



23 July 2010

The Honourable Michael Campbell QC  
C/- Legislation, Policy and Criminal Law Review  
Department of Justice and Attorney General  
GPO Box 6  
Sydney NSW 2001  
Email: ag\_clrd@agd.nsw.gov.au

**By email**

Dear Mr Campbell,

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

1. Women's Legal Services NSW (**WLS NSW**) welcomes the opportunity to make a submission to the Criminal Law Review Division review of the laws surrounding criminal incidents involving the death of an unborn child. We respond to a number of questions raised by the review below.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic casework services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.
3. Relevantly WLS NSW has assisted many women who report experiencing domestic violence either during a pregnancy or because of the pregnancy. We have also been involved in a number of cases where women have experienced the destruction of a foetus after physical assaults by current or previous partners in circumstances where there was a clear intention by the offender to cause the termination of the pregnancy.

**Terminology**

4. 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.
5. We note that the status of 'child' is also conferred on a stillborn foetus in certain



circumstances.<sup>1</sup> We see this as a respectful way of acknowledging significant loss and not as a conferral of legal status with any associated rights beyond registration of the birth.

**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**

6. WLS NSW submits that there is no reason to insert additional provisions into the *Crimes Act 1900* to address criminal incidents involving the 'death of an unborn child'.
7. The loss of a foetus as a result of an act of violence or offence perpetrated against a pregnant woman should be interpreted only as an injury to the woman. It is not necessary or appropriate to introduce specific offences relating to the destruction of a foetus.
8. The case law makes it clear that there is significant scope to assess the objective gravity of injuries resulting from a specific offence. For example, Spigelman CJ in *R v Kama* stated that the seriousness of an offence may be: "*determined by the viciousness of the attack and the severity of the consequences*".<sup>2</sup>
9. Further in *Vragovic v R* Adam J stated that the: "*objective gravity of the offence is not determined merely by considering the injuries*".<sup>3</sup>
10. In *McCullough v R* Howie J stated: "*[g]enerally speaking the seriousness of the offence will significantly depend upon the seriousness of the wounding. That is not to say that the manner in which the wound was inflicted, the reason for the infliction of the wound and the circumstances surrounding the wounding are irrelevant. The same can be said for an offence involving the infliction of grievous bodily harm: the more serious the harm inflicted the more serious the offence*".<sup>4</sup>
11. Additionally, factors such as knowledge of the fact of a pregnancy at the time the offence is committed by the offender and the stage of foetal development can be taken into account when assessing the seriousness of the offence and in sentencing.
12. Therefore it is our position there is sufficient scope in current wording of the *Crimes Act 1900* to respond appropriately to all criminal incidents involving the death of a foetus.
13. We also wish to note concerns that the current definition of 'grievous bodily harm' may create a hierarchy, which elevates pregnant women over non-pregnant women based on assumptions that certain fact scenarios are automatically deserving of greater penalty. For example, the current legislation suggests that an act of violence or offence resulting in a woman being injured so as to cause the destruction of a foetus, whether the woman is aware of the pregnancy or not, will always be viewed at the outset as more serious than an injury which results in the complete loss of a woman's (or man's) reproductive capacity.

<sup>1</sup> See the definition of stillbirth in section 4 of the *Births, Deaths and Marriages Registration Act 1995* NSW.

<sup>2</sup> *R v Kama* (2000) 110 A Crim R 47 at 16.

<sup>3</sup> *Vragovic v R* [2007] NSWCCA 46 (27 February 2007) at 32.

<sup>4</sup> Howie J in *McCullough v R* [2009] NSWCCA 94 (8 April 2009) at 37 referring to *R v Mitchell and Gallagher* [2007] NSWCCA 296; 177 A Crim R 94 at 27.

14. We do not wish to see the insertion of any further provisions that extend such a hierarchy of human worth. In particular we wish to voice objection to the amendment proposed by the Crimes Amendment (Grievous Bodily Harm) Bill 2010 which aims to extend the definition of grievous bodily harm to loss of an embryo, including in circumstances where a woman was unaware of her pregnancy. We reiterate the position that each case is best assessed on the facts and sentences can be imposed at the higher end of the range where appropriate.
15. Further, it is our view that the reference to the destruction of a foetus in the current definition of 'grievous bodily harm' in the *Crimes Act 1900*, as introduced by the *Crimes Amendment (Grievous Bodily Harm) Act 2005*, could be removed without any loss of capacity to impose appropriate sentences as long as the destruction of a foetus is clearly understood to be a serious injury to the woman.

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

16. It is our opinion that the introduction of standard non-parole periods for manslaughter or any other specific offence created in relation to the destruction of a foetus is limiting and dangerous. It removes the discretion of judges, who remain, in our view the best qualified to deal with these matters. It is trial judges (and where relevant Appeal Court judges) who are best placed to sentence the offender once they have heard, in detail, the circumstances of the offence and considered the mitigating factors on the offenders behalf, in the context of relevant case law. The standardisation of non-parole periods is a severe incursion on the fundamental and important discretion of judges.

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

17. We strongly oppose the introduction into the *Crimes Act 1900* of an offence of manslaughter of an 'unborn child'.
18. WLS NSW is extremely concerned about the harm done to women including their foetuses, particularly in situations of domestic violence. The *Women's Safety Survey* showed that pregnancy is a time when many women are especially vulnerable to abuse. Of the women who were pregnant during their relationship with a violent partner, 42 percent had violence inflicted on them during their pregnancy and for 20 percent of these women the violence in fact began when they became pregnant.<sup>5</sup>
19. Similar data was collected in the *Personal Safety Survey 2005*, which found that of women who had experienced violence by a previous partner:
  - 667 900 had been pregnant at some time during their relationship;
  - 35.9 percent of these women (239 800) experienced violence during the pregnancy; and
  - 112 000 of them (16.8 percent) experienced violence for the first time during the pregnancy.<sup>6</sup>

<sup>5</sup> *Women's Safety Survey*, Australian Bureau of Statistics, 1996, Commonwealth Government, Cat No 1428.0 at 52 and 57.

<sup>6</sup> *Personal Safety Survey 2005*, Australian Bureau of Statistics, 2005, Commonwealth Government, Cat No 4906.0 at 39. See also Taft, A., "Violence against women in pregnancy and childbirth: Current knowledge and issues in health care response", *Australian Domestic and Family Violence Clearinghouse*, Issue Paper 6, 2006, <http://www.austdvclearinghouse.unsw.edu.au/documents/Issuespaper6.pdf> (accessed 22 July 2010).

20. Despite these alarming figures WLS NSW does not consider the proposed amendment is necessary or appropriate as it is based on an incorrect assumption that a foetus has a separate human personality capable of being the subject of a crime of violence.<sup>7</sup>
21. It is our position that a foetus only becomes a person after it has been born and when at least one of the indicia of independent life is detected as discussed in cases such as *R v Iby*.<sup>8</sup> Prior to birth the foetus is "connected to, and a part of, the body of its mother".<sup>9</sup> It is acknowledged that a foetus in the later stages of a pregnancy may be viewed as a more viable form of potential life. However until the foetus achieves an independent existence it must not be granted legal personhood in its own right.
22. Additionally, notwithstanding the current exemption in the definition of 'grievous bodily harm' in the *Crimes Act 1900* for medical procedures, which result in the destruction of a foetus, we remain concerned that any further award of personhood status to a foetus may affect the lawfulness and accessibility of abortion in NSW, particularly for procedures carried out later in a pregnancy.
23. If a foetus is destroyed individual women and medical practitioners could face harsher penalties under the proposed manslaughter offences than they would under the current abortion procurement offences.<sup>10</sup>
24. We refer to comments made of the Honourable Mervyn Finlay QC in his findings of the *Review of the Law of Manslaughter (the Finlay Report)* that the recommendations are not "in anyway involved with the abortion debate".<sup>11</sup> WLS NSW disagrees that this is the case and is concerned that the bestowal of foetal personhood in any context is capable of manipulation to support arguments against the provision of accessible, legal and safe abortion.
25. WLS NSW considers that reproductive rights are essential human rights and we are opposed to legislative change, which elevates the impact of any action on a foetus over the rights of the woman.<sup>12</sup>
26. We also note that the proposal contained in the Finlay Report for pregnant women to be excluded as possible offenders, could well be an insufficient safeguard.<sup>13</sup> We wish to prevent public criticism or sanction of women who attempt to self-abort their foetus or attempt suicide or self-harm in other ways, such as, substance abuse, which subsequently impacts the foetus.
27. WLS NSW is concerned that this is an area of law where calls for reform have been driven by emotion, media and politics largely in response to isolated tragic incidents.<sup>14</sup> Whilst sympathetic to the grief and loss of individuals we believe that any amendments to the legislation must be the result of reasoned and considered analysis and not just a response to individual circumstances, which have been used

<sup>7</sup> See the UK case of *Attorney General's Ref (No 3 of 1994)* [1996] 2 WLR 412 (Court of Appeal) and [1998] AC 245 (House of Lords). See also discussion of this case in Savell, K., "Is the 'Born Alive' Rule Outdated and Indefensible?", *Sydney Law Review* (2006) 28(4), *Austlii*, <http://www.austlii.edu.au/au/journals/SydLawRw/2006/28.html> (accessed 22 July 2010).

<sup>8</sup> *R v Iby* (2005) 63 NSWLR 278.

<sup>9</sup> Savell K., "The Legal Significance of Birth", *University of New South Wales Law Journal* (2006) 29(2), *Austlii*, <http://www.austlii.edu.au/au/journals/UNSWLawJl/2006/23.html> (accessed 22 July 2010).

<sup>10</sup> Sections 82-84 *Crimes Act 1900* NSW which we would argue should be removed in their entirety from the Act.

<sup>11</sup> The Honourable Mervyn Finlay QC, *Report on the Review of the Law of Manslaughter*, April 2003 at p. 145.

<sup>12</sup> See the *Convention on the Elimination of All Forms of Discrimination Against Women*, Article 16(e) which provides that women should be free of discrimination in exercising "rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights".

<sup>13</sup> Note 11 above at pp.139 and 145.

<sup>14</sup> For example, the experiences of Renee Shields, which lead to the 2005 amendments to the definition of 'grievous bodily harm' in the *Crimes Act 1900* (Byron's Law) and the circumstances of Brodie Donegan, which have triggered this review, clearly illustrate this.

as a catalyst for zealous pleas for reform.

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

28. WLS NSW notes our response above at paragraph 20 and strongly believe it is not appropriate or necessary to introduce any other specific offences for cases involving the 'death of an unborn child'. We do not consider it appropriate to view the foetus as a separate legal entity or to create statutory foetal rights.
29. Accordingly, WLS NSW submits that no offences specifically referring to the destruction of a foetus or the 'death of an unborn child' in any context should be created. The stage of pregnancy and foetal viability remain relevant to sentencing, but as noted above the loss of the foetus should only be viewed as an injury to the woman who was pregnant.

**What further consultation, if any, should take place**

30. We have no suggestions at this stage, but would welcome the opportunity to provide further comment, if sought and on the Report when released.

**Any other relevant civil or criminal matter**

31. We submit (and have previously submitted in other forums) that 'destruction of a foetus' should be listed as a compensable injury in the Schedule of Compensable Injuries contained in the *Victims Support and Rehabilitation Act 1996 NSW*. In this way, the loss of a foetus would be consistently interpreted as an injury to the pregnant woman.
32. We look forward to Mr Campbell's report later this year. If you would like to discuss this further, please contact Carolyn Jones or Mari Vagg on 02 9749 7700 or via email at carolyn\_jones@clc.net.au.

Yours faithfully,

**Women's Legal Services NSW**



**Janet Loughman  
Principal Solicitor**