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Crimes Amendment (Zoe's Law) Bill 2013

by Lynsey Blayden

1. Introduction

The [Crimes Amendment \(Zoe's Law\) Bill 2013](#) (the 2013 Bill) is a Private Member's Bill introduced in the NSW Legislative Council by Reverend the Hon Fred Nile of the Christian Democratic Party. It seeks to amend the *Crimes Act 1900* (NSW) (Crimes Act) to change the current definition of grievous bodily harm and insert a new offence relating to the causing of death or serious harm to "a child in utero".¹

The question of how the law of NSW can address the death of an unborn child when it occurs as a consequence of a criminal act has come under scrutiny more than once in the past 10 or more years. It raises a number of complex moral and ethical issues. Two separate reviews have previously been commissioned to examine the subject. Both recommended that homicide offences should continue to be inapplicable in these circumstances. However, the [2003 Finlay Review](#)² recommended the implementation of a separate offence of "killing an unborn child". The [2010 Campbell Review](#)³ found that such an offence was unnecessary: this followed changes made to the definition of grievous bodily harm in the Crimes Act in 2005, which provided that the "destruction of a foetus" can constitute grievous bodily harm.⁴ This review concluded that "current offences do allow the justice system to respond appropriately."⁵

This paper provides an overview of the amendments proposed by the 2013 Bill and also sets out some background to the development of the law in NSW to date. It is noted at the outset that the use of the term "unborn child" is contentious.⁶ However it is a term that appears repeatedly throughout both the Finlay and the Campbell Reviews and has been employed here in the interests of clarity and simplicity only.

2. The case of Zoe

In his [second reading speech](#), delivered on 21 February 2013, Reverend Nile explained that he called his Bill "Zoe's law" after the baby Zoe. On Christmas Day 2009, Ms Brodie Donegan was hit by a motor vehicle while she was walking along the side

of a road. Ms Donegan was 32 weeks pregnant at the time.⁷ Her daughter, Zoe, was later delivered stillborn. The death of Zoe was caused by placental abruption, which in turn was caused by the collision.⁸ Ms Donegan's injuries included a fractured pelvis, as well as fractures to her leg and her lower spine.⁹

The driver of the vehicle, who was later found to be under the influence of a number of prescription drugs, entered a plea of guilty to the offence of "driving in a manner dangerous occasioning grievous bodily harm, contrary to section 52A(3)(c) of the Crimes Act."¹⁰ The maximum penalty for this offence is 7 years imprisonment. The charge of grievous bodily harm encompassed both the death of Zoe and Ms Donegan's injuries.¹¹ No separate charge was made in relation to Zoe because under the current law of NSW, the death of an unborn child can only amount to a charge of grievous bodily harm to its mother. It cannot constitute murder or manslaughter due to a legal principle known as the "born alive" rule.

The driver received a sentence of two years and three months imprisonment, with a non-parole period of nine months. In his ex tempore sentencing remarks, delivered on 31 March 2011, Judge Ellis of the District Court noted that the physical and psychological injuries suffered by Ms Donegan were "such as to fall within the higher end of the range of potential injuries" under the relevant offence, and acknowledged the "anguish, hurt and suffering" of Ms Donegan, her partner and family due to the loss of Zoe. He also took into account factors subjective to the defendant, including her mental health and the fact that she was the carer of her two children, one of whom was "completely dependent" upon her as a result of physical and intellectual disability.¹² A media report of the sentencing hearing states that Ms Donegan said afterward that this result "was better than she expected", and added:

"The judge took Zoe into account and I really liked the way he described things," she said. "I think he obviously thought about it quite long and hard and tried to come to the right conclusion, and I'm happy the driver expressed remorse and that seemed to be genuine."¹³

Following the death of Zoe, Ms Donegan campaigned for changes to the law covering circumstances where unborn babies are killed following criminal acts.¹⁴ In 2010, she met with the then Attorney General, just after he had announced the Campbell Review.¹⁵ Reverend Nile did not consult with Ms Donegan prior to the introduction of the 2013 Bill.¹⁶ In his second reading speech he explained "[a]fter the tragedy that she experienced I felt that I had no right to interfere in her privacy" and added "I am very happy to talk to her and discuss the bill at length with her." Ms Donegan has been reported to be "still determined to see the law recognise unborn children" but also to have "grave concerns" regarding some aspects of the Bill which she feels "could be opening the way for an abortion law."¹⁷

3. Provisions of the 2013 Bill

The 2013 Bill creates a new offence of "harm or destruction of a child in utero", and amends the dangerous driving offences in the Crimes Act so that they can apply in circumstances where the offending conduct has caused serious harm to, or destruction of, a child in utero. Contrary to some media reports, the amendments proposed by the Bill would not allow

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a person to be charged with murder or manslaughter in relation to the death of an unborn child.¹⁸

The Bill is comprised of just one schedule. Clause [1] of this schedule seeks to remove paragraph (a) of the definition of grievous bodily harm in section 4 of the Crimes Act. Currently, paragraph (a) provides that the offence of grievous bodily harm can encompass:

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.

In place of this, clause [2] of the 2013 Bill inserts a new provision in the Crimes Act, section 41AA, which is to be entitled "Harm or destruction of a child in utero". This section will be a part of Division 6 of the Act, which covers "Acts causing danger to life or bodily harm". Proposed section 41AA creates the following offence:

A person who engages in any conduct that causes serious harm to or the destruction of a child in utero, being reckless as to whether the conduct causes serious harm to any person, is guilty of an offence.

The maximum penalty for this offence is set at 10 years imprisonment. The phrase "child in utero" is defined in section 41AA(4) as meaning "the prenatal offspring of a woman." Section 41AA(2) goes on to clarify that section 41AA(1) does not apply either:

- (a) to anything done in the course of a medical procedure, or
- (b) to anything done by or with the consent of the mother of the child in utero.

Proposed section 41AA(3) provides that, for the purposes of section 41AA:

- (a) serious harm to or the destruction of a child in utero includes serious harm or death occurring after birth, if the serious harm or death is caused by conduct that occurred while the person was a child in utero, and
- (b) being reckless as to causing serious harm to a person includes being reckless as to causing serious harm to or the destruction of a child in utero of a pregnant woman.

The remaining provisions of the 2013 Bill, clauses [3]-[5], seek to make supplementary amendments to the dangerous driving offences in the Crimes Act, to ensure they accommodate the new offence. Clause [3] would insert a new subsection, (7A), in section 52A, which would be entitled "[p]rotection of a child in utero", and would provide:

A reference in this section and in section 52AA to the death of a person, or grievous bodily harm to a person, includes a reference to the destruction of, or serious harm to, a child in utero.

4. The current law of NSW

At present a person cannot be charged with murder or manslaughter in relation to the death of an unborn child. As explained by the Finlay Review, both crimes require the same physical element, which is "the defendant

must cause the death of another human being.”¹⁹ Under current law, “a foetus is not treated as a human being.”²⁰ This is due to a longstanding common law principle known as the “born alive rule.”

In *Iby*, Spigelman CJ said the rule could “be traced back to the 17th century.”²¹ Kristin Savell, from the University of Sydney, [writes](#):

. . . for the purposes of the criminal law, the born alive rule has been traced to Coke, who defined the common law offence of murder by reference to the killing of a ‘reasonable creature in *rerum natura*’.²²

Savell goes on to quote the following passage from a 1926 English criminal law text by way of explanation:

A living child in its mother’s womb is not a human being within the meaning of the definition that a homicide is the killing of a human being, and the killing of such a child is not homicide, although it may be a misprison.²³

The operation of the rule in Australia was explained in the 1953 case of *R v Hutty* as follows:

. . . 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.²⁴

However where a child is born alive but subsequently dies as a result of injuries it received while still in its mother’s womb, it is possible for the person responsible for its injuries to be charged with murder or manslaughter.²⁵ If such injuries are caused in a motor vehicle accident, the driver at fault could be charged with a relevant offence under section 52A of the Crimes Act.²⁶ The maximum penalty for dangerous driving occasioning death is 10 years imprisonment, or where there are aggravating circumstances, 14 years imprisonment.²⁷

In terms of when a child is considered to have been born alive for the purposes of the offence of murder, section 20 of the Crimes Act, which is entitled “[c]hild murder—when child deemed born alive”, provides:

On the trial of a person for the murder of a child, such child shall be held to have been born alive if it has breathed, and has been wholly born into the world whether it has had an independent circulation or not.

The question of when a child is born alive for the purposes of a charge of manslaughter is determined by reference to the common law. In *R v Iby* (2005) 63 NSWLR 278, Spigelman CJ said:

The viability of a foetus can now be both established and ensured in a manner which was beyond the realms of contemplation when the born alive rule was adopted. That rule should now be applied consistently with

contemporary conditions by affirming that any sign of life after delivery is sufficient.²⁸

In accordance with the current definition of grievous bodily harm in the Crimes Act, inserted in 2005, which, as noted above (at p 3), the 2013 Bill seeks to repeal, the destruction of a foetus can constitute grievous bodily harm to the pregnant woman, whether or not she suffers any other harm (except where the harm is done in the course of a medical procedure).²⁹ There are various offences in the Crimes Act relating to causing grievous bodily harm. The maximum penalties for these offences vary, including, for example, 25 years imprisonment for intentionally causing grievous bodily harm and 10 years imprisonment for recklessly causing grievous bodily harm.³⁰

(i) Debate regarding the born alive rule: There is conjecture regarding whether or not the born alive rule is “an evidentiary rather than a substantive rule.”³¹ In a 1987 article the American lawyer, Clarke Forsythe, contended that “the born alive rule did not originate as a substantive definition of human being”, and was “never a substantive element of the law of homicide, but merely an evidentiary one.”³² Forsythe argued that, prior to the 20th century, it was not possible to determine whether or not a child lived in the womb, and therefore whether or not its death had been caused by a criminal act or some other cause.³³ He considers it was this purely pragmatic consideration that influenced the development of the rule, rather than underlying ideas of what a person was for the purposes of the law.³⁴

In *Iby*, Spigelman CJ referred to the difficulty that existed, prior to 20th century advancements in medical technology, in establishing that an unborn baby was alive at the time of the “allegedly criminal act” as well as that “the child would have lived but for the act.”³⁵ He observed:

The born alive rule is based on two anachronistic, indeed antiquated, factors. First, the primitive state of medical knowledge at the time that it was adopted. Second, the related fact that birth was a process fraught with risk until comparatively recently and, accordingly, there was a high probability that a stillbirth had natural causes.³⁶

Later in his judgment he remarked, obiter, that:

The born alive rule is . . . a product of primitive medical knowledge and technology and the high rate here is a strong case for abandoning the born alive rule completely, as has occurred by statute in many states of the United States and by judicial decision.³⁷

Despite these comments, *Iby* confirmed that the “born alive” rule remains a part of the law.³⁸

Savell contends that, due to the obiter nature of the remarks, the Court in *Iby* “did not provide a careful analysis of the implications” the abandonment of the born alive rule might have.³⁹ She argues:

It is important to note that, however compelling the argument that birth was never intended by the common law to be a substantive criterion for personhood, any modification of the rule *would* entail some judgement about what constitutes a legal person (or, at the very least, the conditions necessary for the imposition of criminal liability for homicide) . . .

Thus, the assertion that the rule is an evidentiary one requires not only a plausible defence of the thesis but also a consideration of how a substantive definition of personhood is to be formulated, assuming one is required.⁴⁰

After a careful consideration of a range of complex philosophical, legal and social questions regarding the concept of “personhood”, which cannot be addressed here, Savell concluded “[t]he comparable intrinsic properties of late [term]-foetuses and newborns is not alone sufficient to warrant the ascription of legal personhood to foetuses” and that the “born alive rule is defensible notwithstanding technological advances.”⁴¹

Two reviews of the law in NSW have declined to make recommendations in relation to the law of homicide that would disturb the rule, although one of these, the 2003 Finlay Review, recommended that a separate offence, that of “killing an unborn child” be created. The 2010 Campbell Review quoted the following remark by McGrath J of the New Zealand Court of Appeal in support of the Review’s conclusion that the law of manslaughter should not be changed in this respect:

The modern justification for the born alive rule is that legal complexities and difficult moral judgments would arise if the Courts were to alter the common law to treat the fetus as a legal person.⁴²

5. The 2003 Finlay Review

In 2002, the then Attorney General, the Hon Bob Debus, appointed the Hon Mervyn Finlay QC, to review the laws of manslaughter in NSW. The terms of reference for this review encompassed “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 terms of reference also asked Mr Finlay to specifically consider “whether NSW should legislate to introduce the offence of “child destruction”.”⁴³

These terms of reference were included in the Finlay Review following the case of Renee Shields and her unborn child, Byron. Byron was killed in a motor vehicle collision that occurred when his mother was seven months pregnant. The collision was the result of a road rage incident, in which the car Ms Shields was a passenger in was rammed into a pole deliberately by another vehicle. Ms Shields suffered serious injuries and was required to undergo a hysterectomy.⁴⁴ The defendant in this case was sentenced to four years and nine months for dangerous driving occasioning grievous bodily harm, with a non-parole period of three years and three months. He was also sentenced at the same time to a term of 18 months imprisonment for doing an act intending to pervert the course of justice. The sentences were to be served cumulatively.⁴⁵ His appeal against these sentences was dismissed.⁴⁶

i) Findings in relation to extending the law of manslaughter to cover unborn children: In the April 2003 report of his review, Mr Finlay decided not to recommend a change to “the current law as to the meaning of personhood for the purposes of unlawful homicide.”⁴⁷ He said:

There are, in my view, sound reasons for maintaining the existing application of unlawful killing offences (murder and manslaughter) to “a person who has been born but has not already died.”⁴⁸

He referred to a submission he had received from Adjunct Professor John Seymour, of the Australian National University, which he quoted at some length, as persuasive on this point.⁴⁹ Professor Seymour's submission outlined some of the difficulties that had arisen in cases in the United States (where there are a number of States in which the law of homicide has been expanded to apply to unborn babies).⁵⁰ These included definitional issues relating to whether such laws should be applied in cases involving, for example, a foetus in a very early stage of development. In such cases, the defendant, and possibly even the woman herself, might not be aware of her pregnancy.⁵¹ Professor Seymour further submitted:

Though important, the definitional problem is not the most significant obstacle to amending the law of manslaughter to include the killing of an 'unborn child.' It is well established that the law of homicide exists to punish the killing of a person. To extend the operation of this law in an attempt to protect entities other than persons could distort the law's concept of personhood. Such a change could have unintended consequences.⁵²

ii) Recommendation that an offence of killing an unborn child be created: In his submission, Professor Seymour noted that while he considered it would be "most unwise" to amend the law of manslaughter so that it encompassed the killing of an unborn child, "[t]his conclusion does not preclude the creation of a special offence to punish an assailant who kills an 'unborn child'".⁵³ Mr Finlay agreed with this view and proposed that NSW adopt the new offence of "killing an unborn child". He noted that, at that stage, NSW and South Australia were the only Australian jurisdictions⁵⁴ that did not have some form of "child destruction" offence in place.⁵⁵

In the context of this recommendation, Mr Finlay considered section 313(2) of the *Criminal Code Act 1899* (Qld), which provides:

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.

This offence carries a maximum penalty of imprisonment for life. It was so formulated in 1997, following a review of the Criminal Code Act by an Advisory Working Group. The provision proposed by the Advisory Working Group would have only applied to a "child capable of being born alive", and would also have been accompanied by an evidentiary provision which provided that evidence that the "woman had at any material time been pregnant for a period of 24 weeks or more shall be prima facie proof that the child with which she was at that time pregnant was then a child capable of being born alive."⁵⁶ Both these aspects of the offence were removed from the amending Bill during its passage through the Queensland Parliament.⁵⁷

Mr Finlay indicated his firm preference for the Advisory Working Group's version of the offence.⁵⁸ He said that the arguments in favour of limiting a child destruction offence "to a viable foetus" included:

- Ideological problems in giving a premature zygote, foetus or embryo the same status as a foetus so advanced that it could live outside its mother's body;

- Related ideological problems of determining when life begins, and the advantage of having an objectively ascertainable point during the maturation of the foetus which will trigger culpability;
- Practical problems in proving that a miscarriage at an early stage in pregnancy was caused by the criminal act considering the high rate of spontaneous abortion [miscarriage] in the first trimester of pregnancy; and
- History of child destruction legislation shows that it was intended to apply shortly before birth. With advances in medicine this has extended back to the point that the child is capable of living outside its mother.⁵⁹

His recommendation that NSW adopt an offence of “killing an unborn child” was based on a number of policy considerations, which are outlined at pages 114-122 of his report. These included:

That the status of the foetus capable of being born alive is not merely that of a body part of its mother nor is it that of “a person” at law. But it is a distinctive entity, the existence and value of which the law in some circumstances should recognize.⁶⁰

Mr Finlay suggested the following draft amendment to the Crimes Act:

XX Killing an Unborn Child

- (1) *If a woman is pregnant of a child capable of being born alive, a person, other than the woman, who:*
- (a) *By an act or omission, with intent to kill or inflict grievous bodily harm upon such a child, and without lawful cause or excuse, causes such a child to die before it has an existence independent of its mother,*
- or*
- (b) (i) *by an unlawful and dangerous act carrying appreciable risk of serious injury, or*
- (ii) by an act or omission which so far falls short of the standard of care required by a reasonable person that it goes beyond a civil wrong and amounts to a crime,*
- Causes such a child to die before it has an existence independent of its mother,*
- shall be liable to imprisonment for X years.*
- (2) *For the purposes of this section, evidence that a woman had at any material time been pregnant for a period of twenty-six weeks or more shall be prima facie proof that she was at that time pregnant of a child capable of being born alive.*
- (3) *A person is not guilty of an offence under this section in procuring a lawful miscarriage.⁶¹*

Mr Finlay noted that the amendment he had proposed should reflect the existing language of the Crimes Act.⁶² He said that his policy recommendation in proposing that NSW adopt this offence was:

*... that the fault element should be similar to that required to sustain a charge of murder or manslaughter if the child had survived to be born but had then died from the injuries received by the offender's act or omission [italics author's own].*⁶³

His decision to set 26 weeks as the gestational period at which the prima facie presumption that a child would be capable of being born alive would arise was informed by material provided to the inquiry by medical experts. He noted that the 26 week threshold was not determinative of whether the offence would be applicable and could "be dispelled by medical evidence."⁶⁴

The Finlay Review also recommended amendments to the dangerous driving offences in the Crimes Act, so that they too encompassed this new offence. Although a relevant draft amendment was not provided, Mr Finlay did suggest that the "meaning of '*another person*' in section 52A(1)" could possibly be expanded "to include such unborn child for the purposes of the section".⁶⁵

The initial indication from the then Government was that it would adopt this recommendation (for example, on 25 June 2003, in [response to a Question Without Notice](#) asked by Mr Paul Gibson, Mr Debus indicated that he would bring a Bill forward in the next session of Parliament to implement the recommendations of the Finlay Review).⁶⁶ However, the subsequent decision of the Court of Appeal in [R v King \(2003\) NSWCCA 399](#) prompted the Government to amend the Crimes Act in another way instead.

6. The case of King and the 2005 legislative reforms

The defendant in *R v King* had assaulted Ms Kylie Flick, who was between 23 and 24 weeks pregnant with his child.⁶⁷ He had tried unsuccessfully to both convince Ms Flick to have an abortion, and to induce others to hit her in the stomach.⁶⁸ His attack upon Ms Flick "included kicking her in the stomach and stomping on her stomach about half a dozen times." Ms Flick's baby was delivered stillborn three days later.⁶⁹ The evidence was that King's actions had caused the death of Ms Flick's baby.⁷⁰ Mr King was charged with maliciously inflicting grievous bodily harm with intent.⁷¹ The District Court ruled a permanent stay of proceedings on the basis that the case against King was "doomed to failure" as, while there was no doubt that "there was really serious bodily harm occasioned to the foetus as a result of the accused assaulting the complainant", the evidence that Ms Flick herself had suffered injuries amounting to grievous bodily harm was not sufficient for the purposes of the offence charged.⁷²

The Director of Public Prosecutions (DPP) appealed this decision to the Court of Criminal Appeal, where Spigelman CJ noted that an important issue of principle, that of "whether or not the death of a foetus is capable of constituting grievous bodily harm to a pregnant mother", was at stake.⁷³ After close consideration of relevant authority, the Chief Justice concluded that "[t]he close physical bond between the mother and the foetus is of such character that, for the purposes of offences such as this, the foetus should be regarded as part of the mother."⁷⁴

The Government subsequently opted to codify this decision, rather than implement the recommendations of the Finlay Review.⁷⁵ The *Crimes*

Amendment (Grievous Bodily Harm) Act 2005 (NSW) was passed, which amended the Crimes Act to provide that the definition of grievous bodily harm covered “[t]he 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”.⁷⁶

Mr King later entered a plea of guilty to the offence of malicious wounding with intent to do grievous bodily harm (section 33 of the Crimes Act, which carries a maximum penalty of 25 years imprisonment).⁷⁷ He was sentenced to 10 years imprisonment with a non-parole period of six and a half years.⁷⁸ Both Mr King and the DPP appealed the length of this sentence. The DPP’s appeal was successful and Mr King’s sentence was increased by the Court of Criminal Appeal to 12 years imprisonment with a non-parole period of eight years.⁷⁹

7. The 2010 Campbell Review

As noted, following the death of Zoe, Ms Donegan approached the then Attorney General, the Hon John Hatzistergos, who appointed the Hon Michael Campbell QC to conduct a review of “whether current provisions in the *Crimes Act 1900* enable the justice system to respond appropriately to criminal incidences involving the death of an unborn child.” The terms of reference for this review directed that:

In particular, the review will assess both the findings of the Review of the Law of Manslaughter conducted by the Honourable Mervyn Finlay QC and the legislative changes brought about by the *Crimes Amendment (Grievous Bodily Harm) Bill 2005* in light of recent criminal cases and incidents involving the death of an unborn child.

The terms of reference further provided that the questions to be considered by the review included “[w]hether the *Crimes Act 1900* should be amended to allow a charge of manslaughter to be brought in circumstances where an unborn child dies and also “[w]hether NSW should introduce any other specific offences for cases involving the death of an unborn child”.⁸⁰

Mr Campbell’s [report](#) was delivered in October 2010. He declined to recommend any change to the law either in relation to manslaughter or the adoption of a new offence or offences.

i) Adequacy of current offences: In a table at page 11 of his report, Mr Campbell set out the offences which currently invoke the definition of grievous bodily harm “to cover the destruction of a foetus of a pregnant woman”, including the relevant driving offences. He stated in regard to these offences that:

These offences provide, in the presence of appropriate culpability, a relatively direct path to the punishment of an offender whose actions have resulted in the death of a foetus albeit an essential feature is the infliction of grievous bodily harm upon the mother.⁸¹

Mr Campbell also found that current provision for maximum penalties and non-parole periods was also appropriate.⁸²

ii) Manslaughter: In relation to his conclusion that the law of manslaughter should not be altered, Mr Campbell referred to the reasons given by Mr

Finlay in reaching the same conclusion, and noted that he did not consider that any legal developments since the Finlay Review could justify a change in this position.⁸³ He also noted that the majority of the submissions received by both reviews were not in support of such an amendment to the Crimes Act.⁸⁴

iii) Whether there was a need for a new offence: On this question, Mr Campbell summarised the findings of the Finlay Review before noting some developments that had occurred since that Review's recommendation in relation to an offence of "killing an unborn child" had been made. These included not only the change to the law of NSW following the case of *King*, but also Victoria's repeal of its own child destruction offence, section 10 of the *Crimes Act 1958* (Vic), on the advice of the Victorian Law Reform Commission (VLRC).⁸⁵ One reason for the VLRC making this recommendation was that the offence contributed to "a lack of clarity in Victorian law", for example, by overlapping, in some circumstances, with the abortion offences in the *Crimes Act 1958* (Vic).⁸⁶ Mr Campbell was of the view that some of the concerns raised by the VLRC in respect to the child destruction offence might apply to the offence proposed by the Finlay Review, were it to be implemented in NSW.⁸⁷

The Campbell Review noted that the VLRC had also recommended that the definition of "serious injury" in the *Crimes Act 1958* (Vic) be amended so that it encompassed harm to an unborn child, in the manner that section 4 of the Crimes Act currently does in NSW.⁸⁸ Mr Campbell indicated that he found "very persuasive the [VLRC] Report's views as to the [NSW] model" and considered that they provided "strong support for a conclusion that the current offences respond appropriately to criminal incidents involving unborn children."⁸⁹

Mr Campbell also referred to a letter that had been sent by the Attorney General's Department in May 2004 to various key stakeholders, including the NSW Bar Association, the DPP and the Legal Aid Commission, following the decision of the Court of Appeal in *King*. This letter was part of what Mr Campbell described as a "more informal and limited review" of the law as it stood following that decision. He stated that the letter "put the perceived advantages of relying upon the law as expounded in *King*", rather than adopting a new offence, as follows:

When the injury inflicted upon the foetus is regarded as an injury to the expectant mother:

- There is no concern about the rights of the mother being superseded by the rights of the foetus (although there may be concerns about the rights of the foetus not being recognised);
- There is no need to consider whether the foetus was viable at the time of injury. The loss of the foetus as whatever stage of the pregnancy may amount to grievous bodily harm;
- There is no need to formulate an exemption for expectant mothers as the offences involving grievous bodily harm do not contemplate a person inflicting grievous bodily harm upon themselves;
- There is no need to formulate an exemption for "lawful abortions";
- The fault element is less complicated . . .⁹⁰

Mr Campbell stated that all of addressees to this letter “responded and all opposed a change to introduce a new offence. All accepted that the current state of the law was adequate.” He quotes the response of the DPP, which he says “pointed out that the problems associated with the proposed offence of killing an unborn child would result in prosecutions protracted by medical evidence and legal argument, leading to extra distress and cost to those involved.”⁹¹

The Campbell Review noted that it too had sought the views of the NSW Bar Association, the DPP and the Public Offender, and they all remained opposed to any change to the law.⁹² In response to the Campbell Review’s approach, the DPP advised:

In my view, the existing law is capable of addressing the criminality of the relevant conduct and imposing appropriate punishment for offending.⁹³

Mr Campbell quoted the following passage from the submission he received on behalf of the Public Defender:

It is not clear why it is thought that there is a need for this provision. If an offender intentionally causes the destruction of a foetus, he has committed the offence of inflicting grievous bodily harm with intent (s. 33 *Crimes Act*), which carries a maximum penalty of 25 years. That is because under the *Crimes Act*, the definition of ‘grievous bodily harm’ includes destruction of the foetus of a woman, even if the woman does not suffer any harm (s. 4, *Crimes Act*). Similarly, if a person recklessly causes the destruction of a foetus, the person has committed the offence of recklessly inflicting grievous bodily harm (s. 35 *Crimes Act*), which carries a maximum penalty of 14 years (if the offence is committed in company) or 10 years (if it is not). If the mother of the child is injured and the foetus is destroyed, both harms can be taken into account as aggravating factors: see s 21A(g) *Crimes (Sentencing Procedure) Act*. Under the current arrangement, it could not be said that any offenders are escaping punishment.⁹⁴

Mr Campbell was of the view that:

The difficulties associated with the introduction of an offence of child destruction and the availability of a less complicated alternative lead me to the conclusion that an offence of killing an unborn child should not be enacted.⁹⁵

Like the Finlay Review, the Campbell Review also received a submission from Professor Seymour (referred to by Mr Campbell as “Dr Seymour”), which said:

The principal objection to the enactment of criminal law explicitly protecting the fetus is that, however cautious the drafting, any reform acknowledging the distinctiveness of the fetus would have implications in other contexts.⁹⁶

Mr Campbell notes that the submission gave “examples of the conflicts that could arise across a range of areas” before continuing:

. . . If laws of the kind discussed were enacted, they could gradually change the way the fetus is regarded. If it is accepted that a fetus should be protected against assault or careless driving, is it logically possible to counter the argument that a fetus should be protected in other contexts such as those in which the potentially harmful conduct of a pregnant woman carries a risk of harm?⁹⁷

Despite this, Mr Campbell noted that Dr Seymour expressed the “view that concern for the broader implications should not stand in the way of introducing criminal laws to punish those whose dangerous and unlawful conduct destroys a foetus.”⁹⁸ However, Mr Campbell states that, “whilst emphasising that [such] new laws should be carefully drafted in order to target particular forms of conduct”, Dr Seymour also said:

I am not sure whether a formula could be devised to exclude conduct inconsistent with the need to respect a pregnant woman's autonomy.

. . . it must be conceded that although specific exclusions might limit the operation of the new laws, they could not completely overcome their symbolic effect. However the offences are defined, recognition of the need to protect a fetus in one context might have ramifications in other contexts.⁹⁹

Mr Campbell stated “[i]t is appropriate to comment that the current law does provide punishment for someone who culpably destroys a foetus albeit by way of an offence against the mother.”¹⁰⁰ He quoted from a second submission made to his Inquiry by Dr Seymour, which said:

Ultimately the decision between retaining the existing law and enacting a new fetal destruction law must be made on the basis of an assessment of both the cogency of the arguments advanced by those who assert that the existing law is unsatisfactory and the degree of support for this view. The extended definition of grievous bodily harm does give some recognition to the hurt suffered by a woman whose fetus has been destroyed. Has it been demonstrated that this recognition is insufficient?¹⁰¹

Mr Campbell considered that “a key factor in dealing with this suggested question is the number of cases likely to fall within the new offences.” On this point he referred to the submission he received on behalf of the Public Defender, which stated “the number of potential offences of this kind appears to be very low” and also noted the small number of convictions for child destruction offences in other Australian jurisdictions.¹⁰² Mr Campbell said:

Whilst I feel great sympathy for Ms Donegan and for others in her position there is a very substantial disproportion between their numbers and the wide-ranging concerns likely to be felt by a significant proportion of the female population along the lines discussed by Dr Seymour.¹⁰³

He concluded by stating that he did not recommend the introduction of any “specific offences for cases involving the death of an unborn child.”¹⁰⁴

8. Other views on the current status of the law in NSW

Like the VLRC Report, referred to in the Campbell Review, other commentators have previously expressed support for the balance struck by the current law of NSW. For example, Savell writes that, rather than attempting to reconceptualise personhood:

A better way to acknowledge the harm caused by the killing of a foetus by a third party is, as the Court of Appeal found in *R v King* (now codified by an amendment to section 4 of the [Crimes Act]), through the persona of the mother. This alternative gives due recognition to the fact that where foetuses do resemble persons, it is in virtue of the value ascribed to them through their relations with kin, particularly mothers. It is both consistent with

how some women value their foetuses and with a more complex understanding of pregnant embodiment.¹⁰⁵

In an [article](#) that outlines the potential for conflict between abortion practices and the child destruction offences of other Australian jurisdictions, Mark Rankin, of Flinders University, notes:

The obvious benefit of the [NSW] approach is that that it results in a satisfactory reconciliation between allowing medical abortion . . . protecting pregnant women from assault, and appropriately acknowledging the death of the foetus 'through the persona of the person most responsible for actualising their personhood'. Indeed, defining harm to the pregnant woman in this way effectively protects the foetus from conception. Of course, this arrangement of the various interests is predicated upon there being no offence of child destruction in [NSW].¹⁰⁶

On the other hand, in a 2012 article, a group of medical academics and practitioners provided an overview of the law in NSW by reference to some case studies and wrote:

The authors submit that the fetus should be given full recognition under the law, as the current legal situation fails to match community expectations and can lead to maternal and familial dissatisfaction when the fetal loss occurs, especially following third party assaults or accidents, as illustrated in the cases described above.¹⁰⁷

The article's conclusion stated:

The issue of how to define the legal status of the fetus is complex. While the fetus may not be accepted as a person until he or she is born alive, it seems inappropriate to do no more than deny the existence of its being, as appears to be the current legal position in many jurisdictions, including New South Wales.

Medical technological advances make the viability of a fetus a shifting standard and encourage the comparison between newborns and late-term foetuses, offer increased fetal health status information, and provide an enhanced capacity to maintain the life of babies born prematurely.

In view of this sophisticated state of medical care available in many jurisdictions, including New South Wales, the three clinical cases described highlight the discrepancy between the medical recognition of the fetus as a patient and its lack of recognition under the law. The cases illustrate the maternal grief experienced when a fetus dies and the societal expectation for enhanced acknowledgement of such a loss. The authors conclude that it is time to revisit the "born alive" rule and to seek a better reflection of current medical practice in the existing laws.¹⁰⁸

In support of the 2013 Bill, the Catholic Archdiocese of Sydney's Marriage and Family Centre issued a [statement](#) which contained the following quotes from a member of the Centre:

"It is heartbreaking and deeply unjust our laws still do not properly recognise the life and value of the unborn child," says Mary Joseph, Project Office with the Life Marriage and Family Centre and hopes the bill will be passed into law.

"The Convention on the Rights of the Child to which Australia is a signatory says the state must provide children with 'appropriate legal protection before

as well as after birth," Mary says. "But Baby Zoe was not recognised as a victim of manslaughter in this case because she was still inside her mother's womb and had not taken a breath. Zoe was a living person, a unique and irreplaceable baby girl with a wonderful future ahead of her, to love and be loved."

9. Issues relating to the 2013 Bill

(i) A conceptual change: In his [second reading speech](#), the Reverend Nile referred to the cases of Ms Shields and Ms Flick, as well as the later case of Ms Donegan, and stated that:

The failure of the law to specifically acknowledge Ms Donegan's loss demonstrated that the concerns of eight years prior had not been adequately addressed. That is why I am introducing this bill.

He further stated:

Several women were to suffer in like circumstances. Mrs Susan Harris had persevered with in vitro fertilisation for three years before finally falling pregnant with her son Lars. On 20 January 2010 a reckless driver crossed the road and hit the vehicle in which she was travelling. The impact caused the death of her child in utero but the driver only received a suspended sentence and loss of licence for six months. This raises the question: What is the value of a human life? When I first became concerned about this issue one of my supporters, who was very close to giving birth to her child, was driving her car when it was hit from the rear by a bus. She was thrown forward onto the steering wheel. She did not sustain any substantive injury—no broken bones and so on—but the impact with the steering wheel caused the death of her unborn child. In my innocence I asked, "What happened about the death of your child?" She replied, "Nothing happened." I could not believe that a baby almost ready to be born had died yet nothing happened, and that has been on my conscience since I entered this Parliament.

The 2013 Bill would not allow the law of homicide to apply to the death of an unborn child. It would, however, change the current law conceptually by establishing an offence that directly applies to the death of "a child in utero", rather than providing, as at present under the Crimes Act, that the death of a "foetus" can constitute grievous bodily harm to the pregnant woman herself. This is a subtle, but nevertheless fundamental, shift. It is difficult to comment upon what the broader and longer term ramifications of this shift, if any, might be.

As noted, clause [3] of the 2013 Bill provides that any references to the "death of a person", or "grievous bodily harm to a person" in section 52A and 52AA (which set out the substantive and procedural matters for dangerous driving offences) will include a reference to "the destruction of, or serious harm to, a child in utero." Commenting on this, the NSW Parliament's Legislation Review Committee observed that "the proposed amendment to the dangerous driving provisions of the [Crimes Act] will deem children in utero equal for some purposes of criminal law, with a natural person."¹⁰⁹

The 2013 Bill also changes the language used by the legislation, exchanging the term "foetus" which is currently used in section 4 of the Crimes Act for the phrase "child in utero." The use of the word child in this

context is contentious, as evidenced by submissions made to both the Finlay and Campbell Reviews.¹¹⁰

ii) Points of difference with the provision recommended by the Finlay Review: In his second reading speech on the 2013 Bill, Reverend Nile stated that the Bill was adopting a recommendation of the Finlay report in proposing “a new stand-alone offence within the Crimes Act”.¹¹¹ However, it will be noted that there are several differences between the offence proposed by Mr Finlay and that contained in the 2013 Bill.

The elements of the offence proposed by the 2013 Bill are not the same as those contained in offence drafted by Mr Finlay, set out above (at p 8). As noted, the Finlay Review recommended that the offence it was proposing should be “in language consistent with that used in the [Crimes Act]” and that “in particular” it should “address expressly the appropriate intent that is necessary to establish murder or manslaughter.”¹¹² At a later point in his report he said that the fault element should be “similar to that required to sustain a charge of murder or manslaughter if the child had survived to be born alive but had then died from the injuries it received from the offender’s act or omission.”¹¹³ The provision proposed by Mr Finlay would have applied where there was “intent to kill or inflict grievous bodily harm” upon an unborn child and also where an unborn child was killed as a consequence of “an unlawful and dangerous act carrying an appreciable risk of serious injury” or “by an act or omission which so far falls short of the standard of care required by a reasonable person that it goes beyond a civil wrong and amounts to a crime.”¹¹⁴ Under the 2013 Bill, the proposed offence applies to “any conduct that causes serious harm to or the destruction of a child in utero” where the person who engages in the conduct is “reckless as to whether the conduct causes serious harm to any person.”

In addition, the offence in the 2013 Bill applies to “a child in utero” at all stages of its development, rather than being restricted to “a child capable of being born alive”. The reasons for Mr Finlay’s preference for limiting the applicability of the offence are outlined above (at pp 7-8). In his second reading speech, Reverend Nile said:

The bill also seeks to provide equal protection for all pregnant women. With the passage of the Crimes Amendment (Grievous Bodily Harm) Bill in 2005 the current Crimes Act only covers cases involving a foetus, thereby ignoring the plight of any woman who happens to be less than 63 days into her pregnancy. This precludes expectant mothers who may have only recently heard the heartbeat of their child—usually around 35 days; or viewed them on an ultrasound—usually around 42 to 56 days—at the first medical check-up. Further, as demonstrated by the case of *R v King*, there is a strong correlation between pregnancy and domestic violence. This is particularly acute in the first 100 days of pregnancy.

The quote from Rankin (see above at p 14) suggests that he considers that the definition of grievous bodily harm currently already applies to an unborn child from the time it is conceived. However, the Campbell Review contains a discussion of a previous Private Member’s Bill introduced by Reverend Nile, the [Crimes Amendment \(Grievous Bodily Harm\) Bill 2010](#), which suggests, rather, that the current law would only apply to a foetus, as it specifically states, and not, for instance, to an embryo. The 2010 Bill sought to replace the word “foetus” in the definition in section 4 of the

Crimes Act with the phrase "child in utero", which was defined as "any form of human life in either the embryonic or foetal stage of development".¹¹⁵ Mr Campbell considered there were "a number of major difficulties which would follow from this amendment", noting that "[q]uestions of causation of the loss become increasingly more difficult to determine the earlier in the pregnancy the loss has occurred" and referring to medical information which indicated the frequency of miscarriage in early weeks of pregnancy.¹¹⁶ He further raised the point, relevant to the 2013 Bill, that:

The inclusion of embryos may well encourage the bringing, or the belief in mothers that there should be brought, prosecutions with a much reduced prospect of success on the issue of causation. This would lead to unnecessary expense and distress.¹¹⁷

Another difference between the amendments recommended by the Finlay Review and those contained in the 2013 Bill relates to the proposed amendment to the driving offences in section 52A. As noted above (at p 3 and p 14), the Bill will amend the meaning of references either to the death of a person or the grievous bodily harm of a person, so that these phrases include "the destruction of, or serious harm to, a child in utero." Although Mr Finlay did not draft an amendment to section 52A, he did suggest that one possible way it could be amended was the expansion of the meaning of "another person" in section 52A(1) to include an unborn child (see above at p 9).

(iii) Interaction between the proposed offence and the current law:

The Bill repeals the statutory definition of grievous bodily harm insofar as it relates to a foetus. One question arising from this is whether, if the Bill were enacted in its present form, the common law definition of grievous bodily harm arrived at by the Court of Criminal Appeal in *King* would still be available. If not, two consequences would seem to follow.

The first is that the offences in the Crimes Act which currently refer to causing grievous bodily harm would no longer be available in circumstances where an act causes the death of an unborn child. This would have consequences in relation to the maximum penalties that are available. For instance, causing grievous bodily harm with intent (the offence applied in the *King* case), has a maximum penalty of 25 years imprisonment.¹¹⁸ The offence proposed by the 2013 Bill has a maximum penalty of 10 years imprisonment.

The second consequence would be that, since the offence created by the Bill only refers to recklessness, there would be no offence available that expressly contemplates circumstances where the harm or destruction of an unborn child is caused with intent. Unlike the current law of grievous bodily harm, the proposed offence does not take into account the differences between harm caused intentionally, and harm caused recklessly, by ascribing different maximum penalties.

A separate issue arises in relation to the amendments proposed by the Bill to the dangerous driving offences in the Crimes Act. Currently, if dangerous driving results in the death of an unborn child, this can only constitute grievous bodily harm to the pregnant woman, meaning that the relevant offences are the dangerous driving offences relating to grievous bodily harm, not death. Dangerous driving occasioning grievous bodily

harm carries a maximum penalty of 7 years imprisonment, or 11 years imprisonment where there are aggravating circumstances.¹¹⁹ The amendments proposed by clause [3] of the Bill appear to mean that dangerous driving occasioning death, or aggravated dangerous driving occasioning death, would now be available offences where the driving causes the destruction of a child in utero. These offences have maximum penalties of, respectively, 10 and 14 years imprisonment.¹²⁰ To that extent it appears that the Bill increases the maximum penalties available where the unborn child is killed as a consequence of a dangerous driving offence. Also, it is noted that where the offence of aggravated dangerous driving occasioning death can be made out in relation to the destruction of a child in utero, a longer maximum penalty would be available than that set by the proposed offence of harm to or destruction of a child in utero.

Another possible issue is that, under the existing law, if a child is born alive but subsequently dies as a result of an act which took place prior to its birth, the perpetrator of that act can potentially be prosecuted for a homicide offence. Proposed section 41AA(3)(a) provides that the new offence of “harm to or destruction of child in utero” would also be applicable in these circumstances. It is unclear whether, in such circumstances, the new offence is intended to operate as an alternative charge or fill potential gaps in the existing law.

iv) Abortion: The 2013 Bill excludes acts done as part of a medical procedure or by the pregnant woman herself from the reach of the offence. The term “medical procedure” is not defined by the 2013 Bill, or anywhere else in the *Crimes Act 1900* (NSW). However, the same term is used in the current definition of grievous bodily harm in section 4 of the Crimes Act. In his second reading speech, Reverend Nile said:

I emphasise that this Bill provides an exemption for “medical procedures”, which is the terminology used for a termination of a pregnancy or for an abortion. This Bill specifically states that it has nothing to do with an abortion or a termination of a pregnancy.

Despite this express exclusion, the issue of abortion has nevertheless been raised in connection with the 2013 Bill.¹²¹ It appears the concerns raised relate to the shift in emphasis from the pregnant woman to the unborn child that is embodied in the proposed offence, and also the use of the word child in the offence. A [media release](#) issued by the Women’s Electoral Lobby of NSW described the Bill as a “Trojan Horse” and said:

The move to give a foetus legal rights would be a disturbing step backwards for women in NSW. We cannot accept a foetus being considered as a “child” in NSW law. This will set an unacceptable precedent for the way foetuses are considered in the law through granting them rights.

The Women’s Electoral Lobby is deeply concerned that this Bill is a way for Mr Nile to establish “personhood” for foetuses, and use this to attempt to legislate against abortion in NSW.¹²²

Unlike in Victoria, where it has been decriminalised¹²³, abortion remains prohibited by the Crimes Act in NSW, except in certain circumstances.¹²⁴ A study recently published in the *Australian and New Zealand Journal of Obstetrics and Gynaecology* reported concern amongst some practitioners

in both NSW and Queensland regarding their liability for prosecution due to the current state of the law in these two States.¹²⁵

10. Child destruction offences in other Australian jurisdictions

With the exception of Victoria, most other States and Territories have some form of child destruction offence. According to Rankin, each "jurisdiction created the offence of child destruction at different times and in different ways."¹²⁶ The Finlay Review stated that the offences were not used very often, and the Campbell indicated that inquiries carried out for its purposed established so far as it was possible that "the position remains much as at the time" of the earlier review.¹²⁷

Rankin considers that these offences may be in conflict with the law of abortion in some jurisdictions.¹²⁸ As noted (see p 11), a similar view was taken by the VLRC which recommended that Victoria's child destruction offence be repealed. The VLRC observed:

The Victorian offence of child destruction was drawn from the Infant Life Preservation Act, enacted in England in 1929 . . .

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.¹²⁹

The VLRC said that the offence had never been used in Victoria for its original purpose and that it:

. . . regulates two quite distinct activities – late abortions and assaults upon pregnant women which result in harm to the fetus. It regulates neither of them with clarity.¹³⁰

On 20 February 2013, a Family First member of the Legislative Council in South Australia, the Hon Robert Brokenshire, introduced the [Criminal Law Consolidation \(Offences Against the Unborn Child\) Bill](#). The Bill seeks to amend the *Criminal Law Consolidation Act 1935* (SA) to provide that "[a] person who causes serious harm to a pregnant woman which causes her unborn child to die is guilty of an offence", which would have a maximum penalty imprisonment for life.¹³¹ The Bill would also create the further offence of causing serious harm to an unborn child, which would have a maximum penalty of imprisonment for 20 years.¹³² In support of the Bill, in the [second reading speech](#), Mr Brokenshire referred to a current requirement of intent in the relevant child destruction offence in South Australia, and also that it does not apply in circumstances where an unborn child dies as a consequence of a driving offence.¹³³ The Bill remains at the second reading stage.

11. Conclusion

While the 2013 Bill is barely more than a page in length its content touches on a range of issues that have a complex history and have proven difficult to resolve. Among the intricate forces at play are the compassion and concern that the community feels in cases in which a pregnant woman loses an unborn child as a result of a criminal act. It is also the case that

contested concepts are at issue here, such as what the law regards as a person, and what the broader ramifications of any alteration to the current law might be.

- ¹ Reverend Nile has introduced similar Private Member's Bills on previous occasions: See [Crimes Amendment \(Destruction of Child in Utero-Zoe's Law\) Bill 2010](#); [Crimes Amendment \(Grievous Bodily Harm\) Bill 2010](#); [Crimes Amendment \(Destruction of Child in Utero - Zoe's Law\) Bill 2011](#).
- ² M Finlay, [Review of the Law of Manslaughter in New South Wales](#) (April 2003).
- ³ M Campbell, [Review of Laws Surrounding Criminal Incidents Involving the Death of an Unborn Child](#) (October 2010).
- ⁴ *Crimes Act 1900* (NSW), section 4.
- ⁵ Campbell, above n 3, 3 and 42.
- ⁶ See for example Campbell, above n 3 at 8 [5.1].
- ⁷ *R v Hampson* (unreported, District Court of NSW, Judge Ellis, 31 March 2011), 3.
- ⁸ *Ibid.*
- ⁹ *Ibid.*
- ¹⁰ *Ibid* 1-2.
- ¹¹ *Ibid* 7.
- ¹² *Ibid* 8-9, 12.
- ¹³ ABC News Online, "[Woman jailed for crash that killed unborn baby](#)", (first posted 31 March 2011, revised 1 April 2011, viewed on 31 July 2013).
- ¹⁴ R Noone "Little girl lost: Don't let death of our Zoe be in vain" *Daily Telegraph* (Monday, May 24, 2010),1; R Noone, "Plea from the heart" *Daily Telegraph* (Friday, 28 May 2010), 22; D Cronshaw, "For the love of Zoe: Parents of unborn victim fight on as Christmas Day crash driver pleads guilty" *Newcastle Herald* (Tuesday, 21 December 2010), 1; T Collins, "Brodie's fight for justice: Mum pushes law change" *Central Coast Express Advocate* (Friday, June 7, 2013), 7.
- ¹⁵ *Ibid* (Noone, "Plea from the heart").
- ¹⁶ A Patty and M Davey, "Manslaughter counts for unborn babies" *Sun Herald* (10 February 2013), 4; T Collins, above n 14.
- ¹⁷ *Ibid*; T Collins, above n 14.
- ¹⁸ See Patty and Davey, above n 16.
- ¹⁹ Finlay, above n 2, 88.
- ²⁰ D Brown et al, *Criminal Laws: Materials and commentary on Criminal Law and Process of New South Wales* (5th ed, 2011), 437.
- ²¹ *R v Iby* (2005) 63 NSWLR 278, 282.
- ²² K Savell, "[Is the 'Born Alive' Rule Outdated and Indefensible?](#)" (2006) 28(4) *Sydney Law Review* 625, 627.
- ²³ *Ibid* 627, quoting Stephen, *Digest of the Criminal Law* (7th ed, 1926) Art 310, quoted by J Barry, "The Child *en Ventre sa Mere*" (1941) 14 *ALJ* 351 at 353.
- ²⁴ *R v Hutty* [1953] VLR 338 at 339 (Barry J) as cited by Spigelman CJ in *R v Iby* (2005) 63 NSWLR 278, 283.
- ²⁵ See *R v Iby* (2005) 63 NSWLR 278; Brown et al, above n 20, 437.
- ²⁶ *R v F* (1996) 40 NSWLR 245; see *ibid* (Brown et al), 437.
- ²⁷ *Crimes Act 1900* (NSW), sections 52A(1) and (2).
- ²⁸ *R v Iby* (2005) 63 NSWLR 278, 288.
- ²⁹ See *Crimes Act 1900* (NSW), section 4, paragraph (a) of the definition of grievous bodily harm.
- ³⁰ *Crimes Act 1900* (NSW), sections 33(1), 35(1) and 35(2).
- ³¹ Savell, above n 22, 629.
- ³² C D Forsythe, "Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms" (1987) 21 *Valporaiso University Law Review* 563, 613.
- ³³ *Ibid* 567-580, where the born alive rule is examined in a medical context.
- ³⁴ *Ibid* 588.
- ³⁵ *R v Iby* (2005) 63 NSWLR 278, 284.
- ³⁶ *Ibid.*
- ³⁷ *Ibid* 288.
- ³⁸ Campbell, above n 3, 20 quoting Victorian Law Reform Commission, [Final Report 15: Law of Abortion](#) (2008) [7.43]; Savell, 628.
- ³⁹ *Ibid* (Savell) 631.
- ⁴⁰ *Ibid.*
- ⁴¹ *Ibid* 664.
- ⁴² Campbell, above n 3, 21 quoting *Harrild v Director of Proceedings* [2003] 2 NZLR 289 at 313 (McGrath J).
- ⁴³ Finlay, above n 2, 8-9.
- ⁴⁴ *Ibid* 26-27.
- ⁴⁵ [Harrigan v R](#) [2005] NSWCCA 449 (15 December 2005), [2]-[4] (James J).

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- 46 Ibid.
- 47 Ibid 97.
- 48 Ibid.
- 49 Ibid 98.
- 50 See *ibid*, Schedule 15, which sets out some detailed information regarding the law of certain States of the United States, as it stood at the time. Also see Campbell, above n 3, at 18-19 where there is some discussion of the laws of the United States. Mr Campbell concluded that the changes made since 2003 “against the quite different background of the American view on abortion issues, do not lead me to take a different view to that of the *Finlay Report*.”
- 51 Ibid 99, quoting “Submission to the Review of the Law of Manslaughter in New South Wales” dated 31 December 2002 by Adjunct Professor John Seymour pp 3 and 4.
- 52 Ibid 100.
- 53 Ibid 101.
- 54 Contra M Rankin, “[The Offence of Child Destruction: Issues for Medical Abortion](#)” (2013) 35(1) *Sydney Law Review* 1-26, 1, where the author states that South Australia does have such an offence in place (sections 82A (7) and (8) of the *Criminal Law Consolidation Act 1935* (SA)).
- 55 Ibid.
- 56 Ibid 107-108, quoting Queensland Criminal Code Review Report (July 1996) page 53.
- 57 Ibid 109.
- 58 Ibid.
- 59 Ibid 110.
- 60 Ibid 114.
- 61 Ibid 123-124.
- 62 Ibid 116.
- 63 Ibid 156.
- 64 Ibid 135.
- 65 Ibid 120.
- 66 NSW Legislative Assembly, *Hansard* (25 June 2003, Mr Gibson and Mr Debus), 2128.
- 67 [R v King \[2003\] NSWCCA 399 \(19 December 2003\)](#), [6] (Spigelman CJ).
- 68 Ibid
- 69 Ibid.
- 70 Ibid [7].
- 71 Ibid [2].
- 72 Ibid [3], [9]-[14].
- 73 Ibid [4].
- 74 Ibid [96].
- 75 Campbell, above n 3, 10.
- 76 See second reading speech, NSW Legislative Assembly, *Hansard* (2 March 2005, Mr Debus).
- 77 [R v King \[2004\] NSWCCA 444 \(7 December 2004\)](#), [1] (McCull JA).
- 78 Ibid [2].
- 79 Ibid [182].
- 80 Campbell, above n 3, 4.
- 81 Ibid 11.
- 82 Ibid 13-14.
- 83 Ibid 15-22.
- 84 Ibid 21.
- 85 Ibid 24-29.
- 86 Ibid 25 quoting Victorian Law Reform Commission, [Final Report 15: Law of Abortion](#) (2008) [7.7].
- 87 Ibid.
- 88 Ibid 29.
- 89 Ibid.
- 90 Ibid 30.
- 91 Ibid 31 quoting Response of Mr Nicholas Cowdery AM QC, Director of Public Prosecutions, 18 June 2004.
- 92 Ibid.
- 93 Ibid quoting Submission of Mr Nicholas Cowdery AM QC, Director of Public Prosecutions, 11 August 2010.
- 94 Ibid 31-32 quoting Submission of Mr John Stratton SC, Deputy Senior Public Defender, 7 September 2010.
- 95 Ibid 33.
- 96 Ibid 34 quoting Submission of Dr John Seymour, 26 August 2010.
- 97 Ibid.
- 98 Ibid.
- 99 Ibid.
- 100 Ibid 34.
- 101 Ibid 35 quoting Second Submission of Dr John Seymour, 6 September 2010.

- ¹⁰² Ibid 35, see also at 32 quoting Submission of Mr John Stratton SC, Deputy Senior Public Defender, 7 September 2010.
- ¹⁰³ Ibid 35.
- ¹⁰⁴ Ibid.
- ¹⁰⁵ Savell, above n 22, 664.
- ¹⁰⁶ Rankin, above n 54, 26.
- ¹⁰⁷ T Uppal, A Pickering, K Erasmus, J Pardey and R G Beran, "The legal status of the fetus in New South Wales" (2012) 20(1) *Journal of Law and Medicine* 178, 183.
- ¹⁰⁸ Ibid.
- ¹⁰⁹ NSW Parliament, Legislation Review Committee, [Legislation Review Digest No 31/55](#) (26 February 2013), 2.
- ¹¹⁰ See for example, Finlay, above n 2, 112, where a submission from the Councils for Civil Liberties is referred to, and Campbell, above n 3, 8-9, where the question of terminology is addressed.
- ¹¹¹ NSW Legislative Council, *Hansard* ([21 February 2013](#), Mr Nile), 17759.
- ¹¹² Finlay, above n 2, 116.
- ¹¹³ Ibid 156.
- ¹¹⁴ Finlay, above n 2, 123-124.
- ¹¹⁵ [Crimes Amendment \(Grievous Bodily Harm\) Bill 2010](#), clause 3.
- ¹¹⁶ Campbell, above n 3, 37-38.
- ¹¹⁷ Ibid 38.
- ¹¹⁸ *Crimes Act 1900* (NSW), section 35(2).
- ¹¹⁹ Ibid sections 52A(3) and (4). See section 52A(7) for what might constitute circumstances of aggravation.
- ¹²⁰ Ibid sections 52A(1) and (2).
- ¹²¹ See for example K Needham, "Nile bill to ignite debate over abortion" *Sun Herald* (30 June 2013), 3.
- ¹²² Women's Electoral Lobby (NSW), Media Release: "[Zoe's Law a Trojan Horse for Nile's Anti-Choice Agenda](#)" (1 July 2013, viewed on 12 August 2013).
- ¹²³ See *Abortion Law Reform Act 2008* (Vic); also see Victorian Law Reform Commission, [Final Report 15: Law of Abortion](#) (2008); and NSW Parliamentary Research Service, [Recent Developments in the Law of Abortion](#), E-Brief 08/08 by Kathryn Simon.
- ¹²⁴ See NSW Parliamentary Research Service, [Abortion and the Law in New South Wales](#), Briefing Paper 9/05 by Talina Drabsch from 19 for an overview of the relevant statutory provisions and case law.
- ¹²⁵ C de Costa, H Douglas and K Black, "Making it legal: Abortion provider's knowledge and use of abortion law in New South Wales and Queensland" (2013) 53 *Australian and New Zealand Journal of Obstetrics and Gynaecology* 184.
- ¹²⁶ Rankin, above n 54, 3.
- ¹²⁷ Finlay, above n 2, 76-81, Campbell, above n 3, 32.
- ¹²⁸ Rankin, above n 54, 3, 21-26.
- ¹²⁹ Ibid 96.
- ¹³⁰ Ibid 108.
- ¹³¹ Criminal Law Consolidation (Offences Against Unborn Child) Amendment Bill 2013 (SA), clause [8], proposed section 31A(1).
- ¹³² Ibid 31A(2).
- ¹³³ Parliament of South Australia, Legislative Council, *Hansard* ([20 February 2013](#), Mr Brokenshire), 3193.

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