

**Review of Laws Surrounding Criminal Incidents Involving the
Death of an Unborn Child**

The Honourable Michael Campbell QC

October 2010

Table of Contents

1	Executive Summary	3
2	Appointment and Terms of Reference	4
3	Summary of responses	5
4	The Process	7
5	Terminology	8
6	Background to the Review	10
7	Current offences	11
8	Maximum penalties	13
9	Non-Parole Periods	14
10	Manslaughter	15
11	Other offences	23
12	<i>The Crimes Amendment (Grievous Bodily Harm) Bill 2010 (NSW)</i>	36
13	Other objections	40
14	Current offences - Conclusion	42
15	Consultation	43
16	Other matters	44
	- Post-accident difficulties	
	- <i>Births, Deaths and Marriages Registration Act 1995</i>	
	- <i>Crimes Act 1900: section 82, 83 and 84</i>	
	- <i>Workers Compensation Act 1970</i>	
	- <i>Victim Support and Rehabilitation Act 1995</i>	
	- <i>Motor Accidents Compensation Act 1988</i>	
	Schedules	49

1. Executive Summary

This Report is concerned to review whether current provisions in the *Crimes Act 1900* enable the justice system to respond appropriately to criminal incidents involving the death of an unborn child. As to terminology, see [5].

It assesses the findings of the Review of the Law of Manslaughter conducted by the Honourable Mervyn Finlay QC and the effectiveness of 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 findings included a recommendation that an offence of 'killing an unborn child' be introduced.

This review was initiated following an incident in which a pregnant woman was struck by a car which left the roadway whilst being driven by an allegedly drug affected driver and the foetus the woman was bearing was not born alive. There had in the meantime been a number of developments, domestic and international, relating to the way in which the criminal law had regard to the death of an unborn child.

The background to the Review is discussed at [6]. Subsequent to the recommendation of the introduction of a new offence, *R v King*¹ established that an injury causing the destruction of a foetus could constitute the infliction of grievous bodily harm upon the mother. Having regard to that decision a new offence was not introduced but *King* codified by Parliament by amending the definition of grievous bodily harm in the *Crimes Act* 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".

The Report considers [7] and [10] to [14] whether current offences involving the extended definition respond appropriately to criminal acts involving the death of an unborn child.

Other offences that might be substituted or added are considered at [10], manslaughter, [11], killing an unborn child or a graduated series of offences with much in common to manslaughter and [12] an extension to the definition of grievous bodily harm.

Other objections to the appropriateness of the current offences are considered at [13].

It is concluded at [14] that current offences do allow the justice system to respond appropriately. No changes are recommended

Present maximum penalties [8] and Non-Parole Periods [9] are considered to be appropriate.

Other relevant civil and criminal matters are dealt with at [16] and recommendations made that the Department of Justice and Attorney General consider possible amendments to the *Victims Support and Rehabilitation Act 1995* to provide for a compensation payment for loss of a foetus and, together with the Motor Accidents Authority consider a legislative, or administrative, scheme to provide for the payment of the funeral costs of a stillborn child.

¹ *R v King* (2003) NSWCCA 399

2. Appointment and Terms of Reference

2.1 On 24 May 2010 I was appointed to review whether current provisions in the *Crimes Act 1900* enable the justice system to respond appropriately to criminal incidents involving the death of an unborn child.

2.2 The Terms of Reference for the Review are:

The principal question to be considered in the review is whether current provisions in the *Crimes Act* enable the justice system to respond appropriately to criminal incidents involving the death of an unborn child.

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.

Such review is to include consideration of the following questions:

- Whether current offences which now invoke an extended definition of grievous bodily harm to cover the destruction of the foetus of a pregnant woman, including those relating to dangerous and negligent driving, enable the justice system to respond appropriately to criminal incidents involving the death of an unborn child;
- Whether maximum penalties for these offences are appropriate;
- Whether standard non-parole periods should be either introduced or varied for any of these offences;
- Whether the *Crimes Act 1900* should be amended to allow a charge of manslaughter to be brought in circumstances where an unborn child dies;
- Whether NSW should introduce any other specific offences for cases involving the death of an unborn child;
- What further consultation, if any, should take place; and
- Any other relevant civil or criminal law matter.

The review may have regard to any recent domestic and/or international developments and may consult with, seek advice or accept submissions from any relevant individuals or organisations, including victims of crime, that help inform its deliberations.

3. Summary of response to the Terms of Reference

Principal question: whether current provisions in the *Crimes Act* enable the justice system to respond appropriately to criminal incidents involving the death of an unborn child.

I consider that current provisions do respond appropriately and I do not recommend any change.

1. Whether current offences which now invoke an extended definition of grievous bodily harm to cover the destruction of the foetus of a pregnant woman, including those relating to dangerous and negligent driving, enable the justice system to respond appropriately to criminal incidents involving the death of an unborn child.

I consider that current offences do respond appropriately. I do not recommend any change.

2. Whether maximum penalties for these offences are appropriate.

I consider the maximum penalties are appropriate. I do not recommend any change.

3. Whether standard non-parole periods should be either introduced or varied for any of these offences.

I do not consider standard non-parole periods should be either introduced or varied for any of these offences. I do not recommend any change.

4. Whether the *Crimes Act 1900* should be amended to allow a charge of manslaughter to be brought in circumstances where an unborn child dies.

I do not consider that the *Crimes Act 1900* should be so amended. I do not recommend any change.

5. Whether NSW should introduce any other specific offences for cases involving the death of an unborn child.

I do not recommend the introduction of any further offences.

6. What further consultation, if any, should take place.

I recommend consultation with Women's Legal Services NSW, incorporating Women's Legal Resource Centre, the Law Society of New South Wales, Life Marriage and Family Centre, Victims of Crime Assistance League and Women's Abortion Action Campaign in respect of possible amendment to the *Victims Support and Rehabilitation Act 1996*.

7. Any other relevant civil or criminal law matter.

I recommend that the Department of Justice and Attorney General consider possible amendments to the Table in Schedule 1 of the *Victims Support and Rehabilitation Act 1996* to include, at least, the loss of a foetus.

I recommend that the Department of Justice and Attorney General together with the Motor Accidents Authority consider a legislative, or administrative, scheme to provide

for the payment of the funeral costs of a stillborn child.

4. The Process

- 4.1 An advertisement inviting submissions to the review was published in the Sydney Morning Herald, the Daily Telegraph and on the www.lawlink.nsw.gov.au website on 16 June 2010. The text of the advertisement appears in Schedule 1 to this Report. It attracted submissions as listed in Schedule 2.
- 4.2 In addition, letters requesting submissions were sent specifically to the individuals and organisations listed in Schedule 3. Responses were received from those listed in Schedule 4.
- 4.3 A number of those who made submissions and some who did not were interviewed in person or on the telephone. Those interviewed are listed in Schedule 5. Most of the interviews were recorded.
- 4.4 In total, fifteen written submissions were received. Seven persons were interviewed.

5. Terminology

5.1 My Terms of Reference speak of an “unborn child”. Women’s Legal Services NSW said in its submission:

We disagree with the use of the term ‘unborn child’ and view this as incorrect and emotive. Pregnancy involves a zygote and then an embryo in the early stages, which develops into a foetus. Upon live birth the foetus becomes a child.²

Women’s Abortion Action Campaign strongly deplored the use of the words “death of an unborn child” in the Terms of Reference and asserts that the use is a condonation of erroneous and emotive language which, it put, are supportive of anti-abortionist views³.

Dr John Seymour⁴, in his leading text *Childbirth and the Law*, observed:

Many of the judgements that will be cited employ the term “unborn child” and, in so doing, add to the difficulties attending the debate over the legal status of the fetus.⁵

As will appear Mr Finlay in his Review recommended the adoption of an offence of “Killing an Unborn Child”⁶.

It was put to him by the Councils for Civil Liberties that the law should not refer to an “unborn child” because the description is neither accurate nor neutral. Mr Finlay was not persuaded by that proposition and cited the following examples of the use of the phrase or similar words in Australian legislation. He wrote:

The *Crimes Act 1900* (NSW), in section 85 presently uses the word “child” to include a child before its birth. The Criminal Code states of Queensland, and Western Australia, use the description of “Killing an Unborn Child” as does the Criminal Code of the Northern Territory. The description in the *Criminal Code Act* of Tasmania is “Causing the Death of a Child before Birth”.⁷

5.2 It is necessary for those considering issues in this area to be aware of the possibility of subliminal responses, however, speaking generally, the words and phrases take their meaning from the context and are not to be taken to convey more than the context allows.

By way of example, Dr Seymour in his book uses ‘fetus’ “in a general sense to describe both embryos and fetuses, whatever their gestation”. He points out that under some circumstances it may be necessary to distinguish them.

² Submission of Women’s Legal Services NSW, 23 July 2010

³ Submission of Women’s Abortion Action Campaign, 9 August 2010

⁴ Formerly Adjunct Professor, College of Law Australian National University

⁵ J Seymour, *Childbirth and the Law* (Oxford University Press, 2000), 35

⁶ The Honourable Mervyn D Finlay QC (2003) *Review of the Law of Manslaughter in New South Wales* [14.1] (‘*Finlay Report*’)

⁷ *Finlay Report* [14.1]

It would be unduly cumbersome to refer repeatedly to the phrase 'zygote, embryo and foetus' where the context makes it clear that it is not intended to give legal content to the word 'child'.

It is usual for medical and other texts to write of a 'fetus'; however, this Report uses the spelling adopted in the *Crimes Act* and in *King*, namely, 'foetus'.

6. Background to the Review

- 6.1 Prior to *R v King*⁸ it was generally thought that the *Crimes Act (NSW) 1900* did not provide for an offence relating to the destruction or injury of an unborn child, other than those relating to abortion⁹.

Following an incident of an assault upon a pregnant woman which resulted in an unborn child not being born alive, further Terms of Reference were added to a review then being conducted by the Honourable Mervyn Finlay QC into aspects of the Law of Manslaughter in New South Wales. The added terms were:

The review is to include 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 examination of this question will involve an assessment of the operation and effect of section 20 of the Crimes Act, concerning child murder, and the adequacy of that provision.

Such review is to include, but not be restricted to, consideration of the following questions:

- (i) whether it would be necessary to establish that an offender knew that the mother was bearing a child; and,
- (ii) whether NSW should legislate to introduce the offence of “child destruction”.

Mr Finlay recommended that the *Crimes Act* provisions concerning manslaughter not be amended. However, he did recommend that New South Wales should legislate to introduce the offence of “child destruction” which he preferred should be called “killing an unborn child”.

- 6.2 Subsequent to the delivery of the *Finlay Report*, *King* was decided. The Court of Criminal Appeal held that an injury causing the destruction of a foetus could constitute the infliction of grievous bodily harm upon the mother.
- 6.3 After taking further advice, the Government introduced the *Crimes Amendment (Grievous Bodily Harm) Bill 2005* which, rather than introduce an offence of child destruction, codified *King*. After some debate the Bill was enacted and section 4 of the *Crimes Act* now provides that grievous bodily harm includes “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”.
- 6.4 Following an event in December 2009 when an eight months pregnant woman, Ms Brodie Donegan, was struck by a car which left the roadway whilst being driven by an allegedly drug affected driver and the foetus she was bearing was not born alive, I was appointed to conduct the review referred to above.

⁸ *R v King* (2003) NSWCCA 399

⁹ *Crimes Act 1900* (NSW) ss82 - 84

7. Current offences

Whether current offences which now invoke an extended definition of grievous bodily harm to cover the destruction of the foetus of a pregnant woman, including those relating to dangerous and negligent driving, enable the justice system to respond appropriately to criminal incidents involving the death of an unborn child

7.1 These offences are set out in the following table:

Crimes Act 1900 (NSW)			
Section	Offence	Maximum Penalty	SNPP*
33	Intent to cause grievous bodily harm	25 years	7 years
35(1)	Recklessly cause grievous bodily harm	14 years	5 years
35(2)	Recklessly cause grievous bodily harm	10 years	4 years
52A	Dangerous driving occasioning bodily harm	7 years / 11 years in circumstances of aggravation	
52B	Dangerous navigation occasioning grievous bodily harm	7 years / 11 years in circumstances of aggravation	
54	Cause grievous bodily harm	2 years	

* Standard Non-Parole Period

7.2 In addition, an offence under section 42(1) of the *Road Traffic (Safety of Traffic Management) Act 1999* (NSW) of negligent driving occasioning grievous bodily harm attracts a maximum penalty for a first offence of 20 penalty units (\$2,200) or nine months or both, or, for a second or subsequent offence 30 penalty units (\$3,300) or 12 months or both.

The extended definition was not applied to the Act by the *Crimes Amendment (Grievous Bodily Harm) Act 2005* (NSW). However, the reasoning in *King* would apply.

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.

Following *King*, the destruction of the foetus could amount to grievous bodily harm whether it did so being a question for the Judge, Jury or Magistrate. Following the *Crimes Amendment (Grievous Bodily Harm) Act 2005* the destruction of the foetus did amount to grievous bodily harm.

This result followed from the amendment to section 4 of the *Crimes Act* to provide that the definition of grievous bodily harm included the destruction

(other than in the course of a medical procedure) of a foetus whether or not the woman suffers from any other harm.

Whilst in *King* the foetus was 23 to 24 weeks old and no issue arose as to whether an embryo or a foetus was involved, the reasoning in *King* would apply in respect of a case involving an embryo except, perhaps, for the first few days of its development. In such a case it would be for the Judge, Jury or Magistrate to decide whether destruction of the embryo amounted to grievous bodily harm.

As discussed below the maximum sentences for the offences are appropriate.

- 7.3 It is, however, submitted by Ms Donegan, her mother Ms Gordon and others, that the offences are inappropriate because they do not recognise the identity and life of the foetus and do not directly punish the offender for the taking of that life.

The issue is put somewhat more formally in the submission of the Life Marriage and Family Centre of the Catholic Archdiocese of Sydney which submitted:

Current offences which invoke an extended definition of grievous bodily harm to cover the destruction of the foetus of a pregnant woman, including those relating to dangerous and negligent driving, do not recognise the distinct and inherent value of the unborn child's life and its inviolability. As a result, the justice system in New South Wales is currently unable to respond appropriately to criminal incidents involving the death of an unborn child.¹⁰

- 7.4 The consideration of whether these are sufficient reasons to conclude that the offences do not allow an appropriate response calls for an examination of what alternative offences might be substituted and the consequences of making such substitution or addition.

The introduction of the *Crimes Amendment (Grievous Bodily Harm) Bill 2010* into the Legislative Council enlivens a consideration of whether the extended definition of grievous bodily harm requires further extension before it can be said that the current offences support an appropriate response.

There are a small number of other specific objections to the appropriateness of the extended definition which I discuss below under the heading 'Other objections'.

After dealing with the issues I will set out my conclusion to the above question.

¹⁰ Submission of the Life Marriage and Family Centre, Catholic Archdiocese of Sydney, 16 July 2010

8. Maximum penalties

Whether maximum penalties for these offences are appropriate

- 8.1 The maximum penalties for offences involving an extended definition of grievous bodily harm to cover the destruction of the foetus of a pregnant woman are set out at [7.1] and those under the *Road Transport (Safety of Traffic Management) Act 1999* at [7.2].

Save as discussed below the submissions I have received have not sought an alteration in these penalties. Those that address the issue regard them as adequate.

- 8.2 The Australian Christian Lobby submitted:

“Perhaps there is some scope to lengthen the penalties applied to the offences of aggravated dangerous driving occasioning death (14 years) and dangerous driving occasioning grievous bodily harm (7 years) when an unborn child dies”.¹¹

Ms Donegan and Ms Gordon submitted that there should be an express additional penalty should a foetus not be born alive as part of or in association with the grievous bodily harm.

I find persuasive the submission of Women’s Legal Services that to acknowledge the destruction of the foetus in this way could be to downgrade other harms, such as, for example, the total loss of reproductive capacity which some might regard as more serious than the loss of one foetus¹². Such an example could be replicated many times.

- 8.3 Ms Donegan did comment in her written submission that “the penalties should be significantly higher than they currently are”, however, it appeared in conference that she was speaking of penalties inflicted as she understood them to be, rather the maximums provided in the statute. She was most concerned with cases in which intent was involved and I did not understand her to regard the 25 years maximum penalty provided by section 33 to be too low.
- 8.4 In my view the maximum penalties presently provided are appropriate.

¹¹ Submission of the Australian Christian Lobby, 16 July 2010.

¹² Submission of Women’s Legal Services NSW, 26 July 2010.

9. Non-Parole Periods

Whether Standard Non-Parole Periods should be either introduced or varied for any of these offences

- 9.1 Save as discussed below none of the submissions I have received has advocated any change in respect of the relevant non-parole periods.
- 9.2 Both Ms Donegan and Ms Gordon sought, in effect, the introduction of mandatory non-parole periods where there are aggravating circumstances or intent. Further, the alternative penalties of a fine, community service or good behaviour bonds should, they submitted, be excluded.
- 9.3 The introduction of a mandatory non-parole period and the exclusion of non-custodial alternatives would be contrary to well-established sentencing principles in New South Wales.
- 9.4 By way of illustration in the Second Reading Speech on the introduction of the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002* the Attorney General, the Hon Bob Debus, said:

At the outset I wish to make it perfectly clear that the scheme of sentencing being introduced by the Government today is not mandatory sentencing...By preserving judicial discretion we ensure that the criminal justice system is able to recognise and assess the facts of an individual case...¹³

- 9.5 In *R v Way*¹⁴ at 116 the Court of Criminal Appeal said:

The nature of the offences included in the Table is such that only rarely will sentences involving an alternative to full time custody be appropriate. However, there is nothing in the Act, to indicate any intention to confine the available sentence, for a Table offence, to one of full time custody, provided that a non-custodial sentence would be a proper sentence upon the particular facts of the case. In fact, subject to appropriate reasons being given s 54C(1) of the Act expressly contemplates that alternatives to full time custody will continue to be available.

- 9.6 I did not consider that any alteration to the current standard non-parole periods provided is called for.

¹³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002 (Bob Debus, Attorney General).

¹⁴ *R v Way* (2004) NSWCCA 131

10. Manslaughter

Whether the Crimes Act 1900 should be amended to allow a charge of manslaughter to be brought in circumstances where an unborn child dies.

- 10.1 One of the Terms of Reference of the Finlay review raised the same question. The *Finlay Report* recommended against any such amendment albeit the report recommended a number of changes that did not have that effect. Mr Finlay dealt with the issue in considerable detail¹⁵.

I agree with Mr Finlay's recommendation as to this question and, accordingly, will content myself with summarising the main points made in his Report and considering some more recent developments which I do not consider lead to a different conclusion.

After noting section 20 of the *Crimes Act*, which provides:

Child murder—when child deemed born alive

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 *Finlay Report* referred to other aspects of the question as to when a child is born to which I need not go.

- 10.2 The Report accepted the view of the Model Criminal Code Officers Committee (MCCOC)¹⁶ that:

The issue for the Criminal Law is a practical one: Where can the line sensibly be drawn so as to provide a helpful and relevant test for juries?

Religious/philosophical questions in relation to the beginning of life are very important but the Committee is unable to conclusively answer such questions for the community. Rather the Committee favours adopting a modern and practical test whilst ensuring that acts which fall short of having caused the death of a human being will be caught by some other offence such as child destruction or an offence against the mother. The Committee has no intention of demeaning the importance of the fundamental religious and philosophical questions by this approach. The Committee believes that the approach taken is

¹⁵ *Finlay Report* [13.1 to 13.12, 15.5]

¹⁶ In 1990, the Standing Committee of Attorneys General (SCAG) placed the question of the development of a national model criminal code for Australian jurisdictions on its agenda. To advance the concept, SCAG established a Committee consisting of an officer from each Australian jurisdiction with expertise in criminal law and criminal justice matters. That Committee was originally known as the Criminal Law Officers Committee (CLOC). In late 1993, the name was changed to the Model Criminal Code Officers Committee (MCCOC) to reflect the principal remit of the Committee directly. (28 September 2010) http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_mccoc

principled but also a recognition of the need for the criminal law to provide a test that is acceptable to the majority of the community¹⁷.

Mr Finlay noted that the Committee did not propose changing the current law, that is, that before anyone can be killed they must first be born.

- 10.3 He considered a number of submissions opposing change and noted the observation of the Councils for Civil Liberties:

The Councils do not support the suggestion to alter the law of manslaughter to include the destruction of a foetus. Such a suggestion demonstrates a fundamental misunderstanding of the law of homicide. For centuries it has been the position of the common law that before anyone can be killed they must first be born.¹⁸

He noted a submission that argued that there should be a radical change to the concept of “personhood” for the purposes of the criminal law and referred to the submission of the St Thomas More Society in the following terms:

A thoughtful submission was received from the St Thomas More Society. The submission opened by noting the society’s acceptance that:

Human life must be respected from conception and protected absolutely from the moment of conception. From the first moment of his existence, a human being must be recognised as having the rights of a person – among which is the inviolable right of every innocent being to life.” (Catechism of Catholic Church no 2270).

It then submitted:

That the unborn child, so far as practicable, should be given equal legal protection as persons who have been born.

And further:

That the Crimes Act 1900 should be amended to allow criminal charges to be brought in circumstances where a person causes an unborn child to die, or causes grievous bodily harm to an unborn child or transmits a serious disease to an unborn child.¹⁹

- 10.4 Mr Finlay also took from that submission an account of the then position in the United States of America. That account was:

Twenty four (24) States have already enacted laws which recognize unborn children as human victims of violent crimes. Eleven (11) of these states provide this protection through the period of in utero

¹⁷ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (1998) *Discussion Paper Model Criminal Code Chapter 5 – Fatal Offences Against the Person*, 15

¹⁸ *Finlay Report* [13.2]

¹⁹ *Finlay Report* [13.3]

development, while the other 13 provide protection during specific stages of development.²⁰

10.5 He then concluded:

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.”²¹

10.6 Mr Finlay found support for that view in the submission of Dr Seymour.²²

From the passages of Dr Seymour’s submission quoted in the *Finlay Report* I extract the following:

Under s 18 of the Crimes Act 1900, an essential element of homicide is causing the death of a person. Under s 20 a fetus becomes a child (and therefore a person) only if it has been born alive, has breathed and has been wholly born into the world. Thus an ‘unborn child’ cannot under the current law be the victim of homicide.²³

Dr Seymour went on:

There is nothing to prevent a legislative amendment designed to overcome this limitation.²⁴

He then gave examples of this being done in the United States of America. He referred to the definitional problems that can arise and then went on:

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. The most obvious would be that the change would raise questions about the potential liability of a medical practitioner who terminates a pregnancy. In the absence of legislation creating a defence, the criminalization of the killing of an ‘unborn child’ could give rise to the presumption that the practitioner is guilty of murder or manslaughter. The change could also have implications for the operation of the Compensation to Relatives Act 1897 (NSW) and for the survival of a cause of action under the Law Reform (Miscellaneous Provisions) Act 1944 (NSW). To confer on an ‘unborn child’ the protection offered by the Crimes Act could pave the way for the recognition of a damages claim by the family members or the estate of an ‘unborn child’. These two examples illustrate some of the difficulties that could result from an amendment that subverts the well recognized concept of personhood.²⁵

²⁰ *Finlay Report* [13.4]

²¹ *Finlay Report* [13.7]

²² J Seymour, *Childbirth and the Law* (Oxford University Press, 2000)

²³ *Finlay Report* [13.7]

²⁴ *Finlay Report* [13.7]

²⁵ *Finlay Report* [13.7]

The Doctor further submitted that:

...there are strong arguments for concluding that an amendment to the law of manslaughter to include the killing of an 'unborn child' would be most unwise. This conclusion does not preclude the creation of a special offence to punish an assailant who kills an 'unborn child'.²⁶

- 10.7 Mr Finlay also found support in the 1996 report by the Queensland Criminal Advisory Group which (through its Advisory Working Group) rejected a suggested amendment to the Queensland Criminal Code to provide that "a child becomes a person capable of being killed at or over the age of 20 weeks of gestation or when it is 400 grams or more, and could reasonably be expected to live if born". The Advisory Working Group said:

The view of the AWG, however, is that adoption of such an amendment would place Queensland out of step with every other jurisdiction. There are sound reasons for not amending section 292 in the manner proposed by the complainant; for example, every unlawful killing (including abortions) of a foetus post 20 weeks could result in a charge of murder or manslaughter being preferred against the person or persons responsible which, depending on the circumstances, could include the mother and/or the doctor. There are better ways to address this issue and they are set out below.²⁷

"The better ways" referred to were proposed amendments to the Killing an Unborn Child provision contained in section 313 of the Queensland Criminal Code 1899 by introducing the concept of a "child capable of being born alive" taken from section 10 of the Victorian Crimes Act. As appears later the Victorian section has now been repealed.

- 10.8 The "better ways" suggestion together with Dr Seymour's remark after the passage quoted above [10.7] that "this conclusion does not preclude the creation of a special offence to punish an assailant who kills an 'unborn child'" foreshadowed the *Finlay Report's* recommendations as to the offence of killing an unborn child.
- 10.9 I turn now to consider later developments that could bear upon the conclusion reached by the *Finlay Report*.
- 10.10 The broad position in the United States of America was referred to by Mr Finlay²⁸ and is noted above. Mr Finlay attached as a Schedule a summary sample which, he said, "demonstrates the unevenness of US case law."²⁹
- 10.11 That this unevenness has continued emerges from the research note of the National Conference of State Legislatures updated as at March 2010. The note reads:

The debate over fetal rights is not new to the legislative arena. Every year pro-life and pro-choice advocates vie for the upper hand in this

²⁶ *Finlay Report* [13.8]

²⁷ *Finlay Report* [13.12]

²⁸ *Finlay Report* [13.4]

²⁹ *Finlay Report* [13.4]

contentious issue. In recent years, states have expanded this debate to include the issue of fetuses killed by violent acts against pregnant women. In some states, legislation has increased the criminal penalties for crimes involving pregnant women. These laws have focused on the harm done to a pregnant woman and the subsequent loss of her pregnancy, but not on the rights of the fetus.

Other legislation has defined the fetus as a person under fetal homicide or "feticide" laws. Such legislation is hotly debated under names such as the Fetal Protection Act, the Preborn Victims of Violence Act and the Unborn Victim of Violence Act. Those supporting these acts, often pro-life advocates, say that both the lives of the pregnant woman and the fetus should be explicitly protected. They assert that fetal homicide laws justly criminalize these cases and provide an opportunity to protect unborn children and their mothers.

Those on the other side feel that laws to protect a fetus could become a "slippery slope" that could jeopardize a woman's right to choose an abortion. Pro-choice advocates say such laws grant a fetus legal status distinct from the pregnant woman - possibly creating an adversarial relationship between a woman and her baby. They are also concerned that the laws could be interpreted to apply to a woman's behavior during her pregnancy (such as smoking, drinking or using drugs). They prefer criminalizing an assault on a pregnant woman and recognizing her as the only victim.³⁰

- 10.12 The note records that at least 38 States have fetal homicide laws and at least 21 of those have fetal laws that apply at the earliest stages of pregnancy.

The research note which sets out the position in the 38 States is at Schedule 9 of this Report.

- 10.13 In 2004 the *Unborn Victims of Violence Act* amended the American *Federal Criminal Code* and the *Uniform Code of Military Justice* to include sections entitled "Protection of Unborn Children". I discuss this Act further at [12.4]. Its relevance at this point is that it effectively overturned the born alive rule in federal jurisdictions.
- 10.14 These changes, against the quite different background of the American view of abortion issues, do not lead me to take a different view to that of the *Finlay Report*.
- 10.15 Subsequent to the *Finlay Report*, the case of *R v Iby*³¹ was decided by the New South Wales Court of Criminal Appeal. The issue in the appeal was whether it was open to the trial judge to find, as he did, that a child was born alive so as to satisfy the 'born alive' rule.

In the course of his judgment, Spigelman CJ, with whom Grove and Bell JJ agreed, said:

³⁰ National Conference of State Legislatures *Fetal Homicide Laws* (8 September 2010) <http://www.ncsl.org/IssuesResearch/Health/FetalHomicideLaws/tabid/14386/Default.aspx>.

³¹ *R v Iby* [2005] NSWCCA 178

The born alive rule is, as I have indicated above, a product of primitive medical knowledge and technology and of the high rate of infant mortality characteristic of a long past era. There 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 in Massachusetts, South Carolina and Oklahoma... It has also been modified in some states by removing the requirement of complete separation from the mother's body... The rule has also been widely criticised in other states, although regarded by some courts as too well entrenched to overrule.³² [Citations omitted]

10.16 However, the common law position is that the born alive rule remains the current law in all the States and Territories of Australia, England, Canada and some American States. The Victorian Law Reform Commission in its Report on the Law of Abortion (2008) observed:

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*.³³

The Report refers elsewhere to the comment on the born alive rule in *Iby* referred to above³⁴.

Again, this case does not lead me to a different view to that of the *Finlay Report*.

10.17 Dr Seymour said in his submission to this Review:

In para 13 of my submission [to the Finlay review] I stated that an amendment to the law of manslaughter to include the killing – more accurately the destruction – of an ‘unborn child’ would be most unwise. In retrospect, I wonder whether I was too legalistic in my approach, which reflected the view that the ‘born alive’ rule is so well established that the distinction between a human being and an ‘unborn child’ is too fundamental to be questioned. The most important implication of an acceptance of this view is that homicide can be committed only when there has been an unlawful killing of a human being.³⁵

He then explained that a re-reading of the judgment in *King* and more attention to the comment of Lord Mustill in *Attorney General's Reference (No 3 of 1994)*³⁶ that the born alive rule is “based on expediency rather than principle” led him to conclude that “it could be argued” that “a violent assault in which a pregnant woman's fetus is destroyed... represents a situation in which it might be concluded that the fetus has enough in common with a human being to justify the laying of a charge of manslaughter”.

³² Spigelman CJ, 63

³³ Victorian Law Reform Commission (2008) *Law of Abortion - Final Report* [7.13]

³⁴ Victorian Law Reform Commission (2008) *Law of Abortion - Final Report* [7.43]

³⁵ Submission of Dr John Seymour, 26 August 2010

³⁶ *Attorney-General's Reference (No 3 of 1994)* [1998] AC 245

Dr Seymour then dealt with his expressed view in the submission to Mr Finlay that a manslaughter charge following the destruction of a foetus would confer personhood on the foetus by noting that the problem could be avoided by a supplementary definition of manslaughter.

- 10.18 He then went on to refer to other reasons for opposing such an extension and said:

My point is a purely theoretical one: there would be nothing to prevent the reform of the law of manslaughter to reflect a changed attitude to the “born alive” rule and a desire to mark the seriousness of an assault or other unlawful act which leads to a stillbirth. This could be done in such a way as to avoid defining a fetus as a person³⁷.

Dr Seymour reiterated his view that the creation of a new offence altogether would be the better course and pointed out that it might be awkward if expanding the crime of manslaughter required the adoption of an amended definition of homicide and thus had implications for the law of murder.

- 10.19 The question for Mr Finlay and now for me is not whether the law of manslaughter can be amended but whether it should be. Taken as a whole I think the views of Dr Seymour rather support the view that it should not be. That is in any event the conclusion I have reached on all the material before the Review.

I should add three things:

- 10.20 First, whilst Lord Mustill did describe the ‘born alive’ rule as a ‘rule of convenience’, in *Harrild v Director of Proceedings*³⁸, Justice McGrath sitting on the Court of Appeal added:

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.³⁹

- 10.21 Second, my Terms of Reference do not extend to an inquiry into the ‘born alive’ rule or, as Dr Seymour pointed out, murder. Such an inquiry would be a very large task requiring the resources of a body such as a Law Reform Commission and, to be effective, would need to cover all Australian jurisdictions.

- 10.22 And third, a substantial preponderance of the submissions to the Finlay Review supported the view that the *Crimes Act* should not be amended. The same can be said of the submissions to my Review.

Ms Donegan put one victim’s views in her written submission:

Most of the legal profession and the police oppose amending the offence of manslaughter to include the death of unborn children. I personally don’t think the manslaughter charge should be amended, as it seems it would probably cause more problems than it would

³⁷ Submission of Dr John Seymour, 26 August 2010

³⁸ *Harrild v Director of Proceedings* [2003] 2 NZLR 289.

³⁹ *Harrild v Director of Proceedings* [2003] 2 NZLR 289 at 313

solve. It is very unlikely that Parliament would pass such a law, and if enacted, no one would be convicted under it, particularly if those that would need to implement it are opposing it".⁴⁰

Those that support amendment generally do so on the basis of a claimed right of the 'unborn child' to the protection of the law, including the law of homicide, from conception. By way of example, Family Voice Australia submitted that the full range of homicide offences should be applicable to the killing of an unborn child⁴¹.

⁴⁰ Submission of Ms Brodie Donegan, 12 July 2010

⁴¹ Submission of Family Voice Australia, 7 July 2010

11. Other offences

Whether NSW should introduce any other specific offences for cases involving the death of an unborn child

- 11.1 In adhering to the 'born alive' rule and rejecting the contention that the *Crimes Act* provisions concerning manslaughter should be amended, the *Finlay Report* accepted the statement from the discussion paper of the Model Criminal Code Offences Committee on *Fatal Offences Against the Person*:

Rather the Committee favours adopting a modern and practical test whilst ensuring that acts which fall short of having caused the death of a human being will be caught by some other offence such as child destruction or an offence against the mother.⁴²

Of the two methods the passage suggests for 'catching' acts which fell short of having caused the death of a human being, the *Finlay Report* preferred that relating to child destruction. This is hardly surprising as none of the submissions before the Review raised the possibility of offences against the mother and the Review's terms of reference specifically asked the question, "whether NSW should legislate to introduce an offence of 'child destruction'".

- 11.2 The *Finlay Report* noted that in all Australian jurisdictions, other than in New South Wales and South Australia, the crime of 'child destruction' had been enacted to deal with the killing of an unborn child⁴³. The current position in those jurisdictions and in New Zealand appears at Schedule 8.

It also noted the recommendation, later adopted, of the Advisory Working Party of the Queensland Criminal Code Advisory Group in a report of July 1996 that a better way of dealing with the born alive issue was to amend the limited provisions of the Queensland 'child destruction' provision by introducing the concept of a woman pregnant with a "child capable of being born alive"⁴⁴.

- 11.3 The *Finlay Report* dealt with a number of issues involved in the introduction of a destruction offence.

It recommended that the offence apply to the destruction of "a child capable of being born alive"⁴⁵.

It recommended a provision that 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 the time pregnant of a child capable of being born alive⁴⁶.

It recommended that the offence not apply to the mother⁴⁷.

⁴² Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (1998) *Discussion Paper Model Criminal Code Chapter 5 – Fatal Offences Against the Person*, 15

⁴³ *Finlay Report* [14.1]

⁴⁴ *Finlay Report* [13.13]

⁴⁵ *Finlay Report* [14.1, 14.4]

⁴⁶ *Finlay Report* [14.4, 14.5]

⁴⁷ *Finlay Report* [14.4, 14.5]

The Report sought to avoid any interference with the law relating to abortion by requiring that the relevant act or omission be “without lawful cause or excuse” and also providing that “a person is not guilty of an offence under this section in procuring a lawful miscarriage”.

It is convenient to deal now with that aspect.

- 11.4 Mr Finlay did not have the advantage of reading the detailed Report of the Victorian Law Reform Commission, *Law of Abortion – Final Report*, released in March 2008. That Report throws considerable doubt on the isolation of the proposed new offence from the laws and issues relating to abortion.

The Final Report of the Victorian Law Reform Commission was issued in March 2008 after a major inquiry into the law of abortion in Victoria. The number of submissions it received, that is, 519, illustrates its size⁴⁸.

Of its 16 recommendations the first two are relevant to the issue of whether an offence of killing an unborn child should be enacted.

- 11.5 The first recommendation was that section 10 of the *Crimes Act 1958* (Vic) be repealed. That section provided for an offence of child destruction.

The second recommendation was that the definition of serious injury in section 5 of that Act be amended by adding “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”. “Serious injury” is the equivalent to “grievous bodily harm” in the NSW Act.

The Report notes that the provisions in the NSW *Crimes Act* that deal specifically with abortion are effectively the same as those in Victoria “except that the offence of child destruction has never been a part of NSW law”⁴⁹.

The Report also noted that the statements of Judge Levine in *R v Wald*⁵⁰ as developed by Justice Kirby in *CES v Superclinics (Australia) Pty Ltd*⁵¹ were accepted by Justice Simpson in *R v Sood*⁵² as a correct statement of the law as to lawful abortion in NSW.⁵³ It referred to the earlier Victorian case of *R v Davidson*⁵⁴ in which Justice Menhennit dealt with similar issues. The Report commented that:

It is likely, but not certain, that if a Victorian court were called upon to interpret section 65 of the *Crimes Act* it would adopt the Menhennitt rules as developed by Judge Levine in *Wald* and by Justice Kirby in *Superclinics*.⁵⁵

Section 10 of the Victorian *Crimes Act*, which was headed “offence of child destruction”, provided in subsection (1):

⁴⁸ Victorian Law Reform Commission (2008) *The Law of Abortion – Final Report* [1.16]

⁴⁹ Victorian Law Reform Commission (2008) *The Law of Abortion – Final Report* [2.37]

⁵⁰ *R v Wald* (1971) 3 DCR (NSW)

⁵¹ *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47

⁵² *R v Sood* [2006] NSWSC 762

⁵³ Victorian Law Reform Commission (2008) *The Law of Abortion – Final Report* [2.38]

⁵⁴ *R v Davidson* [1969] VR 667

⁵⁵ Victorian Law Reform Commission (2008) *The Law of Abortion – Final Report* [2.36]

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).

The Report observed that this section “makes it a criminal offence for a person to destroy the life of an unborn child capable of being born alive by *unlawfully* using any means to achieve this result”⁵⁶.

It points out that the offence was drawn from the *Infant Life (Preservation) Act* enacted in England in 1929. That Act was originally intended to deal with lethal acts intentionally performed during childbirth where there was doubt about whether the child was born alive⁵⁷.

11.6 The Report goes on:

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.

The offence creates a lack of clarity in Victorian law, which has three different aspects. First, an unlawful abortion 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. 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. 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.⁵⁸

The Report describes an unlawful abortion as one that does not comply with the Menhennitt ruling as to the circumstances in which therapeutic abortion is lawful⁵⁹. In New South Wales the rulings in *Wald* and *Superclinics* would be the relevant ones, however, this would not alter the situation materially in respect of the issue being dealt with.

The Report also notes at 7.7:

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

⁵⁶ Victorian Law Reform Commission (2008) *The Law of Abortion – Final Report* [7.3]

⁵⁷ Victorian Law Reform Commission (2008) *The Law of Abortion – Final Report* [7.5]

⁵⁸ Victorian Law Reform Commission (2008) *The Law of Abortion – Final Report* [7.6, 7.7]

⁵⁹ Victorian Law Reform Commission (2008) *The Law of Abortion – Final Report* [7.7]

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 abortions⁶⁰.

A reading of these cases, as one would expect, supports that comment.

11.7 The Report dealt with the offence in Victoria as follows:

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'.

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*. 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* 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'. 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'.

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

⁶⁰ Victorian Law Reform Commission (2008) *The Law of Abortion – Final Report* [7.7]

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.

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. (Citations omitted)

- 11.8 Since the draft of the offence of killing an unborn child as recommended in the Finlay Report contains the words "with intent to kill or inflict grievous bodily harm upon such child", it would appear that a New South Wales Court in construing the phrases "without lawful cause or excuse" and "lawful miscarriage" would need to consider that the words of the offence seem concerned with the interests of the potential life as well as those of the pregnant woman except when there is a risk to the woman's life.

The Report observed at 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 liability⁶¹.

If the proposed new offence is enacted it would appear that the situation in this State would be the same.

The Report noted the submission of the Australian Christian Lobby which specifically noted that among "pro-life" groups, late abortions are viewed as falling within the offence of child destruction.⁶²

- 11.9 The Report set out the current situation in NSW in a way that is instructive and helpful:

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; but while this report was being considered the case of *R v King* arose. In this case an unplanned pregnancy resulted in a dispute between the man and the woman concerning an

⁶¹ Victorian Law Reform Commission (2008) *The Law of Abortion – Final Report* [7.45]

⁶² Victorian Law Reform Commission (2008) *The Law of Abortion – Final Report* [7.65]

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'. 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.

7.73 The Attorney-General noted that the government would not make any legislative change that interfered with the law of abortion. 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*.

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.

7.79 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. (Citations omitted)

- 11.10 In the event the Commission recommended that section 10 *Crimes Act 1958* (Vic) be repealed and that serious injury 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 harm.

In reference to the last recommended amendment the Report read:

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. (Citations omitted)

- 11.11 I find the Report very persuasive as to why the child destruction provision should be repealed – or, in the case of New South Wales, not adopted. The recommended repeal and amendments were enacted by the *Abortion Law Reform Act 2008* (Vic).

It could be argued that any conflict with abortion laws could be avoided by adding further protective provisions to the proposed legislation for the offence of 'killing an unborn child'.

This might well encounter much opposition having regard to the provisions, as to lawfulness, directed to that end which already appear in the suggested draft.

In any event, such a provision would be vulnerable to removal once the offence is in place. This possibility would be of concern to those to oppose the introduction of such an offence.

- 11.12 I also find very persuasive the Report's views as to the New South Wales model and consider them strong support for a conclusion that the current offences respond appropriately to criminal incidents involving unborn children.

11.13 During the Debate in the Legislative Assembly on the *Crimes Amendment (Grievous Bodily Harm) Bill 2005*, the Attorney General, the Honourable Bob Debus said, speaking of the *Finlay Report*:

...the whole report was written before the Court of Criminal Appeal had delivered its historic decision in the *King* case, and that changed the legal landscape in relation to this area of law.⁶³

11.14 Following that change, a more informal and limited review was carried out by the (then) Attorney General's Department. It took the form of the dispatch of a letter, dated 21 May 2004, to the New South Wales Bar Association, the New South Wales Law Society, the Director of Public Prosecutions, the Public Defender and the Legal Aid Commission.

The letter, after referring to the recommendations of the *Finlay Report* and the decision in *King*, went on to put perceived advantages of relying on the law as expounded in *King*.

I set out the following passage from the letter for it does accurately detail a number of respects in which reliance upon the law avoids a number of issues that would arise in respect of the offence of killing an unborn child. The passage reads:

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 at whatever stage in 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 attempt to formulate an exemption for "lawful abortions";
- The fault element is less complicated...

The letter then observed that a number of the submissions received by Mr Finlay expressed opposition to or concern at the introduction of an offence of 'killing an unborn child' and summarised a number of problems that might be said to be associated with such an introduction. The more significant of those problems are discussed elsewhere in this Report and it is unnecessary to set them out here.

The letter then sought comments as to support for the Finlay recommendations and as to the sufficiency of the current state of the law as set out in *King*.

⁶³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 March 2005

11.15 It is fair to say that the letter took a clear position, however, it was written to bodies that had all made submissions to the Finlay Review and which, it can be accepted, would be familiar with the issues and, by their very nature, not likely to be overborne in putting their views.

All the addressees replied and all opposed a change to introduce a new offence. All accepted that the current state of the law was adequate. In doing so they all referred to *King* other than the Public Defender whose submission pointed out that some offenders were being punished for causing the loss of a foetus as a consequence of section 21A of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*⁶⁴.

11.16 In his reply the Director of Public Prosecutions observed that he did not “see the need for the creation of a special offence, with its added difficulties, simply to lend further emphasis to this aspect of the offending in a limited number of cases.” He also pointed out that the problems associated with the proposed offence of killing an unborn child would result in prosecutions protracted by expert medical evidence and legal argument, leading to extra distress and cost to those involved⁶⁵.

11.17 The Public Defender referred to the potential of the proposed new offence to upset the “delicate balance as to the legality of abortion”⁶⁶.

11.18 As part of this Review I wrote to the New South Wales Bar Association, the Public Defender and the Director of Public Prosecutions seeking up to date comments. I did not write to the Law Society and Legal Aid Commission as they provided submissions.

11.19 The New South Wales Bar Association and the Public Defender maintained their opposition to any change. The Director of Public Prosecutions advised that he did not see the need for the creation of additional offences. He observed:

In my view the existing law is capable of addressing the criminality of the relevant conduct and imposing appropriate punishment for offending.⁶⁷

11.20 The submission made on behalf of the Public Defender was prepared by Mr John Stratton SC, Deputy Senior Public Defender. Referring to the proposed introduction of the offence of killing an unborn child he wrote:

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

⁶⁴ Response of Public Defender, 7 July 2004

⁶⁵ Response of Mr Nicholas Cowdery AM QC, Director of Public Prosecutions, 18 June 2004

⁶⁶ Response of Mr John Stratton SC, Public Defender, 7 July 2004

⁶⁷ Submission of Mr Nicholas Cowdery AM QC, Director of Public Prosecutions, 11 August 2010

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 (2) (g) *Crimes (Sentencing Procedure) Act*. Under the current arrangement, it could not be said that any offenders are escaping punishment.⁶⁸

In his submission, Mr Stratton further wrote:

...the number of potential offences of this kind appears to be very low. There are offences of 'killing an unborn child' in all other states and territories except South Australia, but the number of convictions for this offence are extraordinarily small. *The Finlay Report* noted that in Tasmania and the ACT, no one had ever been charged with the offence, in Victoria and Western Australia there had never been a conviction for the offence, and in Queensland there had only ever been once conviction for the offence (*The Finlay Report* pp.53-7).⁶⁹

11.21 Inquiries carried out for this Review establish, so far as can be done, that the position remains much as at the time of the *Finlay Report*.

11.22 The Australian Medical Association (NSW) opposed any legislative amendment or creation of a criminal offence which recognises an unborn child as a legal entity independent of its mother. It submitted that such recognition would create unnecessary complications across several of its members specialties such as genetics and obstetrics⁷⁰.

11.23 As mentioned, the New South Wales Law Society and the Legal Aid Commission made submissions to my Review. I had the opportunity of a meeting with Ms Mary Macken, the President of the Law Society, Ms Lana Nadj of the Society and Ms Annmarie Lumsden of the Legal Aid Commission. The position taken by the two bodies was essentially similar.

As indicated above at 11.15, both bodies had previously indicated that they did not favour the introduction of an offence of "killing an unborn child" and expressed satisfaction with the state of the law following *King*.

However, both took similar issue with the 2005 amendment to the definition of grievous bodily harm. I deal with this aspect of their submissions later.

The Law Society and the Legal Aid Commission now both support a form of "foetus destruction" legislation although a much more limited one than proposed in the *Finlay Report*⁷¹.

11.24 Life Marriage and Family Centre support an offence of 'killing an unborn child'⁷². The Australian Christian Lobby advocate the enactment of an

⁶⁸ Submission of Mr John Stratton SC, Deputy Senior Public Defender, 7 September 2010.

⁶⁹ Submission of Mr John Stratton SC, Deputy Senior Public Defender, 7 September 2010.

⁷⁰ Submission of Australian Medical Association (NSW) Limited, 5 October 2010

⁷¹ Interviews 30 August 2010, Ms Annmarie Lumsden (Director, Grants Division), Legal Aid Commission of NSW, Ms Mary Macken (President) and Ms Lana Nadj (Policy Lawyer), Law Society of NSW

offence of 'killing an unborn child' as recommended by the *Finlay Report* "to operate alongside and in addition to, the offence of grievous bodily harm as presently relates to the death of an unborn child".⁷³ NSW Right to Life may be taken to support such an offence, in the absence of the availability of manslaughter.

- 11.25 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.

If that view is adopted it would not be appropriate to amend the offences under sections 52A and 52B as recommended by the *Finlay Report*⁷⁴.

- 11.26 NSW Right to Life did submit that section 52A should be amended to extend the provision to apply to an 'unborn child'⁷⁵. The *Finlay Report*, in effect, recommended such a change. However, that was part of a scheme which was not adopted and amendment of section 52A cannot, consistently with the decision in relation to the scheme, stand alone.

- 11.27 Dr Seymour submitted that, if any change were to be made, a matter as to which he had significant reservations, the proper course was to create new offences. He did not support the recommendation of the *Finlay Report* in favour of the introduction of the offence of 'killing an unborn child' based on section 10 of the *Crimes Act 1958* (Vic).

Dr Seymour observed:

The Victorian offence should be consigned to history. Its scope is uncertain. It had its origins in the unsatisfactory Infant Life (Preservation) Act 1929 (UK).⁷⁶

As noted above at 11.11 the offence has been so consigned.

- 11.28 Dr Seymour raised the question whether the conduct to be punished was the violent termination of a pregnancy or the violent destruction of an entity.

If it were the first, then he considered the current law sufficient. If it were the second, consideration could be given to the creation of an offence relating to the destruction of a foetus. He did not favour reference to an embryo.⁷⁷

- 11.29 Dr Seymour preferred "a graduated series of offences"⁷⁸ which would have much in common with manslaughter. He drew attention to a considerable number of problems that would need to be addressed in the drafting of the legislative scheme of offences.

⁷² Submission of the Life Marriage and Family Centre, Catholic Archdiocese of Sydney, 16 July 2010

⁷³ Submission of the Australian Christian Lobby, 16 July 2010.

⁷⁴ *Finlay Report* [1.2]

⁷⁵ Submission of NSW Right to Life, 16 July 2010

⁷⁶ Submission of Dr John Seymour, 26 August 2010

⁷⁷ Second submission of Dr John Seymour, 6 September 2010

⁷⁸ Submission of Dr John Seymour, 26 August 2010

11.30 I have considered the proposals, however, I do not propose to deal with them in detail in this Report.

The complication of the scheme and the inevitable points of uncertainty and contention that would arise would be disproportionate to the nature of the problem to which my Terms of Reference refer. I could not recommend the adoption of such a scheme on that ground alone.

11.31 Dr Seymour went on in his submission to comment that there are policy reasons for refusing to enact new legislation that recognises the distinctiveness of the foetus⁷⁹.

He observed:

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.⁸⁰

After giving examples of the conflicts that could arise across a range of areas he went on:

...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?⁸¹

On the policy question Dr Seymour expressed his 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. He relies, in part, upon the emotional ties of a woman with her foetus as the focus of hopes and aspirations.

Whilst emphasising that the new laws should be carefully drafted in order to target particular forms of conduct he did say:

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.⁸²

11.32 It 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.

⁷⁹ Submission of Dr John Seymour, 26 August 2010; see also J Seymour, *Childbirth and the Law* (Oxford University Press, 2000), Chapter 9

⁸⁰ Submission of Dr John Seymour, 26 August 2010

⁸¹ Submission of Dr John Seymour, 26 August 2010

⁸² Submission of Dr John Seymour, 26 August 2010

In a later submission, Dr Seymour set out an expanded version of a comment he had made to me during our telephone conversation:

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?⁸³

11.33 A key factor in dealing with this suggested question is the number of cases likely to fall within the new offences. On this issue I refer to the passage from the submission written by Mr John Stratton SC set out at 11.20.

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.

11.34 I do not recommend the introduction of these or any other specific offences for cases involving the death of an unborn child.

⁸³ Second submission of Dr John Seymour, 6 September 2010

12. The *Crimes Amendment (Grievous Bodily Harm) Bill 2010 (NSW)*

- 12.1 Presently a prosecution may be brought based upon grievous bodily harm being destruction of a foetus. Leaving issues of causation and the like aside, proof that the organism destroyed was a foetus is sufficient to establish grievous bodily harm.

Whilst in *King* the foetus was 23 to 24 weeks old and no issue arose as to whether an embryo or a foetus was involved, the reasoning in *King* would apply in respect of a case involving an embryo. In such a case it would be for the Judge, Jury or Magistrate to decide whether destruction of the embryo amounted to grievous bodily harm.

Theoretically, the reasoning would also apply to a zygote, which precedes the embryo, however, I do not think it necessary to consider this aspect further as the question of causation at such an early stage in the pregnancy would be almost certainly insurmountable.

- 12.2 The *Crimes Amendment (Grievous Bodily Harm) Bill 2010* seeks to amend the definition of 'grievous bodily harm' in the *Crimes Act* so that it includes:

The destruction (other than in the course of a medical procedure) of a child in utero of a pregnant woman whether or not the woman suffers any other harm;

And to add a definition of a child in utero as:

any form of human life in either the embryonic or foetal stage of development.

Notice has been given of an amendment to the amending Act which seeks to simply add to the present definition the words "the embryo or".

- 12.3 The amendment sought by the amending Bill would require a Court to determine whether human life had begun.

In *Roe v Wade*⁸⁴ the Supreme Court of the United States in an opinion delivered by Justice Blackmun said:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer⁸⁵.

As observed by the European Court of Human Rights in the case of *Vö v France*⁸⁶ at 82 this is an issue that involves legal, medical, philosophical, ethical or religious dimensions.

It is not a question that should be put to a Court.

⁸⁴ *Roe v Wade* 410 US 113

⁸⁵ *Roe v Wade* 410 US 113, 159

⁸⁶ *Vö v France* [2004] ECHR 326

It does not provide a “line sensibly drawn so as to provide a helpful and relevant test for juries”⁸⁷. Nor, it would seem from the preponderance of the submissions to my Review, does it “provide a test that is acceptable to the majority of the community”.⁸⁸

- 12.4 The language of the amendment does more than merely seek to extend the inclusive definition to include an embryo. It introduces, no doubt based on the American Federal *Unborn Victims of Violence Act 2004*, the concept of an ‘unborn child’ which under that Act has legal status which effectively overturns the born alive rule.

The decision of Parliament not to adopt an offence of “killing an unborn child” and to adopt the course of extending the definition of grievous bodily harm by reference to destruction of a foetus was clearly designed to avoid the controversies, uncertainties and other difficulties which can be expected to follow from the recognition of legal status in an embryo or foetus. I have already discussed these in the body of the Report and do not need to revisit them except to refer to the submission of the Australian Medical Association (NSW). The Association put that to create a charge of grievous bodily harm for a child in utero would have unintended consequences and flow on effects in other areas of medicine and law⁸⁹.

I should add that in the American statute, the term “unborn child” means a “child in utero” and that term means “a member of the species homo sapiens, at any stage of development, who is carried in the womb”⁹⁰. Thus an American Court is not faced with the need to determine when life begins.

- 12.5 The second proposed amendment does not have this difficulty.

It does make it unnecessary to distinguish between an embryo and a foetus whereas, currently, proof of the presence of a foetus is required. I have been advised by Professor Alec Welsh⁹¹ that whilst there may be borderline cases, determination of the gestation period is not difficult on post-mortem or by ultrasound⁹².

The amendment does remove the possibility of falling short by a small margin, however, in such a circumstance the alternative of relying upon the common law position remains.

However, there are a number of major difficulties which would follow from the amendment.

⁸⁷ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (1998) *Discussion Paper Model Criminal Code Chapter 5 – Fatal Offences Against the Person* at p 15

⁸⁸ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (1998) *Discussion Paper Model Criminal Code Chapter 5 – Fatal Offences Against the Person* at p 15

⁸⁹ Submission of Australian Medical Association (NSW) Limited, 5 October 2010

⁹⁰ *Unborn Victims of Violence Act 2004* (US)

⁹¹ Professor Alec Welsh MBBS MSc PhD MRCOG(MFM) FRANZCOG DDU CMFM. Professor in Maternal-Fetal Medicine at the University of New South Wales / Royal Hospital for Women; NSW Chair of the Royal Australasian and New Zealand College of Obstetrics and Gynaecologists

⁹² Interview, Dr Alec Welsh 29 September 2010

- 12.6 Questions of causation of the loss become increasingly more difficult to determine the earlier in the pregnancy the loss has occurred.

A fact sheet issued by the Royal Women's Hospital of Victoria states:

Miscarriage in the first few weeks of pregnancy is very common. Studies show that up to one in four women, who know they are pregnant, will have a miscarriage before 20 weeks of pregnancy. The vast majority of these occur in the first 12 weeks. The actual rate of miscarriage is even higher, because many women have very early miscarriages without ever realising that they are pregnant.⁹³

MedlinePlus Medical Encyclopedia puts the matter somewhat differently:

It is estimated that up to half of all fertilized eggs die and are lost (aborted) spontaneously, usually before the woman knows she is pregnant. Among those women who know they are pregnant, the miscarriage rate is about 15-20%. Most miscarriages occur during the first 7 weeks of pregnancy. The rate of miscarriage drops after the baby's heartbeat is detected.⁹⁴

A review in the *Australian and New Zealand Journal of Obstetrics and Gynaecology* states:

10-20% of pregnancies will end in miscarriage, known medically as spontaneous abortion.⁹⁵

As the embryo becomes a foetus at about 8 weeks it will be seen that there is a significant rate of spontaneous abortion during this time.

This fact can be expected to limit prosecutions because of concern as to the ability to prove causation beyond reasonable doubt.

The causation difficulties suggest that there is little to be put in the balance against the interests of those who urge strongly that the recognition afforded by the extended definition should not go beyond the foetus.

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.

- 12.7 In *Roe v Wade*⁹⁶ the US Supreme Court recognised the appropriateness of considering a pregnancy and what rights the State could exert in respect of it, in successive stages.

⁹³ The Royal Women's Hospital (2006) *Fact Sheet: Miscarriage in the first 16 weeks – an explanation* (17 September 2010) <http://www.thewomens.org.au/Miscarriageinthefirst16weeksanexplanation>.

⁹⁴ United States National Library of Medicine; National Institutes of Health (2010) *Miscarriage* (17 September 2010) <http://www.nlm.nih.gov/medlineplus/ency/article/001488.htm>.

⁹⁵ K Stratton and L Lloyd, "Hospital-based interventions at and following miscarriage: Literature to inform a research-practice initiative" (2008) *Australian and New Zealand Journal of Obstetrics and Gynaecology* 48:5-11, 5.

⁹⁶ *Roe v Wade* 410 US 113

Whilst the case was concerned with constitutional issues and affected by the particular medical findings made there was a clear recognition that, until approximately the end of the first trimester, the position of the pregnant woman and the embryo or foetus was significantly different to that which later ensued.

The submissions made to me support the view that the period with which the amendment is concerned is one during which many women regard the decision as to what course to adopt in relation to a pregnancy as a matter for them and their doctors.

- 12.8 In my view, the better course is for the question of whether loss of an embryo in a particular case amounts to grievous bodily harm is to be determined by the Court on the facts of the instant case.
- 12.9 The absence of the extension to the definition of grievous bodily harm sought by either amendment does not adversely affect the appropriateness of the current provisions.

13. Other objections

13.1 As noted above at 11.23, the position taken by the New South Wales Law Society and the Legal Aid Commission on the 2005 amendment as to grievous bodily harm are essentially similar. The Legal Aid submission put:

However, for offences under sections 33, 35(1), 35(2), and 54 of the Crimes Act 1900, the mens rea for the offence is in relation to the infliction of harm on the pregnant woman, and the offender is liable to punishment for destruction of the foetus of the pregnant woman, regardless of whether or not the woman suffers any harm, regardless of whether or not the offender knew the victim was pregnant, regardless of the age of the foetus and, it follows, regardless of whether or not the woman knew at the time that she was pregnant.

The result is that, in some instances where there has been harm to a foetus, there may be significant disjuncture between the assailant's culpability and the harm he or she has caused, and the penalty he or she faces.

It is the view of Legal Aid NSW that the current legislative arrangement offends the principle that there should be a close correlation between moral culpability and legal responsibility.

...

Legal Aid NSW is of the view that the extended definition of grievous bodily harm to cover the destruction of the foetus of a pregnant woman does not enable the justice system to respond appropriately to criminal incidents involving the death of an unborn child.

Legal Aid NSW is of the view that relevant legislative provisions should be directed to those cases where the assailant has a specific intent to harm a foetus who is capable of being born alive, and the child is born dead, or born alive with grievous bodily injury, because of acts done which would have amounted to homicide had the child died after birth.⁹⁷

13.2 Upon analysis it will be seen that, bearing in mind the relationship between *King* and the amendment, this amounts to a critique of *King*. It also appears to overlook the principle that, generally speaking, an offender takes a victim as he or she is found to be.

13.3 The Women's Abortion Action Campaign also took issue with the amendment arguing that the law was already adequate. Even if it were assumed that that view was correct it does not, of itself, make the new provision inappropriate.

The submission put that the amendment to the definition of grievous bodily harm represented a failure to uphold Articles of the *Convention for the Elimination of Discrimination Against Women* (CEDAW) and in particular Article 5. The relevant portion of Article 5 provides:

States Parties shall take all appropriate measures:

⁹⁷ Submission of the NSW Legal Aid Commission, 12 August 2010

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;⁹⁸

I am unable to accept that the amendment made has the suggested effect.

- 13.4 These objections do not lead me to the conclusion that the current offences are not appropriate.

⁹⁸ *Convention for the Elimination of Discrimination Against Women, Article 5*

14. Current offences - Conclusion

Whether current offences which now invoke an extended definition of grievous bodily harm to cover the destruction of the foetus of a pregnant woman, including those relating to dangerous and negligent driving, enable the justice system to respond appropriately to criminal incidents involving the death of an unborn child - Conclusion

14.1 As I observed at 7.2:

“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”.

The advantages of such a path are conveniently summarised in the first six paragraphs of the letter of 21 May 2004 set out at 11.14.

The alternative paths of amending the law of manslaughter, adding an offence of ‘killing an unborn child’, a “series of graduated offences” as discussed by Dr Seymour, or some other offence are, for the reasons I have set out, unacceptable.

Again, for the reasons I have set out, I do not consider the issue raised by the *Crimes Amendment (Grievous Bodily Harm) Bill 2010* (NSW) or the matters I have dealt with as “Other objections’ affect the conclusion I should reach.

14.2 Acknowledging the concerns of Ms Donegan and those who take a similar position I conclude that the current offences do allow the justice system to respond appropriately.

15. Consultation

Whether further consultation, if any, should take place

- 15.1 The submission of the Women's Abortion Action Campaign contends that there was not adequate public consultation before the introduction of the *Crimes Amendment (Grievous Bodily Harm) Bill 2005* (NSW) and that recommendations from this Review should not go "straight to NSW Parliament" without the opportunity for further public discussion and debate.

A number of submissions seek post Report public consultation and others such consultation during the Review.

- 15.2 The events leading up to this Review and its establishment attracted considerable media interest. The opportunity to make submissions was advertised. It is unlikely that persons or organisations interested in the topics dealt with would not have been aware of the Review. Schedule 2 lists organisations and persons from whom submissions were received and demonstrates the representative nature and range of the submissions made.
- 15.3 As the Review recommends no change to the current situation it would be inappropriate for me to recommend a further program of consultations except in relation to the following matter:
- 15.4 I propose to recommend that the Department of Justice and Attorney General consider possible amendments to the Table in Schedule 1 of the *Victim's Support and Rehabilitation Act 1996*. This work will also involve consultation which I discuss when dealing with the recommendation.

16. Other matters

Any other relevant civil or criminal matter

Post-accident difficulties

- 16.1 Ms Donegan and Ms Gordon referred in submissions and at interview to difficulties they perceived in the way the accident and its consequences were dealt with by Police and Prosecuting Authorities. These matters fall outside my Terms of Reference and I do not have the requisite information to comment upon them.
- 16.2 Ms Donegan and Ms Gordon also raised issues as to the adequacy of regulatory provisions relating to driving license suspension. That question, which is beset with many conflicting interests, also falls outside my Terms of Reference.

Births, Deaths and Marriages Registration Act 1995 (NSW)

- 16.3 Ms Donegan has drawn attention to what she perceives to be a conflict between the absence of recognition of her stillborn daughter in the criminal law and the requirement of the *Births, Death and Marriage Registration Act 1995* (NSW) that her stillbirth be registered. That process required that she be given a name, although that had already been done. The name chosen was Zoe.

The conflict is more apparent than real, for the purposes of the criminal law are quite different to those of the *Births, Deaths and Marriages Registration Act 1995*, which includes the collection of medical statistics, and there is no inconsistency.

- 16.4 Prior to 1992, the recording of stillbirths was relatively informal. Following a recommendation of the New South Wales Law Reform Commission in its report *Names: Registration of Certificates of Births and Deaths*⁹⁹ the then relevant Act was amended to provide that the registration of stillbirths was similar to that of live births.

The principal purpose of the amendment, as expressed in the Parliamentary speeches, was to give grieving parents the comfort of recognition of the loss and the issue of a certificate in respect of it. The Commission had observed, speaking of the grieving process, "It is now widely accepted that this process is fostered by the appropriate recognition of the loss of an expected child".¹⁰⁰

- 16.5 It would seem that steps taken to assist the grieving process for some, may have a different effect for others. This is not a matter about which I can make any useful recommendation.

⁹⁹ New South Wales Law Reform Commission (1988) Report 61 - *Names: Registration and Certification of Births and Deaths*

¹⁰⁰ New South Wales Law Reform Commission (1988) Report 61 - *Names: Registration and Certification of Births and Deaths* [4.86]

Crimes Act 1900 (NSW) – sections 82, 83 and 84

- 16.6 The Women’s Abortion Action Campaign has sought under this Term of Reference that I recommend the repeal of the above sections which deal with ‘Attempts to procure abortion’¹⁰¹.

My Terms of Reference do not authorise an examination of the law of abortion and, accordingly, I do not respond to this part of the Campaign’s submission.

Workers Compensation Act 1970

- 16.7 Ms Donegan raised in her submission and at interview several issues relating to payments of compensation to women who have lost a foetus.
- 16.8 The first, was in respect of the addition of an item to the “Table of Maims” under the *Workers Compensation Act 1987* (NSW) so that a woman, otherwise qualifying for compensation under that Act, would be entitled to payment of a lump sum in respect of a lost foetus. She suggested that a gestation period of 12 weeks might be appropriate as a qualifying age as the likelihood of a miscarriage occurring naturally would have lessened.

Since 1 January 2002 New South Wales has moved from a “Table of Maims” approach to an assessment of whole person impairment scheme (*Workers Compensation Legislation Amendment Act 2001* (NSW)). However, whilst this change might have highlighted the difficulty, the basic problem in including the loss of a foetus as a basis for an award of compensation remains the same.

Section 66(1) provides:

A worker who receives an injury that results in permanent impairment is entitled to receive from the worker’s employer compensation for that permanent impairment as provided by this section.

The loss of a foetus is not a “permanent impairment” falling within the terms of this section and compensation is not payable under it.

- 16.9 To add a special provision to the Act relating to the loss of a foetus would be a departure from the scheme of the Act and would require consideration of a whole range of issues including other losses that it could be argued justified similar treatment. I do not have scope to undertake such an inquiry.

Whilst I make no formal recommendation, it is of course open to Ms Donegan and others to pursue an amendment by normal democratic means.

Victim Support and Rehabilitation Act 1996

- 16.10 The second was in respect of the addition to the Table in Schedule 1 to the *Victim Support and Rehabilitation Act 1996* of an item to provide

¹⁰¹ *Crimes Act 1900* (NSW), ss 82, 83, 84

compensation to a woman who loses a foetus as a result of criminal conduct without the need to establish psychological injury or that domestic violence was involved.

- 16.11 A 2004 Report on a statutory review of the *Victims Support and Rehabilitation Act 1996* and the *Victim's Rights Act 1996*¹⁰² considered a submission from the Women's Legal Resource Centre that there was a need to expand the categories of compensation. The contention was supported by a submission from the Law Society of New South Wales.

The Report recommended:

The categories of compensable injury should be expanded to include injury to or loss of a foetus, miscarriage as a result of violence, and associated injury to reproductive organs as a result of violence¹⁰³.

In a letter dated 22 September 2010 I was advised by the Director General of the Department of Justice and Attorney General that this recommendation was not progressed "given concerns about the proposal, including that establishing a causal nexus between the act of violence and a miscarriage or still-birth, or an injury to a foetus is problematic"¹⁰⁴.

- 16.12 Subsequently, during debate in the Legislative Council upon the *Victims Support and Rehabilitation Amendment Bill 2006*, the Reverend the Honourable Fred Nile MLC moved amendments to add to Table 1 items relating to the partial loss of fertility and "miscarriage of, or injury to foetus". This was done, he said, at the behest of the Law Society of New South Wales and the Women's Legal Resource Centre.

The Government took the position that, apart from questions of causation, there were other issues which called for "further work" and consultation. It was indicated that the Government intended to consult further to ensure that a number of concerns were addressed.

The Honourable Lee Rhiannon MLC, representing the Greens, opposed the amendment on the basis that there had been insufficient time to consider its potential broader implications. She instanced a number of possible issues to which it is unnecessary to refer.

The amendments were negatived.

- 16.13 The reasoning in *King*, which was not available at the time the *Report on the Review of the Victims Support and Rehabilitation Act 1996 and the Victims Rights Act 1996* was written, lends support to the view that, at least, the loss of a foetus should be included in the Table and could be so included without undue detrimental effect.

The history of the issue makes it clear that such inclusion is unlikely to occur without there first being a specific and detailed inquiry, supported by

¹⁰² Legislation and Policy Division, Department of Justice and Attorney General (2004) *Report on the Review of the Victims Support and Rehabilitation Act 1996 and the Victims Rights Act 1996*

¹⁰³ Legislation and Policy Division, Department of Justice and Attorney General (2004) *Report on the Review of the Victims Support and Rehabilitation Act 1996 and the Victims Rights Act 1996*, 5.

¹⁰⁴ Letter, Director General, Department of Justice and Attorney General, 22 September 2010

consultation, on the concerns raised as to the possible implications of such inclusion.

The Director General has advised that his Department could undertake the work as part of its regular legislation and policy work.

- 16.14 I recommend that the Department of Justice and Attorney General consider possible amendments to the Table in Schedule 1 of the *Victims Support and Rehabilitation Act 1996* to include, at least, the loss of a foetus.

The organisations to be consulted on such possible amendments should include Women's Legal Services NSW, incorporating Women's Legal Resource Centre, the Law Society of New South Wales, Life Marriage and Family Centre, Victims of Crime Assistance League and Women's Abortion Action Campaign.

Motor Accidents Compensation Act 1999

- 16.15 Ms Donegan informed me that the relevant insurer has paid the funeral and related expenses in respect of the loss of her foetus. However, she pointed out that this was done on an ex gratia basis and submitted that the *Motor Accidents Compensation Act 1999* should be amended to make the insurer liable for such payments. She also pointed out that the Scheme for special children's no fault benefit provided for such payments in respect of a child but not a stillborn child.

- 16.16 I have been informed by the Motor Accidents Authority of NSW (MAA) that Compulsory Third Party insurers often make such payments on an ex gratia basis. And, further, that such payments would be unlikely to have a significant impact on the motor accidents scheme. How to make such payments a matter of obligation is, however, a more difficult matter.

Funeral expenses, including those under the children's no fault benefit, are recoverable under the *Compensation to Relatives Act 1897* and that Act only applies to persons born alive.

Any amendment to that Act to provide for payments such as those being considered would be likely to imperil the born alive rule in its application to the civil law.

It may be that the *Motor Accidents Compensation Act 1999* could be amended to provide for a payment connected to the mother, rather than to the foetus. The reasoning in *King* may be of some assistance in this regard.

- 16.17 This is not an aspect I can advance further in this review. I recommend that the Department of Justice and Attorney General together with the Motor Accidents Authority consider a legislative, or administrative, scheme to provide for the payment of the funeral costs of a stillborn child..

- 16.18 Ms Donegan has also submitted that I should recommend the amendment of the *Motor Accidents Compensation Act 1999* to provide a solatium for the loss of a child including an unborn one.

The *Motor Accidents Compensation Act 1999* does not, and has not since its introduction, provided any benefits on a solatium basis.

As the Authority has pointed out, such a benefit could be expected to raise the general issue of the payment of a solatium in all cases involving death.

It would have cost implications for the motor accident scheme which would flow on to the price of a Green Slip paid by motorists. The ascertainment of that cost and price impact would require an actuarial assessment.

- 16.19 Whilst Ms Donegan's situation was, and no doubt remains, a great personal tragedy it is one that, in a broader sense, has been replicated many times both before and after the passing of the *Motor Accidents Compensation Act 1999*.

There is nothing special in Ms Donegan's situation or in the information that has come to me during the course of this Review that would justify me recommending that the amendment sought be made or that there be a further inquiry into that matter.

Whilst I make no formal recommendation it is, of course, open to Ms Donegan and others to pursue the amendment by normal democratic means.

Index to Schedules

Schedule 1	Text of advertisement inviting submissions to the Review
Schedule 2	Submissions received
Schedule 3	Organisations and individuals to whom letters inviting submissions were sent
Schedule 4	Organisations and individuals who responded to request for information
Schedule 5	Interviews
Schedule 6	Table of Cases and Legislation
Schedule 7	Bibliography
Schedule 8	Summary of Child Destruction/Kill Unborn Child Legislation in Other Australian Jurisdictions and New Zealand
Schedule 9	Research Note: National Conference of State Legislatures (US)