



1. Introduction
2. Provisions of the Zoe's Law (No 2) Bill
3. Differences between the Nile Bill and the Zoe's Law Bill (No 2)
4. Issues relating to the Zoe's Law Bill (No 2)
5. Conclusion

## Crimes Amendment (Zoe's Law) Bill 2013 (No 2)

by Lynsey Blayden

### 1. Introduction

This e-brief provides commentary on the [Crimes Amendment \(Zoe's Law\) Bill 2013 \(No 2\)](#) (Zoe's Law Bill (No 2)), a Private Member's Bill introduced in the Legislative Assembly on 29 August 2013 by Mr Chris Spence. It has been reported that a conscience vote will be allowed by the Premier in relation to the Zoe's Law Bill (No 2).<sup>1</sup>

While its approach is different, like the Bill of the same name introduced by Reverend the Hon Fred Nile in the Legislative Council earlier this year (the [Nile Bill](#)), Zoe's Law Bill (No 2) seeks to provide a remedy in circumstances where an unborn child is killed as a consequence of a criminal act. Like its predecessor, Zoe's Law Bill (No 2) raises complex issues, including questions regarding the legal concept of a person, and any ramifications arising from modification of this concept. Informing the case for reform is the compassion that the community feels in circumstances where an unborn child is not born alive as a consequence of a criminal act.

Readers are referred to [e-brief 8/2013: Crimes Amendment \(Zoe's Law\) Bill 2013](#), which focussed on the Nile Bill, for the background to this issue, including comment on the current law of NSW and in relation to the two reviews which have considered how the criminal law should address this question, the [2003 Finlay Review](#)<sup>2</sup> and the [2010 Campbell Review](#).<sup>3</sup>

### 2. Provisions of Zoe's Law (No 2) Bill

The explanatory note accompanying Zoe's Law Bill (No 2) states:

The object of this bill is to amend the *Crimes Act 1900* to recognise the separate existence of the foetus of a pregnant woman that is of at least 20 weeks' gestation (as a living person) so that proceedings for certain offences relating to grievous bodily harm may be brought against an offender who causes the unlawful destruction of or harm to any such foetus as proceedings for grievous bodily harm to the foetus rather than proceedings for grievous bodily harm to the pregnant woman. In the case of the

unlawful destruction of a foetus of less than 20 weeks' gestation, the Bill retains the existing provision that enables proceedings to be brought for grievous bodily harm to the woman.

As outlined in [e-brief 8/2013](#), it is currently only possible to charge a person for conduct which brings about the harm or destruction of an unborn child for grievous bodily harm to the pregnant woman herself. This is because the law does not recognise an unborn child as a person, due to the operation of the “born alive” rule. In 2005, a new paragraph (a) was inserted into the definition of grievous bodily harm in section 4 of the *Crimes Act 1900* (NSW) (Crimes Act) to provide 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”.<sup>4</sup> As a consequence, where the destruction of an unborn child is caused by criminal conduct, it can be recognised, albeit as an injury to the pregnant woman. The rationale for this amendment seems to have been that it would provide some acknowledgement of the loss of an unborn child, while at the same time accommodating a number of complex notions about the legal concept of a person and the relationship between a woman and her unborn child.<sup>5</sup>

As Mr Spence said in his [second reading speech](#), like the Nile Bill, Zoe’s Law Bill (No 2) is named after Ms Brodie Donegan’s baby, Zoe, who was stillborn after Ms Donegan was hit by a motor vehicle while she was out walking. In explaining the purpose of Zoe’s Law Bill (No 2), Mr Spence said:

Brodie Donegan was denied the right for her to choose to go full term in her pregnancy. She was denied the right to face the person responsible and see that person face the charges she should have faced for the direct consequences of her criminal actions. The driver of that vehicle should never have got behind the wheel. The driver of that vehicle should never have been on the road on Christmas Day 2009. Yet she was, and the catastrophic and tragic circumstances surrounding what followed were not dealt with, they were not considered to be over for the parents of Zoe in the weeks that followed just by what was presented to them through the Births, Deaths and Marriages Act; the grieving did not end.

The closure for Brodie Donegan should have been when—15 months later—she testified in court against the driver. Yet it was not. It was not closure listening to the driver face a charge simply listing Zoe as an injury. That is not the closure that grieving parents would seek. That is not the closure that is deserving of the criminal action that ended the pregnancy of Brodie Donegan.

Mr Spence also noted that he had consulted with Ms Donegan in relation to the preparation of Zoe’s Law Bill (No 2), and that Ms Donegan and her partner Nick were present in Parliament for its introduction.

Zoe’s Law Bill (No 2) is comprised of just one Schedule. Schedule 1, clause [2] proposes to insert the following provision in the Crimes Act:

**8A Offences in relation to the destruction of or harm to the foetus of a pregnant woman**

(1) In this section:

**applicable offence** means an offence against section 33(1), 33A (1), 35, 46, 51A, 52A (3) or (4), 52B (3) or (4), 54, 95 or 110.

**unborn child** means the foetus of a pregnant woman that:

- (a) is of at least 20 weeks' gestation, or
  - (b) if it cannot be reliably established whether the period of gestation is more or less than 20 weeks, has a body mass of at least 400 grams.
- (2) For the purposes of an applicable offence:
- (a) an unborn child is taken to be a living person despite any rule of law to the contrary, and
  - (b) grievous bodily harm to an unborn child is taken to include the destruction of the unborn child.
- (3) For the purposes of an applicable offence, the destruction of the foetus of a pregnant woman (not being an unborn child) is taken to be grievous bodily harm to the woman, whether or not the woman suffers any other harm.
- (4) This section does not apply to or in relation to:
- (a) anything done in the course of a medical procedure, or
  - (b) anything done by, or with the consent of, the pregnant woman concerned.

The explanatory note contains the following list outlining which offences section 8A applies to:

Proposed section 8A (1) defines **applicable offences** for the purposes of the proposed section. The offences are as follows:

- (a) section 33 (1) (Intentionally causing grievous bodily harm),
- (b) section 33A (1) (Discharging firearm etc with intent to cause grievous bodily harm),
- (c) section 35 (Recklessly causing grievous bodily harm),
- (d) section 46 (Intentionally or recklessly causing grievous bodily harm by gunpowder etc),
- (e) section 51A (Predatory driving),
- (f) section 52A (3) or (4) (Dangerous driving causing grievous bodily harm),
- (g) section 52B (3) or (4) (Dangerous navigation causing grievous bodily harm),
- (h) section 54 (Causing grievous bodily harm unlawfully or negligently),
- (i) section 95 (Robbery or stealing from the person in circumstances of aggravation),

- (j) section 110 (Breaking and entering dwelling and infliction of grievous bodily harm therein).

Clause [1] of schedule [1] makes consequential amendments to the definition of grievous bodily harm contained in section 4 of the Crimes Act by omitting the current paragraph (a) and inserting a new one which states:

- (a) for the purposes of section 8A – any destruction of the foetus of a pregnant woman that is taken to be grievous bodily harm by the operation of section 8A(2) or (3), and

Mr Spence said in his [second reading speech](#):

This [b]ill does not propose any new offences; rather it works within the framework of select existing grievous bodily harm offences.

Thus, unlike the Nile Bill, Zoe’s Law Bill (No 2) does not create an entirely new offence. Rather, it seeks to enable charges to be laid under one of the specified, already existing, “applicable offences” for grievous bodily harm to the foetus itself, where the definition of “unborn child” applies and where it is harmed grievously or destroyed as the result of a criminal act. The term “unborn child” is defined as a foetus of at least 20 weeks’ gestation, or where the length of gestation cannot be established, weighing at least 400g. If the foetus meets this threshold, according to the Bill, it is to be “taken to be a living person despite any rule of law to the contrary”.

In circumstances where the foetus has not reached 20 weeks’ gestation, or 400 grams where gestation length cannot be proved, section 8A(3) retains the current position, which is that the harm or destruction to the foetus can constitute grievous bodily harm to a pregnant woman, “whether or not the woman suffers any other harm” (see outline of *R v King* (2003) NSWCCA 399 and the 2005 amendments to the Crimes Act in [e-brief 8/2013](#) at pp 9-10).

### 3. Differences between the Nile Bill and Zoe’s Law Bill (No 2)

Zoe’s Law Bill (No 2) differs from the Nile Bill in several ways. As noted, unlike the Nile Bill, it does not seek to create a new offence or completely abolish the definition of grievous bodily harm found currently in paragraph (a) of the Crimes Act. Instead it extends the application of the “applicable offences” listed in proposed section 8A(1) of the Crimes Act, which all relate to the infliction of grievous bodily harm, to the foetus itself, where it has reached the threshold of 20 weeks’ gestation. It otherwise essentially maintains the existing framework of the Crimes Act insofar as it applies to the death of a foetus that has not reached the stage of 20 weeks’ gestation.

The offence created by the Nile Bill would have applied to “a child in utero”. This phrase is defined in the Nile Bill to mean “the prenatal offspring of a woman.” Therefore, as Reverend Nile noted in his [second reading speech](#), his Bill “seeks to provide equal protection for all pregnant women” in that the offence it proposes would apply to unborn babies at all stages of development. Zoe’s Law Bill (No 2), on the other hand, would only apply to an unborn child that has reached 20 weeks’ gestation. Where this is not the case, the current position, that the harm or destruction of the foetus can constitute grievous bodily harm to the pregnant woman, but not the unborn child, would be maintained.

It has been reported that Reverend Nile will sponsor Zoe's Law Bill (No 2) in the Legislative Council.<sup>6</sup>

### 4. Issues relating to Zoe's Law Bill (No 2)

**i) A conceptual change:** Like the Nile Bill, Zoe's Law Bill (No 2) proposes a conceptual change to the law. It is in fact more explicit than the Nile Bill, expressly stating that, in circumstances where a foetus has reached 20 weeks' gestation (or has a body mass of 400 grams where the length of gestation cannot be proven) it is an "unborn child" and "taken to be a living person despite any rule of law to the contrary." In his [second reading speech](#), Mr Spence said:

For the specific purpose of this section only, the defined unborn child is taken to be a living person in order for the applicable offences to actually apply. The applicable grievous bodily harm charges in the Crimes Act are directed against a person. As a foetus is not recognised as a person, let alone living, in any part of the law for the present without taking a breath, it is necessary to allow by law an unborn child to be considered as a living person for the purpose of the applicable offences only. It does not translate across the Crimes Act in its entirety. It is restricted and specific to the applicable offences as listed in the bill as being grievous bodily harm, not murder or manslaughter.

Notwithstanding that it does not allow the law of homicide, nor any offence other than those specified in section 8A(1) to apply to the death of an unborn child, Zoe's Law Bill (No 2) proposes a partial modification of the longstanding born alive rule.

Zoe's Law Bill (No 2) takes an approach that is novel in Australia. While other Australian jurisdictions have child destruction offences, these are usually phrased so that they apply in circumstances where a woman is "about to be delivered of child" and the offender takes action to prevent the child from being born alive, with the exception of Queensland, where there is an additional offence of killing an unborn child.<sup>7</sup> None of these provisions state that the unborn child is taken to be a living person for the purposes of the offence.

By providing that an unborn child of at least 20 weeks' gestation is "taken to be a living person" for the purposes of the specified offences, Zoe's Law Bill (No 2) also takes a different approach to that recommended by the 2003 Finlay Review. As outlined in [e-brief 8/2013](#), while the Hon Mervyn Finlay QC considered that there were "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", he recommended the creation of a new child destruction-type offence, which he called "killing an unborn child."<sup>8</sup> The offence proposed by the Finlay review would have applied to "a child capable of being born alive".<sup>9</sup> Unlike the provision proposed by Zoe's Law Bill (No 2), it did not, therefore, equate an unborn child with a living person, although it would, if adopted, have allowed separate charges to be laid in relation to the death of the unborn child. The offence proposed by the Finlay review was conceptually different from Zoe's Law Bill (No 2) in that it would not have allowed existing offences to apply to an unborn child as though it was a "living person". Rather, like the Nile Bill, it created a new offence, however one which was to be applicable



to “a child capable of being born alive”, and not (as with the Nile Bill) an unborn child at any stage of gestation.

Even so, the offence proposed by Mr Finlay gave rise to concerns regarding its potential broader consequences. In his 2010 Review, the Hon Michael Campbell QC referred to a letter that had been sent in 2004 by the Attorney General’s Department to key stakeholders which “put the perceived advantages of relying upon the law as expounded in *King*” (a NSW Court of Criminal Appeal case which extended the law of grievous bodily harm, and was later codified by the 2005 amendment to the Crimes Act – see [e-brief 8/2013](#) at p 9), rather than adopting a new offence, as follows:

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

- There is no concern about the rights of the mother being superseded by the rights of the foetus (although there may be concerns about the rights of the foetus not being recognised);
- There is no need to consider whether the foetus was viable at the time of injury. The loss of the foetus at whatever stage of the pregnancy may amount to grievous bodily harm;
- There is no need to formulate an exemption for expectant mothers as the offences involving grievous bodily harm do not contemplate a person inflicting grievous bodily harm upon themselves;
- There is no need to formulate an exemption for “lawful abortions”;
- The fault element is less complicated . . . <sup>10</sup>

a) Available stakeholder views: Like the Nile Bill, the Zoe’s Law Bill (No 2) expressly excludes things done in the course of a medical procedure or by or with the consent of the pregnant woman herself. However, by seeking to give recognition to an unborn child as a “person” separate from its mother, Zoe’s Law Bill (No 2) has given rise to concerns in certain quarters which echo some of those outlined in the above quote from the Attorney General’s Department letter.

For example, the *Sun Herald* has reported that “health and legal groups” believe that the Bill “could have serious repercussions for women’s control of their bodies”, despite the exemptions it contains for medical procedures or “anything done by, or with the consent of the pregnant woman concerned” (see proposed section 8A(4)).<sup>11</sup> According to the *Sun Herald* report, women’s rights groups are concerned that Zoe’s Law Bill (No 2) may have the “unintended consequences” of “further criminalising abortion” as well as “the potential prosecution of women who behave recklessly” while pregnant.<sup>12</sup>

A separate report, but by the same journalist in the same edition of the *Sun Herald*, stated that groups such as the Women’s Electoral Lobby, Women’s Legal Service, Family Planning and the Rape and Domestic Violence Service:

. . . have warned the change to the Crimes Act to recognise a foetus as distinct from its mother was a step towards further criminalisation of abortion.

Women using the RU486 abortion drug would be at risk of prosecution because exemptions for medical procedures aren't strong enough, the groups argue. There is also concern the law could be used to bring charges against pregnant women abusing drugs and alcohol, as has occurred in the United States.<sup>13</sup>

While it may be arguable that the administration of the drug RU486 or Mifepristone is not a medical procedure, it seems likely that the second exemption would still apply for something done by or with the consent of the mother (or where she does not have capacity to give consent, someone legally capable gives it on her behalf). The same exception would also apply at the moment in relation to harm caused to an unborn child by a pregnant woman's use of drugs or alcohol. The concern raised in relation to this issue appears to relate to the potential for Zoe's Law Bill (No 2) to pave the way for future changes to the law.

The Chief Executive of Family Planning NSW, Ms Ann Brassil, was also quoted in the latter report from the *Sun Herald* as stating that the "biggest concern" with Zoe's Law Bill (No 2) was "the explicit reference in the bill to the foetus being regarded as a living person."<sup>14</sup> Such an approach is of course contentious, because it raises the question of competition between the rights of the pregnant woman and those of the unborn child.

In his [second reading speech](#), Mr Spence sought to forestall these concerns by stating:

Many will argue that this bill will be seen as being the first step in encroaching upon the rights of women to choose; that it will be seen as the first step in recognising an unborn child as a living entity. That is not what this bill is about. In fact, for the record Brodie Donegan herself is a self-confessed supporter of pro-choice. She has made it clear that this bill should not encroach upon a woman's right to choose.

*b) Why is grievous bodily harm to be the only applicable charge?* Zoe's Law Bill (No 2) would seem to introduce a theoretical anomaly into the criminal law by extending the law in such a way that an "unborn child" is regarded as a person for the purpose of a charge of grievous bodily harm but not for other charges including murder and manslaughter. Should such a distinction be made? Further to this, the Bill equates the destruction of an "unborn child" with grievous bodily harm, rather than death. This may give rise to the question whether the Bill satisfactorily responds to the need of a grieving parent for recognition of the loss of the unborn child.

In his [second reading speech](#), Mr Spence explained in relation to this issue that:

The reasoning behind the use of the words "unborn child" as being a living person for the purposes of this bill was because of the difficulties in trying to acknowledge that the existing grievous bodily harm charge could be brought against an offender, recognising the foetus as being separate to the mother. Each act of grievous bodily harm currently in the Crimes Act is listed as being "to a person". Rather than duplicate every grievous bodily harm listed and change them to include a foetus of 20 weeks gestation or greater, and because a foetus is not deemed to be a living entity until such time as it takes a breath, for the purposes of this section, and this section only, the foetus will be referred to as an "unborn child" considered to be a "person" so that each of the grievous bodily harm charges noted can be applied. As I

said earlier in this speech, it does not apply outside of this section. It is not a first step—it is not to be used as a first step. Indeed, sections 52A (1) and (2) and 52B (1) and (2) were removed because these sections dealt with dangerous driving or dangerous navigation causing death.

It is a fact that in order for death to be considered in a criminal charge, the victim must first have been born. In this bill, the charge is not death as the foetus has not yet been born. Therefore, it is appropriate that grievous bodily harm be the only charge applicable in this instance. The passing of this bill, does not allow, in any way, shape or form, for the charges of murder or manslaughter.

c) *Other conceptual considerations*: Although the conceptual change to the criminal law has been specifically limited in a number of ways, it is significant in nature. It is difficult to comment on possible unintended consequences of this change, if any. Could such reform, for instance, prompt courts to develop the common law along similar lines?

Brief note can be made of the use of the born alive rule in other legal contexts, including in civil law. Currently, in some civil contexts, a foetus has no legal rights until it is born alive, while its claims may be recognised in others. In their article “Legal pragmatism and the pre-birth continuum: An absence of unifying principle”, Pam Stewart and Anita Stuhmcke, from the University of Technology Sydney, examine the way in which several areas of law approach the recognition of unborn children. For example, in relation to negligence, they state:

At common law, an unborn child has no ability to commence an action in tort (assuming proceedings would be brought by a parent or other guardian in a representative capacity) because of the operation of the “born alive” rule. However, if injured in utero and subsequently born suffering damage as a result of that injury, then upon birth the child attains the right to sue in tort in respect of the in utero injury.<sup>15</sup>

Once the child is born alive, action in negligence can be taken on its behalf for injuries it may have suffered while still in utero. The NSW Court of Appeal has even held that a child had an action in negligence against its mother where her negligent driving, while it was still in utero, had caused it to be born with an injury.<sup>16</sup> Stewart and Stuhmcke note that, in this case, the “court was keen to confine the mother’s duty to her unborn child to the situation of negligent driving so as not to make a mother liable to her child for other acts during pregnancy.”<sup>17</sup>

On the other hand, they also refer to the law of trusts:

Traditionally, the “born alive” rule has not prevented a child who was in utero at the death of a testator, or at the date of a commencement of a trust, from taking a benefit to which he or she would have been entitled if living at the relevant date. Such a child, when born, subsequently, would be entitled to a share in the trust or estate. The courts have for many years been prepared to recognise an “exception” to the traditional common law “born alive” rule so as to enable the share of an unborn child in an estate or trust to take effect at birth *as if the child had been born at the relevant date*.<sup>18</sup>

They conclude that their analysis of these as well as several other fields of law “reveals that a uniform legal approach to defining the [foetus] is an impossibility.” They continue:



Instead, a “silo” approach, whereby every legal area has separate determinations on the legal recognition of the [foetus], is now a reality. This approach, apart from being pragmatic, is arguably the most appropriate. Areas of law such as patent law cannot be equated with an application to the court to restrain an abortion – clearly, patent law, family law and criminal law, as well as the other areas identified in this article will have different policy requirements and serve varying social, economic and moral interests.<sup>19</sup>

In an [article](#) referred to in [e-brief 8/2013](#), Kristen Savell, an academic from the University of Sydney, considers the relationship between the civil and criminal law in relation to the approach taken to unborn child. Savell provides a careful consideration of a range of intricate philosophical, legal and social questions regarding the concept of “personhood”, which serves to demonstrate some of the complex questions at play in relation to this issue. She writes of the common law rule that:

The claim that the ‘born alive’ rule is, in modern times, outdated and indefensible rests on the assumption that being a member of the human species is sufficient to ground the law’s concept of personhood. But, as the foregoing analysis has shown, this criterion alone is not sufficient to rationalise the law in the distinct, but nonetheless, related contexts of abortion and child destruction, suggesting that a more complex and nuanced understanding of personhood is required for the common law as well.<sup>20</sup>

She refers to the NSW case of *R v Iby*, in which Spigelman CJ had made obiter remarks regarding the continued validity of the common law rule in the modern era<sup>21</sup>, and she poses this question:

In *Iby*, the Court interpreted the ‘born’ limb of the test as if principally relevant to the issue of causation. But can a case be made for recognising the ‘born’ limb as being substantively relevant? Is it arguable that the individuated form of embodiment that is achieved at birth is an essential requirement of personhood?<sup>22</sup>

Savell goes on to examine a number of civil cases, noting that:

The definition of person for the purposes of the civil law demonstrates that individuated embodiment is an important factor in that context . . .

This insistence on being born makes considerable sense in the context of civil law, where, as courts have repeatedly pointed out, conferring legal status on a foetus might bring the rights of the pregnant woman into direct conflict with those of the foetus.<sup>23</sup>

She writes of cases in which courts have refused to enter into an exercise requiring the balancing of the rights of the pregnant woman and the unborn child, involving questions such as whether the wardship jurisdiction could be extended to an unborn child, or whether a pregnant woman could refuse a caesarean section.<sup>24</sup> She then argues:

Thus, it is possible to mount substantive arguments for the continuing recognition of birth as a necessary condition of personhood. It might be argued in response that there are distinctions between the meaning of personhood for the civil law and the criminal law, such that a different standard could apply to the criminal law. Caulfield and Nelson note that ‘there is an argument to be made that the criminal law context presents a very different set of factors than does the civil law context’. In the former, unlike the latter, a foetus need not be alive as a pre-requisite to criminal

charges being brought – ‘rather, it is within the purview of the state to decide whether or not to proceed criminally’. Against this, some commentators have warned that the introduction of any exception to the ‘born alive’ rule ‘could distort the law’s concept of personhood’ which may in turn have ‘unintended consequences’ for medical professionals and pregnant women. I agree that this would be problematic and, for this reason, abolition of the rule is undesirable. It is also unnecessary, given that the [Crimes Act] now provides a mechanism for imposing criminal liability for the death of a foetus arising from the acts of third parties . . .

If the criminal law were to recognise foetal personhood in the context of third party assaults on pregnant women, it would need to be very clear about the basis for doing so. The basis would specifically *not be* that a late-term foetus is straightforwardly analogous to a newborn infant, as some biological, ethical and popular discourses claim. The law would need to acknowledge that the basis for extending the concept of personhood to foetuses in limited circumstances involves a richer understanding of personhood, one that combines the relational, emotional and social attachments of the maternal-foetal relationship with the intrinsic properties of the late-term foetus. Extending the concept of personhood to foetuses for the purpose of homicide on this basis would thus entail a range of other limitations. It would necessarily limit the enlarged concept of personhood to circumstances where the woman and her foetus are harmed by the acts of third parties, and it would necessarily exclude the lawful termination of pregnancy.<sup>25</sup>

Balanced against the issues raised by Savell are the opposing views of the American lawyer Clarke Forsythe, who argues that the born alive rule was only ever evidentiary in character. He writes that:

. . . a review of the common law authorities indicates that the common law had such great difficulty in determining, as a matter of medical evidence, when and whether the unborn child was alive that the law was forced to rely on evidence that the child, no matter what stage of gestation, was born alive.<sup>26</sup>

Forsythe goes on to argue that unborn children are, from conception, “human beings”, writing that:

The very nature of a homicide statute is to protect human beings, since homicide is, by definition, the killing of a human being. The common law was limited by its inability to determine when and whether the unborn child was ever alive. Now that modern medicine enables society to recognise, as a matter of scientific fact and definition, that the unborn child is a *living* human being from conception, and now that such can be proved by modern medical technology, a homicide statute, literally applied, must encompass the unborn child.<sup>27</sup>

These are difficult and contentious issues. It is important to emphasise that Zoe’s Law Bill (No 2) does not purport to alter the law of murder or manslaughter. The Bill also contains limits pertaining to medical procedures and things done by or with the consent of the mother of the unborn child.

**ii) 20 weeks’ gestation threshold:** In his second reading speech, Mr Spence said that Zoe’s Law Bill (No 2):

. . . does, however, acknowledge and protect a woman’s right to choose to carry her pregnancy to full term and acknowledges loss in the same scope

as the requirements under Births, Deaths and Marriages when that right is suddenly taken away by a serious criminal offence. Under the Births, Deaths and Marriages Registration Act 1995, a stillborn foetus at 20 weeks gestation is required to be registered as a birth in New South Wales. The definition of "unborn child" for the purposes of this bill is identical to the definition of "still birth" in the Act. The Births, Deaths and Marriages Act 1995 allows parents of a stillborn to name their still born baby. It requires the stillborn baby to be buried or cremated and a perinatal medical certificate to be registered with Births, Deaths and Marriages, the stillborn certificate and a birth certificate is issued. On this basis, the bill is very distinct in referring to a foetus that is 20 weeks gestation or more in order to correlate with existing legislation.

Section 12 of the *Births, Deaths and Marriages Registration Act 1995* (NSW) requires notice of stillbirths to be given to the registrar within 48 hours of the stillbirth. Section 4 of the Act contains the following definitions:

**stillbirth** means the birth of a stillborn child.

**stillborn child** means a child that exhibits no sign of respiration or heartbeat, or other sign of life, after birth and that:

- (a) is of at least 20 weeks' gestation, or
- (b) if it cannot be reliably established whether the period of gestation is more or less than 20 weeks, has a body mass of at least 400 grams at birth.

Section 36 of the *Births, Deaths and Marriages Registration Act* sets out the circumstances in which deaths must be registered under the Act. Section 36(6) provides "[i]f a child is stillborn, the child's death is not to be registered under this Part." A statutory note to the word death as used in this subsection states "ie the foetal death. A stillbirth is registered as a birth but not a death."

In his 2003 Review, the Hon Michael Campbell QC referred to a submission he had received from Ms Brodie Donegan, the mother of the baby Zoe, after whom both the Nile Bill and Zoe's Law Bill (No 2) have been named, in which the issue of a conflict between the need to register the stillbirth for the purposes of the *Births, Deaths and Marriages Act* with "the absence of recognition of her stillborn daughter in the criminal law" was raised.<sup>28</sup> In response to this Mr Campbell stated:

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.<sup>29</sup>

He went on to give a brief overview of the background to the registration requirements for stillbirths contained in the *Births, Deaths and Marriages Act*.

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* 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 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 appropriate recognition of the loss of the expected child”.<sup>30</sup>

Aside from the use of 20 weeks’ gestation as the point at which a stillbirth must be registered in accordance with the *Births, Deaths and Marriages Registration Act*, there does not appear to be another reason why this stage of development has been selected by the Bill as the threshold at which a charge can be laid in relation to the harm or destruction of the unborn child itself, rather than to the pregnant woman. Unlike the provision proposed by the Finlay Review, it does not seem concerned with questions of the stage of gestation at which a child might be considered viable. It is possible for babies to be born with signs of life at 20 weeks’ gestation. However, every week of foetal development is vital, as this [2006 paper](#), published in the *Medical Journal of Australia*, notes:

The risk of infant death or survival with long-term sequelae increases acutely with each weekly (and even daily) reduction in gestational age at birth.<sup>31</sup>

The paper states:

In an otherwise normal infant born before 23 weeks, the prospect of survival is minimal and the risk of major morbidity is so high that the initiation of resuscitation is not appropriate.<sup>32</sup>

The paper suggests, based upon both international guidelines and the views of medical professionals with expertise in neonatal care in NSW and the ACT that there is a “grey zone”, when a baby is between 23-25 weeks’ and 6 days gestation, in which medical treatment may not be provided to the child, depending upon the wishes of its parents after counselling.<sup>33</sup>

This is consistent with information provided to the Finlay Review, which suggested that babies are not considered viable unless they are born at 24 weeks at least. The equivocal nature of this information appears to have influenced Mr Finlay to set a gestation period of 26 weeks as the threshold at which a child would be considered, *prima facie*, capable of being born alive for the purposes of his proposed offence.<sup>34</sup> Mr Finlay’s reasons for limiting the application of his proposed offence to a child capable of being born alive are set out in [e-brief 8/2013](#) at pp 7-8. Given the later decision of the NSW Court of Criminal Appeal in *R v Iby* (2005) 63 NSWLR 278, which held that any sign of life after birth is sufficient to establish that a child was “born alive”, it may be arguable that a child is “capable of being born alive” at 20 weeks’ gestation. However, in the discussion of the offence proposed in his Report, Mr Finlay refers to a “viable foetus”, suggesting that in employing this phrase he is most likely concerned with a child not only capable of being born alive, but also of surviving.<sup>35</sup>

**iii) Other issues – who can be prosecuted under the proposed legislation and in what circumstances?:** Like the Nile Bill, Zoe’s Law Bill (No 2) excludes “anything done in the course of a medical procedure” or “anything done by or with the consent of the pregnant woman concerned”.

The latter exemption should prevent a woman from being charged in relation to a dangerous driving or other offence that leads to the death of her own unborn baby. It would not stop the father of an unborn child (or any other driver), that had reached the stage of 20 weeks' gestation, from being charged with dangerous driving occasioning grievous bodily harm in relation to the child if he was responsible for driving in a way that constituted the offence and led to the destruction of, or caused grievous bodily harm to, the unborn child. It should be noted, of course, that the current law would allow a charge of grievous bodily harm to the pregnant woman herself for the criminal act of the father that led to the destruction of their unborn baby. There has recently been a controversial case in New Zealand where the father of an unborn child was charged with its death following the involvement of a vehicle he was driving, in which his pregnant wife was a passenger, in a motor vehicle accident (see this [New Zealand media report](#)).

### 5. Conclusion

Although Zoe's Law Bill (No 2) takes a different approach to the Nile Bill, it raises some similar complex legal, ethical and medical issues. At the very least it can be acknowledged that this is a difficult and contested area of the law.

- <sup>1</sup> A Clennell and D Barnes, "New law protects unborn babies" *Daily Telegraph* (Wednesday, 21 August 2013), 18.
- <sup>2</sup> M Finlay, [Review of the Law of Manslaughter in New South Wales](#) (April 2003).
- <sup>3</sup> M Campbell, [Review of Laws Surrounding Criminal Incidents Involving the Death of an Unborn Child](#) (October 2010).
- <sup>4</sup> This amendment was made by the S (NSW); see [e-brief 8/2013: Crimes Amendment \(Zoe's Law\) Bill 2013](#) at 9-10.
- <sup>5</sup> See NSW Parliament, Legislative Assembly, *Hansard* ([2 March 2005](#), Mr Debus), 14454, and Campbell, above n 3, at 30-31 where Mr Campbell outlines consultation undertaken by the then Attorney General's Department prior to the passage of the *Crimes Amendment (Grievous Bodily Harm) Act 2005*.
- <sup>6</sup> K Needham, "Zoe bill could have unwanted consequences" *Sun Herald* (Sunday, 1 September 2013), 33.
- <sup>7</sup> See for example: *Criminal Code Compilation Act 1913* (WA), section 290; *Criminal Code Act 1924* (Tas), section 165; *Criminal Law Consolidation Act 1935* (SA), section 82A(7); *Criminal Code* (NT), section 170; *Crimes Act 1900* (ACT), section 42; and *Criminal Code Act 1899* (Qld), section 313(1) and (2). Victoria repealed its child destruction offence in 2008 (see *Abortion Law Reform Act 2008* (Vic)).
- <sup>8</sup> Finlay, above n 2, 97 (italics author's own), 6 and 112-124.
- <sup>9</sup> *Ibid* 123.
- <sup>10</sup> Campbell, above n 3, 30.
- <sup>11</sup> Needham, above n 6, 33.
- <sup>12</sup> *Ibid*.
- <sup>13</sup> K Needham, "Women MPs fear Zoe's bill will criminalise abortion" *Sun Herald* (Sunday, 1 September 2013), 4.
- <sup>14</sup> *Ibid*.
- <sup>15</sup> P Stewart and A Stukmcke, "Legal pragmatism and the pre-birth continuum: An absence of unifying principle" (2007) 15 *Journal of Law and Medicine* 272, 279-80; see also *Watt v Rama* [1972] VR 353 at 360 (per Winneke CJ and Pape J); *Lynch v Lynch* (1991) 25 NSWLR 411
- <sup>16</sup> *Lynch v Lynch* (1991) 25 NSWLR 411.
- <sup>17</sup> Stewart and Stumke, above n 15, 280.
- <sup>18</sup> *Ibid* 281.
- <sup>19</sup> *Ibid* 295.
- <sup>20</sup> K Savell, "[Is the 'Born Alive' Rule Outdated and Indefensible?](#)" (2006) 28(4) *Sydney Law Review* 625, 660.



- 
- <sup>21</sup> *R v Iby* (2005) 63 NSWLR 278, see 284 and 288.
- <sup>22</sup> *Ibid.*
- <sup>23</sup> *Ibid* 661.
- <sup>24</sup> *Ibid* 661-662.
- <sup>25</sup> *Ibid* 662-663.
- <sup>26</sup> C D Forsythe, "Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms" (1987) 21 *Valparaiso University Law Review* 563, 580.
- <sup>27</sup> *Ibid* 612.
- <sup>28</sup> Campbell, above n 3, 44.
- <sup>29</sup> *Ibid.*
- <sup>30</sup> *Ibid*, quoting New South Wales Law Reform Commission (1988) Report 61 – *Names: Registration and Certification of Births and Deaths* [4.86]. See [Report 61](#) for a further discussion of the rationale behind the Law Reform Commission's Recommendations.
- <sup>31</sup> K Lui et al, "[Perinatal care at the borderlines of viability: a consensus statement based on a NSW and ACT consensus workshop](#)" (2006) 185(9) *Medical Journal of Australia* 495, 498.
- <sup>32</sup> *Ibid.*
- <sup>33</sup> *Ibid* 495-496.
- <sup>34</sup> Finlay, above n 2, 130-1366.
- <sup>35</sup> See for example Finlay, above n 2, 109-110.

Information about Research Publications can be found on the Internet at the:  
[NSW Parliament's Website](#)

Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion.

© 2013

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this document may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior consent from the Manager, NSW Parliamentary Research Service, other than by Members of the New South Wales Parliament in the course of their official duties.

ISSN 1838-0204