately filled by extending the offence of infanticide 'to include the killing of a child by the mother in the course of delivery' rather than creating a new offence.²⁸ 'The course of delivery' would be deemed to continue until the child had an existence independent of the mother.²⁹ Allowing the offence to apply to someone other than the mother went further than necessary according to Lord Atkin, because there were no instances of anyone other than the mother harming a child during birth.³⁰
- 7.22 This was not disputed in parliamentary debates. The 'good many' cases referred to by Justice Talbot where the person could not be punished because of the perceived gap, and which led to the private member's Bill, related to cases of infanticide.³¹ There was no agreement among the Lords that the lack of punishment was itself a problem. The class system was still entrenched in the UK, and the debate referred specifically to the circumstances of these infanticide cases being 'nearly always' those of young, unsupported, unmarried girls giving birth, often without care or attendance.³² Lord Dawson commented: 'For my part the fact that there is a gap in the law leaves me cold, when I feel all the time that this class (women in this situation) do not require conviction and it is a pity almost if they are convicted'.³³
- 7.23 Concerns about the gap in the law had first been raised in the mid-19th century. It appears the Bill was passed because of concern that publication of Justice Talbot's comments, alerting women and abortionists to the gap, would lead to abortionists being hired to destroy the child during birth.³⁴ However, Lord Atkin did not believe that professional abortionists would consider themselves safe because of this gap, or that a woman who coldly and deliberately killed her child during 'the actual act of delivery' would truly believe she could argue this and be acquitted because of the gap.³⁵

LACK OF CLARITY IN THE LAW

- 7.24 The third concern was that the offence overlapped with the abortion laws, which Lord Atkin saw as 'unnecessary, and, indeed ... undesirable'.³⁶ Lord Atkin stated:

*In so far as it deals with the offence of killing a child, the provision as to twenty-eight weeks after conception seems to be quite unnecessary, because such an act as that would, as I am advised and as I understand, always be covered by the law as to procuring abortion.*³⁷

15 The Act does not apply throughout the UK, but in England and Wales only (see section 3(2)).

16 Several previous attempts had been made to introduce legislation to fill the gap, none of which were accepted. There were Bills proposed in: 1867 (after the report of the Capital Punishment Commission of 1866); 1874 (part of the Homicide Law Amendment Bill of 1872–74); and by the Draft Code of 1879, which attempted to introduce an offence of a mother neglecting to obtain reasonable assistance for birth with the intention that the child should die. For details of the history of earlier proposals to remedy the gap see D Seaborne Davies, 'Child-Killing in English Law' (1937) *Modern Law Review* 203; JJ Keown, 'The Scope of the Offence of Child Destruction' (1988) 104 *Law Quarterly Review* 120.

17 Stated in the course of Talbot J's charge to the Grand Jury at Liverpool Assizes, extracts from which—including this quote—were quoted by Lord Darling in debate on the Child Destruction Bill: UK, *Parliamentary Debates*, House of Lords, 21 June 1928, 71, 617–18 (Lord Darling).

18 United Kingdom, *Parliamentary Debates*, House of Lords, 22 November 1928, 74, 440–441 (The Lord Chancellor (Lord Hailsham)). No assistance can be gained from debate in Commons as the Bill was passed without debate there.

19 In England the overlap has been recognised and the child destruction provision quarantined from abortion laws. This is discussed later.

20 UK, *Parliamentary Debates*, House of Lords, 22 November 1928, 74, 427 (Lord Atkin).

21 *Infanticide Act 1922*, later repealed and replaced by the *Infanticide Act 1938*.

22 A woman convicted of infanticide was sentenced as if for manslaughter. The crime of murder still carried a penalty of death. Commentators noted that many women were acquitted of murder in such cases because judges and juries sympathised with the circumstances of these cases and did not believe the women deserved to hang. The offence of infanticide was therefore also an attempt to increase convictions in such cases. See Seaborne Davies (1937) above n 16 218–219.

23 Ibid 221.

24 Ibid 221.

25 There are no reported cases in the UK. A search of the internet on 12 December 2007 revealed only one prosecution in the UK relating to the original purpose of the legislation. A 22-year-old mother of two was convicted of child destruction after allegedly using an illegal abortionist (who was not identified or charged, though the police investigation is ongoing) to end her pregnancy and disposing of the fetus sometime between 28 and 32 weeks gestation: Nick Britten, *Jury convicts mother who destroyed foetus* (27 May 2007) Telegraph <www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/05/26/nabort26.xml> at 12 December 2007. There are no reported cases in Victoria of child destruction. There was a police investigation of a late abortion at the Royal Women's Hospital in 2000 to see if any of the doctors involved should be charged with child destruction, but no charges resulted: Julie-Anne Davies, '32 Weeks: 5½ Years', *The Bulletin* (Sydney) 8 January 2008.

26 Examples in the UK include: *R v Virgo* [1989] Crim LR 233; *R v Johnson and Lorraine* [1990] Crim LR 661; *Attorney-General's Reference (No 3 of 1994)* [1998] AC 245. In Victoria information provided by the Office of Public Prosecutions on 7 September 2007 from internal records noted two unreported cases where accused people were charged with attempted child destruction over attacks on pregnant women.

27 UK, *Parliamentary Debates*, House of Lords, 22 November 1928, 72, 272 (Lord Atkin).

28 Ibid 426.

29 Ibid 425 (Lord Atkin).

30 Ibid 427.

31 Ibid 269 (Lord Darling). Conviction for infanticide required proof that the child had been born alive. Judges and juries contrived to avoid conviction of women in this circumstance, particularly when the death penalty still applied: Seaborne Davies (1937) above n 16, 217–219.

32 UK, *Parliamentary Debates*, House of Lords, 22 November 1928, 72, 271 (Lord Atkin).

33 Ibid 273 (Lord Dawson of Penn).

34 UK, *Parliamentary Debates*, House of Lords, 6 December 1928, 74, 440 (The Lord Chancellor Lord Hailsham).

35 Ibid 446, 448 (Lord Atkin).

36 Ibid 428.

37 UK, *Parliamentary Debates*, House of Lords, 22 November 1928, 72, 272 (Lord Atkin).

- 7.25 There was no agreement between the Lords about whether the offence overlapped with abortion.³⁸ For example, while Lord Atkin clearly thought it did, Earl Russell remarked during debate 'it does not deal with abortion or anything in the nature of abortion'.³⁹
- 7.26 Noted commentators have expressed no doubts about the overlap, or about the problems left unresolved by the offence. Professor Glanville Williams noted in 1958:

The legislation penalizes the destruction of unborn infants and infants not completely born. It thus straddles part of the law of abortion and the no-man's land between abortion and murder, and obviates some of the difficulties connected with the proof of birth without exempting the prosecution from having to prove an act of killing with the requisite mental state (mens rea).

- 7.27 Keown notes that the overlap was well recognised by the Home Office when the offence was enacted. A Home Office comment on the Bill stated 'there can be no harm in overlapping between the Bill and section 58 of the *Offences Against the Person Act, 1861* (abortion)' because the penalty for both was the same and they could be charged in the alternative on indictment.⁴⁰
- 7.28 This contrasts with a 1987 House of Lords Select Committee examining the application of the Act in relation to abortion, which noted:

It is plain that it was not the intention of the author of the Bill or of the House that the Bill should overlap the law of abortion or the law of murder. The Bill had the purpose only of filling a well known and clearly defined gap in the criminal law.⁴¹

- 7.29 These differences of opinion from authoritative sources demonstrate the ongoing lack of clarity associated with this offence.

THE OFFENCE IN VICTORIA

- 7.30 The issue of overlap with the offence of unlawful abortion was not considered when the offence of child destruction was introduced into Victorian law in 1949. It was widely believed that section 10 did not interfere with the law of abortion. During parliamentary debate, a member of the Legislative Council quoted from a memorandum of the Chief Justice's law reform committee, which had considered the Bill: 'It is thought that this provision will fill a gap in the criminal law between the offences of abortion and murder'.⁴²
- 7.31 While the overlap was not recognised or discussed during parliamentary debates, it does exist and it produces uncertainty in Victorian law. Unlawfully terminating a pregnancy when a woman is carrying a fetus capable of being born alive falls within the ambit of both section 65 (abortion) and section 10 (child destruction) of the Victorian Crimes Act.⁴³ This overlap causes great uncertainty for the medical profession and women when a woman has reached a stage in her pregnancy when the fetus may be capable of being born alive.
- 7.32 The English statute has always contained a proviso that the offence of child destruction was not committed when an act was done in good faith with the intention of saving the life of the mother. When the offence of child destruction first became part of Victorian law in 1949, the English proviso was omitted and replaced by the word 'unlawfully'. This change has further confused the meaning of this offence in Victoria.
- 7.33 Victorian Parliamentary debate about the offence in 1949 suggests that the proviso was omitted and replaced by the word 'unlawfully' in an attempt to ensure Victorian medical practitioners, and courts, were granted more responsibility for determining when the destruction of a fetus during childbirth, or the later stages of pregnancy, could be lawfully performed. Specific reference was made to the UK case of *Bourne*⁴⁴ and its 'broad interpretation of' preserving the life of the mother: 'By the insertion of the word "unlawfully" ... that position will still obtain to the extent that the courts will determine what is unlawful'.⁴⁵ In clear reference to medical practitioners, concern was expressed that 'no person shall suffer for an act on his part that is not unlawfully done'.⁴⁶
- 7.34 The parliamentary intention of delegating law-making responsibility to the judiciary has not been achieved because the meaning of the word 'unlawfully' in section 10 has not been

considered by a Victorian court. It is unlikely, however, that the word has the same meaning in that section as it does in the Menhennitt rules, which are concerned with the meaning of the word unlawfully in section 65. This is because 'potential life' is not one of the factors which must be considered when determining whether conduct is unlawful for the purposes of the section 65,⁴⁷ but it is a factor which may arise when construing the word for the purposes of section 10. The Menhennitt rules are directed towards the interests of the woman alone.⁴⁸

- 7.35 Section 10 seems concerned with the interests of a potential life as well as those of a pregnant woman, except when there is a risk to the woman's life. When the risk to the woman falls short of death, it appears that for an abortion to be lawful a medical practitioner must determine whether termination is a necessary and proportionate response to the health risk faced by the woman, and at the same time consider the potential life of the fetus. This is a balancing task of extraordinary, perhaps impossible, complexity, especially in the absence any guidance about how to weigh the competing considerations.

IS REFORM NEEDED?

- 7.36 Use of the words 'capable of being born alive' in section 10 raises questions about the relevance of the born alive rule to this provision. The application of the rule to the section is unclear.

COMPLEXITY OF THE BORN ALIVE RULE

- 7.37 Although the offence of child destruction was introduced to overcome the need for proof that a child was in fact born alive for the offences of murder or manslaughter to be charged, it raises a raft of other problems through the requirement of proof that the child was capable of being born alive.
- 7.38 How does a court determine the factual question of whether a particular fetus was capable of being born alive? The words invite argument about the meaning of 'born alive' and about whether the fetus in question was 'capable' of being born alive. Is a fetus that exhibits any signs of life born alive or does it need to be viable in terms of being able to maintain an independent, ongoing existence?⁴⁹ Both interpretations are problematic because of their uncertainty and propensity to change over time because of medical advances.⁵⁰
- 7.39 The English High Court and Court of Appeal considered this issue in *C and another v S and others*.⁵¹ The Court of Appeal held that 'born alive' meant capable of ongoing life. For a normal healthy fetus this was determined to be when lungs are sufficiently developed for the infant to be able to breathe, either naturally or with assistance.⁵² After this decision it was argued in England that viability was an inappropriate and 'flimsy'

38 UK, *Parliamentary Debates*, House of Lords, 6 December 1928, 74, 430 (Lord Merrivale) and 444 (Earl Russell).

39 *Ibid* 444 (Earl Russell).

40 Quoted in Keown (1988) above n 16, 128.

41 Her Majesty's Stationery Office, *Select Committee on the Infant Life (Preservation) Bill [HL] Special Report with Evidence* House of Lords: Session 1986–1987 (1987) 6.

42 Victoria, *Parliamentary Debates*, Legislative Council, 11 May 1949, 1253 (Archibald Fraser).

43 See, eg, *C v S* [1988] 1 QB 135 and *Rance v Mid-Downs Health Authority* [1991] 1 QB 587, which were cases involving the equivalent provision in the UK *Infant Life Preservation Act 1929*.

44 *R v Bourne* [1939] 1 KB 687, [1938] 3 All ER 615.

45 Victoria, *Parliamentary Debates*, Legislative Council, 11 May 1949, 1252 (Archibald Fraser).

46 *Ibid* (WJ Beckett).

47 *Crimes Act 1958* ss 65, 66. The rationale for these statutory offences may have changed over time. Prof Waller has written that the legislative intention of the original UK statute of 1803 was 'to protect women from being forced to undergo abortions'. He states that by 1861 the UK legislation 'deals with abortion from the standpoint of protecting the foetus rather than the mother, and of doing so on moral grounds': Louis Waller, 'Any Reasonable Creature in Being', 1987 13 *Monash University Law Review*, 40. When describing the same UK law almost a century later Prof Glanville Williams wrote: 'The chief evil of an abortion is no longer thought to be the loss of the unborn child, but the injury done to the mother by the unskilled abortionist': Williams (1958) above n 7, 146.

48 See Chapter 2 for a detailed discussion of the Menhennitt rules.

49 See discussion in Ian Kennedy and Andrew Grubb, *Medical Law* (3rd ed, 2000) 1429–1436.

50 See discussion in Savell (2006) above n 6, 637–639.

51 *C and another v S and others* (1987) 1 All ER 1230.

52 *C and another v S and others* (1987) 1 All ER 1242.

basis on which to proscribe abortion because of its uncertainty.⁵³ Lung development cannot be accurately determined in utero.⁵⁴ The ability to breathe as the sole determinant of viability also does not take into account extremely premature births that can result in serious congenital abnormalities. A 22-week fetus may occasionally survive, but is likely to suffer serious and ongoing disabilities 'in which case the pure fact of viability alone should not be the only guiding factor over an abortion decision'.⁵⁵

- 7.40 The lack of certainty and clarity created by this provision are evidenced by the fact that legislators in 1929 clearly considered 28 weeks gestation to be the earliest time a fetus may be viable, whereas it is now recognised there is a 'grey zone' of viability from 23–26 weeks.⁵⁶ In this zone 'the wishes of parents (as to whether treatment should be offered) should be paramount'.⁵⁷ While such a grey zone is appropriate for medical decisions about treatment of newborns, it is too uncertain to be suitable for use in the criminal law.
- 7.41 If section 10 is retained in Victorian law, it will remain unclear whether the born alive rule, with all of its own uncertainty, applies, or whether the offence is limited to cases where a fetus is found to be capable of ongoing life.
- 7.42 The born alive rule has most recently been developed through application in murder or manslaughter cases.⁵⁸ In relation to homicide or manslaughter, a major issue is raised if unlawful injury is inflicted on a pregnant woman resulting in miscarriage of a fetus that is born alive but dies sometime later due to the unlawful injury.
- 7.43 In the recent decision of *Iby*, the NSW Court of Appeal considered the born alive rule in the context of a manslaughter charge resulting from a dangerous driving incident that resulted in the premature birth and subsequent death of a child.⁵⁹ The court questioned the continuing relevance of the rule in light of its basis on 'the primitive state of medical knowledge at the time it was adopted' and the high incidence of stillbirth at the time, which we have discussed.⁶⁰ Given medical advances, the court considered there to be a 'strong case for abandoning the born alive rule completely'.⁶¹
- 7.44 *Iby* significantly extended the meaning of born alive in NSW through Chief Justice Spigelman's ruling that 'any sign of life after delivery is sufficient'.⁶² He also noted that the authorities had recognised different criteria as indicating life, which were 'not necessarily reconcilable', and that this was because it was an evidentiary rather than substantive rule.⁶³ Rulings therefore had to be understood in the context of the particular facts of the case.

LEGAL UNCERTAINTY ABOUT LATE THERAPEUTIC ABORTIONS

- 7.45 Late abortions occur in a small number of cases in Victoria, many for severe fetal abnormality and some for other reasons. If the child destruction provision remains in Victorian legislation, medical practitioners who perform abortions in any of these circumstances will remain vulnerable to criminal liability.
- 7.46 In the UK from 1967 (when the Abortion Act was introduced) until 1990, the medical profession was greatly concerned about the lawfulness of late abortions because of the child destruction provision. The overlap between child destruction and abortion law was recognised⁶⁴ and child destruction was quarantined from abortion law by a legislative amendment in 1990. A provision was added to the Abortion Act to make it clear that a registered medical practitioner performing an abortion in accordance with the provisions of the Act could not commit the offence of child destruction.⁶⁵
- 7.47 Although no medical practitioners have been charged with performing a late abortion in Victoria, the termination of a pregnancy at 32 weeks by doctors at the Women's in 2000 did lead to a child destruction investigation. Fetal abnormality was raised in this case, but the lawfulness of the abortion centred on the risk to the woman, who was suicidal. Ultimately, criminal charges were not pursued against the staff involved. The conduct was probably not considered to be unlawful under section 10 because there was clear evidence that all staff involved genuinely believed the woman would commit suicide if the abortion was not performed.⁶⁶

SUBMISSIONS AND CONSULTATIONS

- 7.48 In our Information Paper, we asked whether the offence of child destruction needed to be changed in any way and, if so, how. Many people who provided submissions did not address the issue of child destruction. In consultations, many participants had not considered the interrelationship of the abortion and child destruction provisions, and therefore did not have an established view about how it should be amended.
- 7.49 Responses that were received in submissions and consultations were divided into four categories:
- wanting the current offence abolished
 - retaining it but ensuring it is properly enforced, or retaining but amending it to lower the 28 week presumption, or link it to viability
 - confining its operation to childbirth
 - amending it to make it clear that it does not apply to lawful abortions performed by medical practitioners.

ABOLISH

- 7.50 Those who argued that section 10 should be abolished generally expressed concern that the provision is confusing, overly complex, outdated, and ambiguous.⁶⁷ There was also concern that as the original intent of the provision is unclear, interpretation is variable and the provision had been used to intimidate doctors.⁶⁸ Similarly, the Campaign for Women's Reproductive Rights felt that retaining the offence of child destruction for pregnancies beyond 28 weeks puts medical practitioners, and women, at risk of prosecution.
- 7.51 Some expressed concern that if sections 65 and 66 of the Crimes Act are repealed, it needs to be made clear that the offence of child destruction cannot be used as another way to criminalise abortions.⁶⁹ Many submitters thought that as the offence is no longer used for the purpose it was enacted for, it was more appropriate to repeal it and enact clear provisions that effect the intended purpose.⁷⁰
- 7.52 For example, Dr Jo Wainer submitted that it would be more appropriate to repeal section 10 and extend the law of assault to take into account damage to a fetus caused by assault of a pregnant woman. Many submitters agreed that section 10 should be amended to apply only in cases of assault of a pregnant woman with intent to harm the fetus, or an assault provision created.⁷¹
- 7.53 In consultations, many others supported the introduction of an assault offence that recognised the aggravating circumstance of pregnancy.⁷² Some of these also thought section 10 should be repealed, others that its application should be clearly confined to killing a child at childbirth and not abortion.

53 RD Mackay, 'The Relationship Between Abortion and Child Destruction in English Law' (1988) 7 (2) *Medicine and Law* 177, 181–2.

54 'Respiratory distress syndrome of the newborn infant caused by immaturity of the fetal lung continues to be a clinical problem. Unfortunately, currently available tests continue to demonstrate low diagnostic specificity and remain poor predictors of fetal lung immaturity': DG Grenache and AM Gronowski, 'Fetal Lung Maturity' (January 2006) 39(1) *Clinical Biochemistry* 1. A paediatric specialist on our Medical Panel advised there is no antenatal test that will determine, in extreme preterm situations, whether an extreme preterm infant will survive, survive with disability, or not survive at all.

55 Ibid 181. For data on rates and types of disability for children born at 22–26 weeks see J Keogh et al, 'Delivery in the "Grey Zone": Collaborative Approach to Extremely Preterm Birth' (2007) 47 *Australian and New Zealand Journal of Obstetrics and Gynaecology* 273; Nuffield Council on Bioethics, *Critical Care Decisions in Fetal and Neonatal Medicine: Ethical Issues* (2006) 71–72; British Medical Association, *Abortion Time Limits: A Briefing Paper from the BMA May 2005: Part Two—Factors Influencing Views on Abortion Time Limits: Fetal Viability* <www.bma.org.uk/ap.nsf/Content/AbortionTimeLimits-Factors~viability> at 14 September 2007.

56 Keogh (2007) above n 55.

57 David Ellwood, 'Is There a "Borderline of Viability"?' (2007) 47 *Australian and New Zealand Journal of Obstetrics and Gynaecology* 261.

58 *R v Iby* (2005) 63 NSWLR 278; *Attorney-General's Reference (No 3 of 1994)* [1998] AC 245.

59 *R v Iby* (2005) 63 NSWLR 278.

60 *R v Iby* (2005) 63 NSWLR 278, 284.

61 *R v Iby* (2005) 63 NSWLR 278, 288.

62 *R v Iby* (2005) 63 NSWLR 278, 288.

63 *R v Iby* (2005) 63 NSWLR 278, 285, and see discussion by Savell (2006) above n 6, 629–633.

64 See, eg, Kennedy and Grubb (2000) above n 49, 1418, 1428; P Skegg, *Law, Ethics, and Medicine: Studies in Medical Law* (1988) 5.

65 *Abortion Act 1967* s 5(1), substituted by *Human Fertilisation and Embryology Act 1990* s 37(4).

66 Savell (2006) above n 6, 648; Davies (8 January 2008) above n 25.

67 Consultations 9 (Croydon Day Surgery), 15 (Dr Ian Freckleton), 12 (Reproductive Choice Australia), 33 (Dr Lachlan de Crespigny), 35 (Women's Clinic Richmond Hill); 24 (Fetal Management Unit—Royal Women's Hospital); submissions 227 (Reproductive Choice Australia), 235 (Youthlaw), 273 (Law Institute of Victoria), 504 (Fitzroy Legal Service).

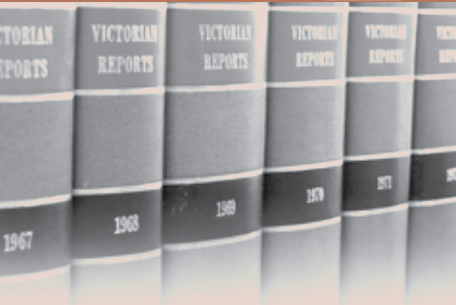
68 Submissions 461 (Association for the Legal Right to Abortion), 505 (Victoria Legal Aid); consultation 3 (Association for the Legal Right to Abortion).

69 Eg, submission 487 (Victorian Women's Trust).

70 Ibid.

71 Submissions 24 (Humanist Society of Victoria), 152 (Rebecca Albury), 154 (Maryse Usher), 226 (Women's Health Association of Victoria), 231 (Public Health Association of Australia, Women's Health Special Interest Group), 261 (Gippsland Women's Health Service), 314 (South West Community Legal Centre), 340 (ALP Brunswick South Branch), 426 (Anglican Diocese of Melbourne), 507 (Royal Women's Hospital).

72 Consultations 3 (Association for the Legal Right to Abortion), 6 (Women's Health Victoria), 11 (Family Planning Victoria), 17 (Victorian Women's Trust), 21 (Women's Electoral Lobby), 31 (Royal Australian and New Zealand College of Obstetricians and Gynaecologists), 32 (Dr Lyn Gillam), 34 (Jewish Community Council of Victoria and Rabbi Aviva Kipen).



- 7.54 In its submission, Fitzroy Legal Service said that utilising the child destruction provisions in cases of assault was inappropriate because it does not recognise that the injury is to the pregnant woman through loss of the child. It supported the NSW model of defining grievous bodily harm (serious injury in Victoria) to include 'the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, whether or not the woman suffers any other harm'. It submitted that this avoids any overlap with abortion and is an appropriate recognition of the harm caused to the woman by such acts.
- 7.55 Liberty Victoria submitted that repeal of section 65 of the Crimes Act necessarily requires section 10 to be altered. Considering the original intent of the provision, and the fact that the UK has recognised and rectified the overlap, it submitted that section 10 should be abolished. Fitzroy Legal Service agreed, submitting:
- When incorporated into Victorian law ... this provision effectively overlapped with ss 65 and 66 of the Crimes Act to create an additional offence when the woman was 28 weeks or more pregnant. This overlap seems unnecessary. Any act done before birth should be covered by abortion regulations. Any act done once the foetus is breathing independently of the mother should be covered by murder, manslaughter or infanticide laws. If there is concern about this, it may be beneficial to specify that destruction of a foetus in the birth process (with the clear exceptions of saving the life or physical mental health of the mother) can also be prosecuted as murder, manslaughter or infanticide.*
- 7.56 The Law Institute of Victoria and Children by Choice submitted that the term 'capable of being born alive' makes the balancing task required overly complex and difficult for medical practitioners to implement in their daily roles. Furthermore, it does not accord with the approach taken in the Menhennitt ruling, which is directed to the interests of the woman alone.
- 7.57 The Law Institute of Victoria, Victoria Legal Aid, and Victorian Women Lawyers submitted that section 10 should be repealed and replaced with provisions which make the following circumstances criminal offences:
- wilful or negligent destruction of a child during birth
 - assault or violence against a pregnant woman with an intent to harm or reckless disregard as to the harm caused to the fetus.
- 7.58 These organisations also submitted that a legislative provision specifically preclude lawful abortion or 'distinguish between abortion which is performed with the consent of the woman, and the offence of child destruction'.

RETAIN BUT ENFORCE

- 7.59 The Respect Life Office felt that the offence of child destruction should be retained and enforced to protect 'viable' children. The Australian Family Association also favoured retaining the child destruction provisions and felt they should not be weakened. The Presbyterian Church of Victoria favoured retaining child destruction; however, it acknowledged that the current law is unclear.
- 7.60 A significant proportion of submitters stated that the child destruction provision should be retained in its current form.⁷³ Some of these submitters also felt that not only was it necessary it be retained, but that it also be enforced or 'not weakened'.⁷⁴
- 7.61 The National Civic Council felt that the child destruction provision should be retained as it 'recognises the development of a child in the later stages of pregnancy, one who is viable outside the womb, and is deserving of protection in spite of not yet having been born alive'.
- 7.62 Two submitters believed police were failing to enforce the law.⁷⁵ One argued that the failure to enforce the provision has led to 'inconsistency between a third party killing the pre born child by negligence or intention, without the consent of the mother of the pre born child; and an abortionist killing the same child, with the consent of the mother of the pre born child'.⁷⁶

CONFINE TO CHILDBIRTH

- 7.63 Some who preferred the abolition of the provision noted that if a decision was made to retain child destruction, it should apply only during childbirth.⁷⁷ This is the model that operates in the

ACT. These people generally also favoured a specific assault offence against pregnant women. Others noted that if the original intention of the provision was to only apply during childbirth, it should be amended to reflect that.⁷⁸

- 7.64 A significant number of submitters expressed the view that any changes to the provision should specify that the offence of child destruction does not, or should not, relate to abortion.⁷⁹ Moreover, medical practitioners performing lawful abortion procedures should not be subject to criminal sanctions.⁸⁰

AMEND TO TIGHTEN

- 7.65 Those who favoured retaining the offence of child destruction generally also wanted an amendment to lower the current 28-week presumption.⁸¹ The alternative gestational limits proposed ranged from 20 weeks to 23 weeks in consultations, and from 6 to 24 weeks in submissions.⁸² The Australian Christian Lobby specifically noted that among ‘pro-life’ groups, late abortions are viewed as falling within the offence of child destruction. Of the pro-forma submissions, many argued that section 10 should remain and the 28-week presumption lowered to 20 weeks, effectively making late abortion a criminal offence. Others wanted the existing offence to remain in its current form.
- 7.66 Those who favoured 20–24 week presumptions were generally arguing on the basis of viability. For example, Rabbi Faitel Levin believed that viability gives greater ethical worth to the fetus, that is, a fetus is a potential human being from conception, but that this potential has more meaning as the fetus develops, particularly from the point of viability.
- 7.67 Dr Tonti-Filippini argued that the child destruction provision should be shifted back to a gestational limit of 23 weeks or 600 grams, and that the viability clause should be retained to arguably allow the provision to apply to cases below the gestational limit.

OPTIONS FOR REFORM

- 7.68 The problems caused by the overlap between the child destruction and abortion offences have not been recognised or debated by the legal profession in Victoria;⁸³ however, all the problems that have been discussed in the UK for many years are relevant here, because we have essentially the same offence in our criminal laws. While section 10 remains in its present form there is potential for it to be used to charge medical practitioners who perform late abortions, as well as pregnant women who have late abortions. This has been clearly demonstrated by the investigation of the doctors involved in the late abortion at the Royal Women’s Hospital in 2000, and by the recent prosecution of a woman in the UK.⁸⁴

73 Submissions 12 (Paul Johnson), 145 (Roger McWhinney), 180 (Jeremy Peet), 188 (David Forster), 252 (National Civic Council), 316 (Westgate Catholic Deanery Social Justice Group), 324 (Rodney Schneider), 332 (Pat Healy), 334 (Anthony Krohn), 362 (Rosaria Righiele), 407 (John Keble), 435 (Brian Gleeson), 452 (Catholic Justice Agency), 467 (Suryan and Therese Chandrasegaran).

74 Submissions 12 (Paul Johnson), 180 (Jeremy Peet), 188 (David Forster), 252 (National Civic Council), 288 (Anonymous).

75 Submissions 12 (Paul Johnson), 252 (National Civic Council).

76 Submission 12 (Paul Johnson).

77 Consultations 10 (Health Services Commissioner), 17 (Victorian Women’s Trust), 21 (Women’s Electoral Lobby), 31 (Royal Australian and New Zealand College of Obstetricians and Gynaecologists) (some participants only).

78 Submissions 226 (Women’s Health Association of Victoria), 261 (Gippsland Women’s Health Service), 314 (South West Community Legal Centre).

79 Submissions 136 (Emily’s List), 183 (Barb Jennings), 226 (Women’s Health Association of Victoria), 261 (Gippsland Women’s Health Service), 269 (Stef Puszka), 279 (Elyse Brown), 281 (Rhiannon Platt), 314 (South West Community Legal Centre), 319 (Tanya Mammone), 450 (Victorian Young Labor), 453 (Young Labor Left Victoria), 483 (Margaret Pekin), 498 (Union of Australian Women), 499 (YWCA), 500 (Scott Bloodworth), 501 (Liberty Victoria), 508 (Catherine Mayes), 510 (Public Health Association of Australia, Women’s Health Special Interest Group).

80 Submissions 134 (Women’s Health West), 152 (Rebecca Albury), 226 (Women’s Health Association of Victoria), 261 (Gippsland Women’s Health Service), 314 (South West Community Legal Centre), 462 (Family Planning Victoria), 503 (Australian Medical Association Victoria), 507 (Royal Women’s Hospital).

81 Consultations 2 (Endeavour Forum), 5 (Australian Christian Lobby), 7 (Right To Life Australia); submissions 15 (Dr Nicholas Tonti-Filippini), 249 (Agnes Mary Hanna), 291 (Professor Loane Skene), 357 (Anonymous), 400 (Lisa Brick), 417 (Anonymous), 458 (Caroline Chisholm Society).

82 Consultations supporting 20 weeks: 2 (Endeavour Forum); 22 weeks: 5 (Australian Christian Lobby); 23 weeks: Dr Nicholas Tonti-Filippini. Submissions supporting 6 weeks: 194 (Katie Lindorff); 14 weeks: 259 (Michael Anstis); 20 weeks: 9 (Charles Francis), 121 (Barry and Helen Lauritz), 233 (Brendan Griffin), 255 (Waverly Catholic Deanery), 272 (Desmond Kelly), 357 (Anonymous), 372 (Mary McInerney), 396 (Mark Godfree), 417 (Anonymous), 458 (Caroline Chisholm Society), 252 (National Civic Council), 202 (James Jackson); 21 weeks: 249 (Agnes Mary Hanna); 24 weeks: 120 (Rebecca Carey), 299 (Caroline Chisholm Centre for Health Ethics), 290 (Professor Loane Skene).

83 This is not true within the medical profession, where the issue has been raised for some time. See, eg: Lachlan de Crespigny and Julian Savulescu, ‘Abortion: Time to Clarify Australia’s Confusing Laws’ (2004) 181(4) *Medical Journal of Australia* 201; Lachlan De Crespigny, ‘Australian Abortion Laws: Do They Pose a “Health Hazard”?’ (2005) 7 (1) *O & G* 52; Thomas Faunce, ‘The Carhart Case and Late-Term Abortions—What’s Next in Australia?’ (2007) 15 *Journal of Law and Medicine* 23.

84 Britten (27 May 2007) above n 25.

- 7.69 Three options for reform of the child destruction provision were considered by the commission and discussed with people in consultations.

OPTION 1: NSW MODEL

Repeal section 10 and clarify that destruction of a fetus through assault of a pregnant woman constitutes 'serious injury' to the woman.

- 7.70 In Victoria, section 10 has been viewed as only being applicable to the destruction of viable fetuses through assault on the pregnant mother. The Office of Public Prosecution advises that its records show this to be the only situation in which anyone has been charged with this offence.⁸⁵ One option for reform is to repeal the child destruction provision and replace it with an offence clearly designed for the purpose for which it is used.
- 7.71 There has never been an offence of child destruction in NSW. A 2003 review of the law of manslaughter in NSW suggested the creation of an offence of 'killing an unborn child' similar to the Victorian child destruction provision;⁸⁶ but while this report was being considered the case of *R v King* arose.⁸⁷ In this case an unplanned pregnancy resulted in a dispute between the man and the woman concerning an abortion. The woman decided against an abortion but, when 24 weeks pregnant, she was attacked by the man. He kicked and stomped on her stomach, killing the fetus, which was subsequently stillborn. The trial judge granted a permanent stay of proceedings on the charge of grievous bodily harm of the woman on the basis that the fetus was an organism separate to the woman and therefore the charge was 'doomed to failure'.⁸⁸ The Director of Public Prosecutions appealed the decision to stay proceedings. The Court of Criminal Appeal ruled that a violent act inflicted on a pregnant woman causing the stillbirth of the fetus constituted grievous bodily harm to the mother.
- 7.72 The NSW government decided to codify this ruling rather than create a child destruction offence. This was achieved through an addition to the definition of 'grievous bodily harm' in the NSW Crimes Act. 'Grievous bodily harm' now includes destruction of the fetus of a pregnant woman, other than in the course of a medical procedure, whether or not the woman suffers any other harm.⁸⁹
- 7.73 The Attorney-General noted that the government would not make any legislative change that interfered with the law of abortion.⁹⁰ He also noted that altering the definition affected a range of offences that may be charged when a criminal act resulted in destruction of the fetus of a pregnant woman:
- The amendment will cover a range of situations from maliciously inflicting grievous bodily harm with intent under section 33 of the Crimes Act, which carries a maximum penalty of 25 years imprisonment, to causing grievous bodily harm by an unlawful or negligent act, which carries a maximum penalty of two years imprisonment under section 54 of the Crimes Act.*⁹¹
- 7.74 The NSW option for reform overcomes the inherent evidentiary difficulties and shifting ground problems of fetal viability in section 10. Further, it avoids the common law issue of whether there is 'a creature in being' to which harm can be done. It appropriately reflects the seriousness of the offence and, most importantly, differentiates between abortions and criminal acts by third parties resulting in fetal death.
- 7.75 This approach to reform of the law applicable to assaults upon pregnant women does not prevent the creation of different laws for late abortions—that is a quite separate policy decision to be made by government. However, the commission's strong view is that if any such laws are introduced they should deal with abortion alone for the sake of clarity.
- 7.76 Charges of manslaughter have been made in various circumstances of fetal death in NSW in recent years. These cases demonstrate further why a child destruction provision may no longer be necessary.
- 7.77 In 2006 a doctor was charged with manslaughter relating to a second trimester abortion.⁹² Dr Sood was also charged with unlawful abortion. At the trial there was conflicting evidence about whether the 22–24 week old fetus was born alive. The jury acquitted Dr Sood of manslaughter because it was not satisfied that the fetus was born alive. Nevertheless, Dr Sood was found guilty of unlawful abortion and was sentenced to a two year good behaviour bond.

Although she had performed the abortion at the request of the patient, she had made none of the enquiries required by the ruling in *Wald*.⁹³ She therefore could not be said to ‘honestly and genuinely hold’ the belief that the abortion was necessary. Dr Sood was also dealt with by the NSW Medical Tribunal for professional misconduct and was deregistered and ordered not to apply to re-register as a medical practitioner for 10 years.⁹⁴

- 7.78 It is clear that defendants may be charged and convicted of manslaughter in circumstances where there has been an unlawful act resulting in the death of a fetus after live birth. This is so even for a non-viable fetus that demonstrates ‘any sign of life after birth’.⁹⁵ It is likely that a Victorian court would find that a fetus had been born alive, even if it had lived for only a short time with the assistance of medical technology.⁹⁶
- 7.79 It is also likely that a Victorian court would take a similar approach to that in *King*, and find that the fetus was part of the mother, allowing a serious injury charge to be laid. Rather than await clarification by a court, the commission believes the clearest and safest way forward is to amend the statutory definition of ‘serious injury’ in the Crimes Act.
- 7.80 It may seem anomalous that this option would see the same criminal conduct resulting in different charges, depending on whether the fetus was born alive or stillborn. If a fetus were stillborn following a criminal assault upon a pregnant woman, a charge of intentionally or recklessly causing serious injury to the woman would apply. If a child were born alive, manslaughter could be charged.
- 7.81 There are two responses. First, the criminal law governing offences against the person has always been concerned with the effect of the conduct as well as the state of mind of the perpetrator. An assailant who shoots and kills will be charged with murder, whereas one who shoots and misses but has precisely the same intent, will be charged with attempted murder.
- 7.82 Secondly, any differences or similarities in the seriousness of the criminal conduct can be taken into account at sentencing. The maximum penalty for manslaughter and intentionally causing serious injury is the same—20 years imprisonment.⁹⁷

OPTION 2: ACT MODEL

Retain section 10 but confine it to childbirth.

- 7.83 The ACT child destruction offence prohibits behaviour ‘occurring in relation to a childbirth and before the child is born alive’ that ‘prevents the child from being born alive’ or ‘contributes to the child’s death’.⁹⁸ There is no case law to explain the meaning of this provision.⁹⁹ It has been suggested that the words ‘in relation to a childbirth’ would prevent this section applying to an abortion ‘unless it was performed at the very end of pregnancy, when delivery has already commenced or is very imminent’.¹⁰⁰ This was the conduct originally targeted by the English Infant Life (Preservation) Act.
- 7.84 Our medical panel expressed concern that this model leaves a doctor’s liability unclear when a decision must be made during childbirth about whether to save the mother or the child. Although this is not a common occurrence, the panel advised that there are still cases where complications during birth make it necessary to perform action that risks killing the child to save the mother.¹⁰¹
- 7.85 The medical panel raised the concern that the term ‘childbirth’ could be open to broad interpretation.¹⁰² A provision such as this could leave the medical profession open to criminal liability for late abortions performed because of fetal abnormality. The ACT model would allow only completely destructive abortion procedures, which would not result in ‘childbirth’. This would cause undue interference with current medical practice. It would also cause additional distress to parents who wish to deliver an intact fetus to assist with the grieving process when an abortion is undertaken because of severe abnormality.¹⁰³ Some may also wish the fetus to be delivered alive. In common with the current Victorian child destruction provision, the ACT law is problematic because it places in jeopardy medical practitioners who bring about a live birth of a fetus with severe abnormality at the request of the parent(s).

- 85 Information supplied by Karen Argiropoulos, Senior Solicitor, Office of Public Prosecutions, 7 September 2007 and 15 January 2008.
- 86 Criminal Law Review Division, NSW Attorney General’s Department, *Review of the Law of Manslaughter in New South Wales* (2003).
- 87 *R v King* 2003 NSWCCA 399; *R v King* [2004] NSWCCA 444.
- 88 *R v King* 2003 NSWCCA 399 [3].
- 89 *Crimes Act 1900* (NSW) s 4(1).
- 90 New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 December 2004, 13390 (Mr Bob Debus, Attorney-General).
- 91 *Ibid.*
- 92 *R v Sood* [2006] NSWSC 1141 (Unreported, Simpson J, 31 October 2006). See Chapter 2 for facts of case.
- 93 *R v Wald* (1971) 3 NSWDCR 25, adopting the ruling of Menhennitt in *R v Davidson* [1969] VR 667.
- 94 *Re Suman Sood* (2006) No 774 of 2005 NSW Medical Tribunal decision <www.nswmb.org.au/system/files/f10/f20/o585/SOOD.pdf> at 12 February 2008.
- 95 *R v Iby* (2005) 63 NSWLR 178 [64].
- 96 *R v Iby* (2005) 63 NSWLR 178 [46]–[65].
- 97 *Crimes Act 1958* s 5 (punishment for manslaughter), s 16 (intentionally cause serious injury).
- 98 *Crimes Act 1900* (ACT) s 40.
- 99 A search of ACT Reports on Lexis Nexis on 27 November 2007 revealed no cases on child destruction.
- 100 Parliamentary Library, Parliament of Australia, *Abortion Law in Australia*, Research Paper 1 1998–99 (1998) 32.
- 101 Medical Panel meeting, 13 November 2007.
- 102 *Ibid.*
- 103 Consultations 19 (Royal Women’s Hospital), 24 (Fetal Management Unit—Royal Women’s Hospital).

- 7.86 The potential for a charge of manslaughter is also raised when a fetus is born alive. These issues were considered in the NSW review of manslaughter laws.¹⁰⁴ The terms of reference for the review included an 'examination of whether the Crimes Act provisions concerning manslaughter should be amended in such a way as to allow a charge of manslaughter to be brought in circumstances where an unborn child dies'. The review was also to consider whether NSW should legislate to introduce the offence of child destruction.¹⁰⁵
- 7.87 During the review, the AMA expressed concern that the proposed offence would render medical practitioners and/or patients liable to be charged in circumstances where late abortions currently occur. This includes fetal reduction in a multiple pregnancy and abortion for fetal abnormality.¹⁰⁶ Mervyn Finlay QC, who conducted the review, did not think that manslaughter would apply in either case, though may have assumed that such abortions would not result in the delivery of a live fetus. He recommended against extending manslaughter to circumstances in which a fetus dies in utero.¹⁰⁷
- 7.88 After consideration, the offence of child destruction was not introduced in NSW, with the assault provision introduced instead. A clear intention to prevent overlap with abortion laws was expressed within the review and by the NSW government when introducing the assault offence.
- 7.89 Other jurisdictions have retained child destruction and introduced an assault offence. For example, in Queensland section 313(1) of the Criminal Code has an ACT style child destruction provision that is confined to circumstances where the woman is 'about to be delivered of a child'. Section 313(2) then creates a specific offence of assault of a pregnant woman. The offence is committed if the assault destroys the life of, does grievous bodily harm to, or transmits a serious disease to the child before its birth.¹⁰⁸ Both offences carry a maximum penalty of life imprisonment.

OPTION 3: ENGLISH MODEL

Retain section 10 but quarantine its operation from lawful abortions.

- 7.90 Until 1990 England experienced the same problem of overlap between child destruction and abortion laws as currently exists in Victoria. When first enacted in England the Abortion Act contained no time limits for lawful abortions. The legality of an abortion had to be assessed in the light of the child destruction provisions of the Infant Life (Preservation) Act. Between 1967 and 1990 there was considerable debate about the difficulties generated by late abortions being governed by both the Abortion Act and the Infant Life (Preservation) Act. In 1990 the Abortion Act was amended to provide that '[n]o offence under the Infant Life (Preservation) Act shall be committed by a registered medical practitioner who terminates a pregnancy in accordance with the provisions of this Act'.¹⁰⁹ Consequently, the offence of child destruction is of no effect when a medical practitioner performs an abortion in compliance with the Abortion Act.¹¹⁰
- 7.91 The English provision is not a considered response to the overlap between abortion and child destruction laws. It was an amendment to the Abortion Act, enacted in haste, during debate about a broader range of issues.¹¹¹ It has been criticised for not providing clear protection for health professionals other than medical practitioners involved in an abortion, such as nurses.¹¹² It does not assist with clarity and simplicity of laws and leaves on the statute book an offence that appears to have never been used for its original purpose of fetal destruction during childbirth, and only once for a late abortion.¹¹³

COMMISSION'S RECOMMENDATION

- 7.92 The commission believes the current child destruction provision should be repealed.
- 7.93 Section 10 of the Crimes Act regulates two quite distinct activities—late abortion and assaults upon pregnant women which result in harm to a fetus. It regulates neither of them with clarity. Section 10 has never been used in Victoria for its original purpose, which was to overcome a perceived gap in the law and prohibit any person from 'unlawfully' destroying a fetus during childbirth.

- 7.94 There is no evidence to suggest that there is, or ever has been, a practice of destroying fetuses during childbirth. It is not possible to predict how section 10 may operate in practice because of the difficulty in giving meaning to the term ‘unlawfully’.
- 7.95 If the parliament wishes to regulate late abortion, it should do so under laws specifically designed to deal with abortion. If the parliament wishes to clarify the law concerning assaults upon pregnant women, the Crimes Act should be amended to make it clear that destruction of a fetus caused by assault of a pregnant woman falls within the definition of ‘serious injury’ to the woman. The current assault provisions in the Act probably cover this behaviour but legislative amendment will remove any doubt.
- 7.96 Unlawful injury to a pregnant woman may also result in a fetus being born alive and surviving but with significant injury. If the injury to the child is directly attributable to the injury to the mother, the principles set out in *Iby* would apply. Once the child is born, which may be some time after the injury occurred, the accused person could be charged with causing injury to the child as long as causation is clear.¹¹⁴ The nature of the charges will depend on the nature and extent of the injuries, and whether there was any specific intent on the part of the accused to injure the fetus.
- 7.97 Incorporating the change into the definition of ‘serious injury’, rather than creating a separate offence, will provide clarification of the law applicable in the circumstances that may result in unlawful destruction of a fetus as a result of injury to the mother. The definition of serious injury applies to various offences, including intentionally causing serious injury, recklessly causing serious injury and some driving offences.
- 7.98 The recommended amendment overcomes the difficulty inherent in the current provision in its application to assaults upon pregnant women—the requirement that a child be capable of being born alive for its destruction to be acknowledged. It also allows recognition of the harm caused when the fetus is destroyed as a result of reckless rather than intentional behaviour. The current child destruction provision requires proof of intention to destroy the fetus.

RECOMMENDATIONS

1. Section 10 of the *Crimes Act 1958* should be repealed.
2. Section 5 of the *Crimes Act 1958* should be amended to make the following addition to the definition of ‘serious injury’:

Serious injury includes: the destruction (other than in the course of a medical procedure) of the fetus of a pregnant woman, whether or not the woman suffers any other harm.

104 Criminal Law Review Division, NSW Attorney General’s Department (2003) above n 86.

105 *Ibid* 8–9. See also discussion of the review and consideration of fetal viability in the law in: Savell (2006) above n 6, 646–650.

106 Criminal Law Review Division, NSW Attorney General’s Department (2003) above n 86, 101. ‘Fetal reduction’ refers to abortion of one fetus in a multiple pregnancy.

107 *Ibid* 100.

108 See Stephen Gabriel, ‘Child Destruction: A Prosecution Anomaly Under Both the Common Law and the Criminal Codes’ (1997) 21 *Criminal Law Journal* 32 for background on introduction of this offence in Queensland.

109 *Abortion Act 1967* (UK) s 5, inserted 1 April 1991 by *Human Fertilisation and Embryology Act 1990* s 37(4).

110 Kennedy and Grubb (2000) above n 49, 1429.

111 *Ibid* 1419.

112 *Ibid* 1429.

113 Maisha Mohamed, 22, is believed to be the first expectant mother to be convicted under the 78-year-old law. She never admitted what she did and no body has ever been found. From newspaper reports it appears that she has largely been punished for her lack of remorse and lack of assistance to police in identifying the illegal abortionist. She was sentenced to 12 months in prison, which the judge suspended for 12 months. If there had been no child destruction provision she could have been charged with procuring an illegal abortion: Britten (27 May 2007) above n 25.

114 A similar situation exists in civil law, where a fetus injured by the negligent act of another has a cause of action upon birth: *Watt v Rama* [1972] VLR 353.

