

The Offence of Child Destruction: Issues for Medical Abortion

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Abstract

All jurisdictions in Australia permit, within specified parameters, the performance of an abortion by a qualified medical practitioner. Yet most jurisdictions also maintain an offence of child destruction. This article argues that the offence of child destruction may protect the foetus from early in the second trimester of pregnancy, and thus overlaps with the otherwise lawful practice of medical abortion. This situation creates a site of conflict and confusion for the criminal law, and results in serious legal uncertainty as to what constitutes a lawful medical abortion. The article contends that the most appropriate and effective resolution of these issues is to abolish the offence of child destruction.

I Introduction

This article examines the offence of child destruction, and considers the potential impact of this offence on the practice of medical abortion. Medical abortion — defined as the performance of an abortion by a qualified health professional — although theoretically remaining a crime in most Australian jurisdictions,¹ is nonetheless permitted to varying degrees.² Indeed, in the ACT³ and Victoria⁴ (and

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¹ See *Crimes Act 1900* (NSW) ss 82–4; *Criminal Code Act* (NT) sch 1 ss 208C, 208B ('*Criminal Code* (NT)'); *Criminal Code Act 1899* (Qld) sch 1 ss 224–6 ('*Criminal Code* (Qld)'); *Criminal Law Consolidation Act 1935* (SA) ss 81–2; *Criminal Code Act 1924* (Tas) sch 1 ss 134–5 ('*Criminal Code* (Tas)'); *Criminal Code Act Compilation Act 1913* (WA) app B s 199 ('*Criminal Code* (WA)').

² In New South Wales certain medical abortions are permitted by virtue of the common law defence of necessity, rather than any legislative initiatives: see *R v Davidson* [1969] VR 667; *R v Wald* (1971) 3 DCR (NSW) 25; *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47. In Queensland a combination of legislative and judicial activity has allowed for medical abortions in specific circumstances: see *R v Bayliss* (1986) 9 Qld Lawyer Reps 8 ('*Bayliss*'); *Veivers v Connolly* [1995] 2 Qd R 326; *Criminal Code* (Qld) s 282. In the other jurisdictions it has been purely legislative reform that has achieved relatively easy access to medical abortion services: see *Medical Services Act* (NT) s 11; *Criminal Law Consolidation Act 1935* (SA) s 82A; *Criminal Code* (Tas) s 164.

³ In effect, the Australian Capital Territory legislation defines a lawful abortion as one performed by a medical practitioner in an approved facility: *Health Act 1993* (ACT) ss 80–4.

⁴ In Victoria it is now the case that abortion is not a crime if performed by a registered health practitioner prior to the foetus reaching 24 weeks gestation: *Abortion Law Reform Act 2008* (Vic) ss 4, 6. After 24 weeks gestation, further criteria must be met: ss 5, 7.

to a lesser extent in Western Australia)⁵ medical abortion is no longer a crime. It is not necessary for the purposes of this article to provide a detailed analysis of Australian abortion law; it will suffice to state that, in every jurisdiction in Australia, medical abortion is justifiable in a broad set of circumstances.⁶ The purpose of this article is to emphasise that some medical abortions performed in accordance with such legal conditions (and therefore assumed to be lawful or permitted abortions), may nonetheless constitute the offence of child destruction.

With the exceptions of New South Wales⁷ and Victoria,⁸ child destruction is an offence in every Australian jurisdiction.⁹ At first glance, the offence as described in most jurisdictions seeks to protect a child during the process of birth.¹⁰ However, as will be shown, closer examination reveals that the offence may also protect the child in utero, and from early in the second trimester of pregnancy. Given that approximately eight per cent of abortions are performed during, or after, this period,¹¹ the offence of child destruction thereby overlaps with the practice of otherwise lawful medical abortion.¹²

⁵ See *Health Act 1911* (WA) s 334. In Western Australia medical abortions not meeting the requirements of the *Health Act* are still defined as criminal (*Criminal Code* (WA) s 199), but a medical practitioner found guilty under s 199 is only liable to a pecuniary penalty: s 199(2).

⁶ For a discussion of such circumstances see Heather Douglas, 'Abortion Reform: A State Crime or a Woman's Right to Choose?' (2009) 33 *Criminal Law Journal* 74; Belinda Bennett, 'Abortion' in Ben White, Fiona McDonald and Lindy Willmott (eds), *Health Law in Australia* (Thomson Reuters, 2010) 371; Mark Rankin, 'The Disappearing Crime of Abortion and the Recognition of a Woman's Right to Abortion: Discerning a Trend in Australian Abortion Law?' (2011) 13(2) *Flinders Law Journal* 1.

⁷ New South Wales has never possessed an offence of child destruction: see Kerry Petersen, 'Classifying Abortion as a Health Matter: The Case for De-criminalising Abortion Laws in Australia' in Sheila McLean (ed), *First Do No Harm: Law, Ethics and Healthcare* (Ashgate, 2006) 353, 360.

⁸ In 2008 the Victorian Parliament repealed *Crimes Act 1958* (Vic) s 10, thereby abolishing the offence: *Abortion Law Reform Act 2008* (Vic) s 9.

⁹ It should be noted that jurisdictions label the offence differently, and only the Australian Capital Territory continues to refer to the offence as 'child destruction': *Crimes Act 1900* (ACT) s 42. The most common title for the crime is 'killing unborn child', which may be found in the Northern Territory, Queensland and Western Australian legislation: *Criminal Code* (NT) s 170; *Criminal Code* (Qld) s 313(1); *Criminal Code* (WA) s 290. In Tasmania the charge is 'causing the death of a child before birth': *Criminal Code* (Tas) s 165; while in South Australia it would appear that the appropriate charge may be 'unlawful abortion', although this is unclear: see *Criminal Law Consolidation Act 1935* (SA) s 82A(7). I have chosen to label the offence 'child destruction' in this article as this is the title utilised in the original UK Act: *Infant Life (Preservation) Act 1929* (UK) 20 Geo 5 s1(1) ('1929 UK Act').

¹⁰ See *Crimes Act 1900* (ACT) s 42; *Criminal Code* (NT) s 170; *Criminal Code* (Qld) s 313(1); *Criminal Code* (WA) s 290.

¹¹ In 2010 it was found that approximately 6.3 per cent of abortions were performed between 15 and 19 weeks gestation, and 1.8 per cent after 20 weeks gestation: Wendy Scheil et al, *Pregnancy Outcome in South Australia 2010* (Pregnancy Outcome Unit, SA Health, Government of South Australia, 2012) 11, 54. South Australia is the only jurisdiction with mandatory reporting requirements sufficient to provide such specific information, but one may reasonably extrapolate that most other states have comparable incidences of such early second trimester abortions: see Angela Pratt, Amanda Biggs and Luke Buckmaster, *How Many Abortions are There in Australia? A Discussion of Abortion Statistics, Their Limitations, and Options for Improved Statistical Collection* (Research Brief No 9, Parliamentary Library, Parliament of Australia, 2005), Social Policy Section, 9–11.

¹² See Thomas Faunce, 'The Carhart Case and Late-Term Abortions — What's Next in Australia?' (2007) 15 *Journal of Law and Medicine* 23, 28.

This article will canvass the offence of child destruction in each jurisdiction, and, by way of an analysis of the applicability and definition of the phrase ‘a child capable of being born alive’ and the common law ‘born alive’ rule, highlight the potential scope of the offence to protect a foetus in utero from the second trimester of pregnancy. The conclusion reached is that the mere existence of the offence of child destruction creates serious legal uncertainty as to what constitutes a lawful medical abortion; in essence, the maintenance of the offence may serve to make the lawful unlawful. Law reforms designed to alleviate this prospective legal conundrum will be considered, along with the policy implications inherent within such reforms.

II The Offence of Child Destruction

A *History and Description: Protecting ‘A Child Capable of Being Born Alive’*

Each Australian jurisdiction created the offence of child destruction at different times and in slightly varied ways, but, despite minor regulatory discrepancies, the offence throughout Australia arguably protects a ‘child capable of being born alive’. In South Australia there is no doubt that this is the case, as the offence was copied almost verbatim from the original United Kingdom (‘UK’) legislation.¹³ The UK Parliament created the offence in 1929, in order to fill a perceived ‘gap’ in the criminal law: that without the offence of child destruction, no protection was afforded a child during the process of delivery, as neither homicide (which only applies to a born individual) nor unlawful abortion (which protects the foetus) were considered appropriate to protect a child killed during the course of childbirth, in that such a child is neither wholly in utero, nor fully extruded from its mother.¹⁴ Hence, the enactment of the *Infant Life (Preservation) Act 1929* (UK) (‘1929 UK Act’). Section 1(1) of this Act states:

[A]ny person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of a felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to penal servitude for life.

The primary legal complexity raised by this offence is the utilisation of the phrase ‘child capable of being born alive’. Given the proclaimed basis for the creation of the offence — to protect the child during the process of birth¹⁵ — the inclusion of the phrase seems unnecessary. Indeed, if the phrase had not been

¹³ *Criminal Law Consolidation Act 1935* (SA) s 82A(7), (8). Prior to abolishing the offence in 2008 Victoria possessed an almost identical provision: *Crimes Act 1958* (Vic) s 10 (since repealed by *Abortion Law Reform Act 2008* (Vic) s 9).

¹⁴ See United Kingdom, *Parliamentary Debates*, House of Lords, 22 November 1928, vol 269, cols 70 (Lord Darling), 270–2 (Lord Atkin), 275–8 (Lord Hailsham LC). See also Louis Waller, ‘Any Reasonable Creature in Being’ (1987) 13 *Monash University Law Review* 37, 41; I J Keown, ‘The Scope of the Offence of Child Destruction’ (1988) 104 *Law Quarterly Review* 120, 120.

¹⁵ There appears little doubt that this was the legislative purpose of the original Bill, but such clear confinement of the offence to a child during the process of birth was eroded by various amendments during the Bill’s passage: see Keown, above n 14, 121–8.

included, and the offence was expressly and clearly confined to causing the death of a child during delivery, then the conflicts with medical abortion that will be raised in this article would not necessarily arise.¹⁶ Nonetheless, the phrase was copied into the South Australian legislation. As to what constitutes a ‘child capable of being born alive’, the *1929 UK Act* (and the South Australian legislation) answers that a foetus of at least 28 weeks gestation is assumed to constitute such a child,¹⁷ but this is expressed as a rebuttable presumption;¹⁸ leaving open the possibility that a foetus of less than 28 weeks gestation may also be a child capable of being born alive.¹⁹ Herein resides the potential for conflict with the otherwise lawful practice of medical abortion. This crucial phrase — ‘child capable of being born alive’ — will be dealt with below.

In the Code jurisdictions of Queensland, the Northern Territory, and Western Australia, the offence is defined in a slightly different manner (and in the case of Queensland and Western Australia the offence was created earlier than the *1929 UK Act*).²⁰ Importantly for present purposes, the relevant provisions in these jurisdictions do not possess the phrase ‘child capable of being born alive’. The offence of ‘killing unborn child’ is described in these jurisdictions as:

Any person who, when a female is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that, if the child had been born alive and had then died, the person would be deemed to have unlawfully killed the child, is guilty of a crime, and is liable to imprisonment for life.²¹

In the Australian Capital Territory the offence of ‘child destruction’ is defined in broadly similar terms as follows:

A person who unlawfully and, either intentionally or recklessly, by any act or omission occurring in relation to a childbirth and before the child is born alive —

- (a) prevents the child from being born alive; or
- (b) contributes to the child's death; is guilty of an offence punishable, on conviction, by imprisonment for 15 years.²²

As may be seen, the wording of the Australian Capital Territory provision differs from the Code jurisdictions’ legislation in a number of respects, but such

¹⁶ Of course, some abortions use the method of inducing labour, usually through the administration of prostaglandins, and these abortions might still be caught by an offence of child destruction so framed.

¹⁷ *1929 UK Act* s 1(2); *Criminal Law Consolidation Act 1935* (SA) s 82A(8); see also *Crimes Act 1958* (Vic) s 10(2) (since repealed by *Abortion Law Reform Act 2008* (Vic) s 9).

¹⁸ *Criminal Law Consolidation Act 1935* (SA) s 82A(8); *Rance Mid-Downs Health Authority* [1991] 1 QB 587, 605, 620 (‘*Rance*’).

¹⁹ *1929 UK Act* s 1(2); *Criminal Law Consolidation Act 1935* (SA) s 82A(7), (8); see also *Crimes Act 1958* (Vic) s 10(2) (since repealed by *Abortion Law Reform Act 2008* (Vic) s 9).

²⁰ Section 313 was inserted into the *Criminal Code* (Qld) in 1901; s 290 resided within the *Criminal Code* (WA) when originally enacted.

²¹ *Criminal Code* (Qld) s 313(1); *Criminal Code* (NT) s 170; *Criminal Code* (WA) s 290. The above quote is taken from the Queensland legislation. The Western Australian legislation differs slightly by referring to ‘a woman’ rather than ‘a female’, and the Northern Territory legislation differs by stating ‘a woman or girl’ instead of ‘a female’.

²² *Crimes Act 1900* (ACT) s 42.

differences are not overly significant for present purposes. For example, although the Australian Capital Territory legislation uses the phrase ‘in relation to a childbirth’, rather than the phrase ‘about to be delivered of a child’, both phrases arguably possess similar literal meaning (one might say that both phrases are equally plain or equally vague). In any case, in terms of any potential overlap with medical abortion, the most notable characteristic of the Australian Capital Territory and Code jurisdictions’ legislation is that they all create an offence that, at first glance, only operates within a specific and narrow timeframe: when the process of birth has begun, or when delivery is imminent.

However, the phrase ‘prevents the child from being born alive’ (contained in both the Australian Capital Territory and Code jurisdictions’ provisions), arguably only makes logical sense if the child was actually *capable* of being so born alive. That is, without such an interpretation the phrase would lead to absurdity: how may one prevent a child from being born alive if that child could not possibly be born alive? Rationally, it is only once a certain gestational age has been reached, and a foetus becomes capable of being born alive, that one may be charged with taking action to prevent that foetus from being born alive. This legislative expression thus demands the application of the ‘Golden Rule’ of statutory interpretation.²³

The ‘Golden Rule’ is that a construction should be adopted that avoids irrationality or absurdity,²⁴ provides ‘a reasonable meaning’,²⁵ and thereby gives rational effect to the words used,²⁶ as it cannot be thought to have been Parliament’s intention to adopt a construction that is irrational.²⁷ Applying the Golden Rule, the relevant phrase should thus be read as ‘prevents the child [*being a child capable of being born alive*] from being born alive’. This was the conclusion reached by McGuire J in *Bayliss*.²⁸ His Honour, in studying the *Criminal Code* (Qld) s 313, quoted above,²⁹ held that it closely resembled, and established a similar offence, to the *1929 UK Act* s1.³⁰ Significantly for present

²³ See the classic framing of the rule in *Grey v Pearson* (1857) 10 ER 1216, 1234 (Lord Wensleydale). See also *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337, 371 (Dixon J).

²⁴ *Heading v Elston* (1980) 23 SASR 491, 494 (King CJ); *Lindner Pty Ltd v Builder’s Licensing Board* [1982] 1 NSWLR 612, 615 (Samuels JA). See also D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis, 7th ed, 2011) 29.

²⁵ *Sakhuja v Allen* [1973] AC 152, 183 (Lord Pearson). Also see *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161–2 (Higgins J).

²⁶ See J J Spigelman, ‘The Intolerable Wrestle: Developments in Statutory Interpretation’ (2010) 84 *Australian Law Journal* 822, 826–8.

²⁷ *Footscray City College v Ruzicka* (2007) 16 VR 498, 505 (Chernov JA); *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 304–5 (Gibbs CJ); *Fry v Bell’s Asbestos & Engineering Pty Ltd* [1975] WAR 167, 169–70 (Jackson CJ); *Pinner v Everett* [1969] 3 All ER 257, 258–9 (Lord Reid).

²⁸ (1986) 9 Qld Lawyer Reps 8. For a more detailed analysis of this case see Mark J Rankin, ‘Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman’s Right to Abortion’ (2001) 27 *Monash University Law Review* 229, 235–7.

²⁹ His Honour provides a comprehensive legislative history of the section: *Bayliss* (1986) 9 Qld Lawyer Reps 8, 34–7 (McGuire J).

³⁰ *Ibid* 13–14.

purposes, McGuire J felt that the ‘child’ referred to in s 313 should be read as ‘one capable of being born alive’.³¹

Given the lack of any other decisions specifically interpreting the offence, McGuire J’s reasoning is especially significant, as, although the binding nature of precedent is reduced to mere persuasive authority in the field of statutory construction,³² there remains ‘a strong influence constraining a court to adhere to a previously stated interpretation of an Act’.³³ Further, as Parliament’s intention is paramount in interpreting a statute,³⁴ the fact that Parliament has opted not to change the legislation subsequent to a judicial interpretation may be construed as evidence that Parliament agrees with that interpretation.³⁵ There is thus a strong case for holding that the offence of child destruction in Queensland protects a child capable of being born alive.

As the offence is expressed in identical terms in both Western Australia and the Northern Territory, one may reasonably argue that an identical interpretation should apply in those jurisdictions. Of course, it should also be noted that statutory interpretation is not a discipline of law with binding rules,³⁶ but rather ‘rules of common sense’,³⁷ and further that such rules do not always point in the one direction.³⁸ The only certainty of statutory interpretation is that Australian courts are under a duty ‘to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have’.³⁹ This duty to give effect to the purpose or object of the Act is also emphasised in Acts interpretation legislation,⁴⁰ but how that intention, object or purpose is ascertained is largely left to the discretion of each court. In the present case, a court may, in determining Parliament’s intention, simply apply a literal meaning to the phrase ‘about to be

³¹ Ibid 37.

³² *Maunsell v Olins* [1975] AC 373, 382 (Lord Reid).

³³ Pearce and Geddes, above n 24, 11.

³⁴ See, eg, *Acts Interpretation Act 1954* (Qld) s 14A.

³⁵ See Pearce and Geddes, above n 24, 11, 108. Indeed, the re-enactment presumption of statutory interpretation holds that the legislature is assumed to have approved of a previous judicial interpretation if the legislation in question has been re-enacted subsequent to that interpretation: see, eg, *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96, 106–7.

³⁶ *Brennan v Comcare* (1994) 50 FCR 555, 572–3 (Gummow J); *McNamara v Consumer Trading and Tenancy Tribunal* (2005) 221 CLR 646, 661 (McHugh, Gummow and Heydon JJ).

³⁷ *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 321 (Mason and Wilson JJ).

³⁸ See Pearce and Geddes, above n 24, 7–12. For instance, one might apply the same ‘Golden Rule’ approach and arrive at the converse conclusion that a court should interpret the offence of child destruction so as to avoid the absurdity of (re)criminalising an otherwise lawful termination. In answer, one might counter that, reading the Act as a whole (ie a rule of statutory construction suggested in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 60 ALR 509, 514 (Mason J)), the legal effect of interpreting the offence of child destruction so as to protect a child capable of being born alive is not to (re)criminalise an otherwise lawful medical procedure, but rather to establish a gestational limit as to what may constitute a lawful medical abortion — hence there is no absurdity in such an interpretation.

³⁹ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 (McHugh, Gummow, Kirby and Hayne JJ).

⁴⁰ See, eg, *Acts Interpretation Act 1901* (Cth) s 15AA; *Legislation Act 2001* (ACT) s 139; *Interpretation Act 1987* (NT) s 62A; *Acts Interpretation Act 1954* (Qld) s 14A; *Acts Interpretation Act 1915* (SA) s 22; *Interpretation Act 1984* (WA) s 18.

delivered of a child' or 'in relation to a childbirth',⁴¹ and subsequently hold the offence to be applicable only during the process of birth.⁴² Or a court might focus on the fact that the legislation in question is penal in nature, and thus seek to interpret the phrase(s) in such a way as to 'avoid the penalty in any particular case',⁴³ which might suggest strictly limiting the scope of the offence to acts committed during the birth of the child.

However, neither of the above approaches would receive support from superior courts. The High Court has made it clear that the old rule that penal statutes should be interpreted in favour of the defendant 'has lost much of its importance', and such legislation should now be interpreted using 'the ordinary rules of construction'.⁴⁴ Similarly, the literal approach to statutory interpretation has recently lost favour with the High Court, which now advocates a more contextual approach to determining the meaning of words.⁴⁵ As the majority stated in *Project Blue Sky Inc v Australian Broadcasting Authority*:

The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.⁴⁶

In addition, a literal approach to the provision does not necessarily yield a narrow interpretation. For instance, Murray J, in delivering the majority judgment in *Martin v The Queen (No 2)*,⁴⁷ explained in obiter that the 'process' of delivery does not necessarily occur within a particularly limited timeframe:

The meaning of the phrase 'when a woman is about to be delivered of a child' is uncertain. Does it mean at or about the time of birth? If so, why is it so limited, or is it a case that a woman is regarded as being about to be delivered of a child at any time while she is pregnant and carrying a live foetus?⁴⁸

⁴¹ A court may be more likely to do so in the Australian Capital Territory, as no previous decisions exist to the contrary (unlike the situation in Queensland and Western Australia, and by extension the Northern Territory), and a different phrase would be the subject of interpretation (ie 'in relation to a childbirth' rather than 'about to be delivered of a child').

⁴² The classic statement of the literal approach to statutory interpretation may be found in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161–2 (Higgins J).

⁴³ *Tuck v Priest* (1887) 19 QBD 629, 638 (Lord Esher MR).

⁴⁴ *Beckwith v The Queen* (1976) 135 CLR 569, 576 (Gibbs J). See also *Waugh v Kippen* (1986) 160 CLR 156, 164. Indeed, it is arguable that this has been the Australian approach since Isaacs J's comments in *Scott v Casey* (1907) 5 CLR 132, 154–5.

⁴⁵ See *Bropho v Western Australia* (1990) 171 CLR 1, 19–20 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 396–7 (Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381–4 (McHugh, Gummow, Kirby and Hayne JJ); *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019, 1028–9 (Kirby J).

⁴⁶ (1998) 194 CLR 355, 384 (McHugh, Gummow, Kirby and Hayne JJ).

⁴⁷ (1996) 86 A Crim R 133.

⁴⁸ *Ibid* 138.

There is thus a strong argument in favour of applying the offence in the above Code jurisdictions⁴⁹ to acts causing the death of a child capable of being born alive.⁵⁰ If such an interpretation holds — and there have been no decisions contrary to this suggested construction — then the above Code jurisdictions possess an offence of similar practical effect (in terms of a potential overlap with medical abortion) to the current South Australian offence, which was modelled on the 1929 UK Act.

The case for interpreting the offence in the Australian Capital Territory in a like manner is less compelling, as the terms of the offence are slightly different to the Code jurisdictions, but the Australian Capital Territory provision does contain the phrase ‘prevents the child from being born alive’,⁵¹ and, as argued above, in order to avoid absurdity this phrase should be read as ‘prevents the child [*being a child capable of being born alive*] from being born alive’. Of course, it is inherently uncertain how an Australian Capital Territory court might interpret the offence, but given that *Bayliss*⁵² is the only Australian decision on point, and that McGuire J’s reasoning appears to be a reasonable application of the Golden Rule approach to statutory interpretation, one may state with confidence that, if not likely, it is certainly a strong possibility that an Australian Capital Territory court would adopt the above construction. It is an appropriate rule of statutory interpretation to seek to derive meaning by reading the Act as a whole,⁵³ and it is noteworthy that the related Australian Capital Territory offence of ‘concealment of birth’⁵⁴ does not apply if the mother was less than 28 weeks pregnant.⁵⁵ One may reasonably assume that this focus on 28 weeks is for reasons consistent with those expressed in the relevant UK and South Australian provisions on child destruction: that a foetus of 28 weeks gestation is presumed to be a child capable of being born alive.⁵⁶ Thus, the discussion concerning what constitutes a ‘child capable of being born alive’ has relevance to not only South Australia, but also the Australian Capital Territory the Northern Territory, Queensland and Western Australia.

Before embarking upon this discussion, it is interesting to note the Tasmanian situation with respect to the offence of child destruction, as it constitutes a possible reform template for the other jurisdictions that retain the offence. Section 165(1) of the Tasmanian *Criminal Code* states that:

⁴⁹ It must be conceded that the argument is stronger in Queensland and Western Australia (where judicial pronouncements consistent with this author’s suggested construction of the legislation exist: *Bayliss* (1986) 9 Qld Lawyer Repts 8, 37; and *Martin v The Queen (No 2)* (1996) 86 A Crim R 133, 138–9).

⁵⁰ In his report, Finlay came to the conclusion that such provisions actually go further and appear ‘to cover unborn children from the time pregnancy has been detected in the pregnant woman’: Mervyn D Finlay, ‘Review of the Law of Manslaughter in NSW’ (Report, NSW Department of Attorney General and Justice, Criminal Law Division, 2003) 80.

⁵¹ *Crimes Act 1900* (ACT) s 42.

⁵² *Bayliss* (1986) 9 Qld Lawyer Repts 8.

⁵³ *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 60 ALR 509, 514 (Mason J).

⁵⁴ *Crimes Act 1900* (ACT) s 47.

⁵⁵ *Ibid* s 47(1)–(2).

⁵⁶ 1929 UK Act s 1(2); *Criminal Law Consolidation Act 1935* (SA) s 82A(8).

Any person who causes the death of a child which has not become a human being in such a manner that he would have been guilty of murder if such child had been born alive is guilty of a crime.⁵⁷

As may be seen, the Tasmanian offence, labelled ‘causing death of child before birth’, does not contain any words similar to the phrase ‘when a female is about to be delivered of a child’, nor does it refer to the principle of ‘a child capable of being born alive’, nor does it contain a phrase akin to ‘prevents the child from being born alive’. In terms of arriving at an appropriate interpretation with respect to the scope of the Tasmanian offence, the associated crime of ‘concealment of birth’, which sits in the same part of the *Criminal Code* (Tas) as the above offence, may be instructive.⁵⁸ The offence of concealment of birth does not apply until the foetus has ‘reached such a stage of maturity as would in the ordinary course of nature render it probable that such child would live’⁵⁹ — in other words, does not apply until the child is capable of being born alive. Adopting a contextual approach to statutory interpretation, it would be reasonable to argue that the offence of ‘causing death of child before birth’ should be interpreted consistently with the ‘concealment of birth’ offence, and consequently both offences should be applicable to the death of a foetus that may be described as a ‘child capable of being born alive’.⁶⁰

However, the construction of the Tasmanian legislation is no longer particularly significant in terms of potential conflicts with the practice of medical abortion, as the 2001 amendments made to the law regulating medical abortion in Tasmania designated that s 165 was expressly subject to s 164, which deals with lawful termination of pregnancy.⁶¹ This strategy of retaining the offence of child destruction, but making it effectively inapplicable to cases of lawful medical abortion, although preferable to allowing the potential conflict between medical abortion and child destruction to remain, is nonetheless problematic, and, in this author’s opinion, should not be the template for reform in other jurisdictions. Apart from the obvious lack of legal simplicity, by leaving the offence of child destruction intact, the fact remains that a medical practitioner performing an abortion that she or he believes is lawful pursuant to the relevant abortion legislation is still in a position of inherent legal uncertainty because, if that abortion is subsequently deemed not to be in accordance with that legislation, then the offence of child destruction is regenerated and would be applicable to that

⁵⁷ *Criminal Code* (Tas) s 165(1).

⁵⁸ That is, reading the Act as a whole in deriving meaning: see, eg, *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 60 ALR 509, 514 (Mason J).

⁵⁹ *Criminal Code* (Tas) s 166(2).

⁶⁰ A New Zealand case, *R v Woolnough* [1977] 2 NZLR 508, dealt with a provision practically identical to the *Criminal Code* (Tas) s 165(1) — *Crimes Act 1961* (NZ) s 182 — and held that the offence is probably not applicable to an early foetus, but is certainly applicable to a foetus in the later stages of pregnancy: at 516–17.

⁶¹ *Criminal Code* (Tas) s 164(1) (as inserted by *Criminal Code Amendment Act (No 2) 2001* (Tas)). A similar legislative reform was embarked upon in the UK in 1990, when the UK Parliament recognised the potential overlap between the offence of child destruction and medical abortion. Amendments were accordingly made to the *Abortion Act 1967* (UK) such that the offence of child destruction created by the *1929 UK Act* could not be committed by a registered medical practitioner performing an abortion in accordance with the *Abortion Act 1967* (UK) — see *Human Fertilisation Embryology Act 1990* (UK) s 37(4).

procedure.⁶² Clearly, the most effective reform option that would guarantee the removal of all legal ambiguity and potential overlap between lawful medical abortion and the offence of child destruction would be to simply abolish the offence of child destruction. This is what occurred in Victoria in 2008.⁶³ To abolish the offence has the dual advantages of legislative simplicity and legal clarity. This preferred reform template will be discussed further in the conclusion.

In summarising the various offences of child destruction currently operating in Australia, the major point to be emphasised is that all such offences arguably protect a ‘child capable of being born alive’. It will be shown through an analysis of this phrase, and the related born alive rule, that such offences thereby protect the foetus from as early as 16 weeks gestation. Prior to this examination, the final preliminary issue that requires clarification is that of defences, as one cannot fully understand the nature and scope of an offence without appreciating the influence of available defences to that crime.

Only South Australia and Tasmania expressly provide for a defence to the crime of child destruction: in these jurisdictions it is a complete defence if the act that caused the death of the child was done in good faith for the preservation of the mother’s life.⁶⁴ The prosecution must prove that the act in question was not done with this legitimate intent in order to secure a conviction.⁶⁵ In the Australian Capital Territory, Queensland, the Northern Territory and Western Australia this defence is not apparent within the relevant provisions (indeed, no specific defence is provided for in these jurisdictions), but may apply in any case through application of surgical operation⁶⁶ or emergency⁶⁷ defences.

The various *possible* defences⁶⁸ to the crime of child destruction do not significantly impact on the potential overlap of the offence with the practice and regulation of medical abortion. In each jurisdiction such defences (with the possible exception of Queensland) are far narrower and restrictive, and more onerous for the defendant, than the defences available for unlawful abortion, or the conditions prescribed for lawful medical abortion. This is most clearly demonstrated in the Australian Capital Territory, where medical abortions are now

⁶² It is for this reason (among others) that the Victorian Law Reform Commission (‘VLRC’) described the UK approach (which, as noted above, is similar to the Tasmanian model in this respect) as ‘not a considered response’: VLRC, *Law of Abortion*, Final Report No 15 (2008) 108.

⁶³ The VLRC recommended abolishing the offence of child destruction: *ibid* 108–9. The Victorian legislature followed that recommendation in 2008: *Abortion Law Reform Act 2008* (Vic) s 9.

⁶⁴ *Criminal Law Consolidation Act 1935* (SA) s 82A(7); *Criminal Code* (Tas) s 165(2). Also see *1929 UK Act* s 1(1).

⁶⁵ This legislative defence was utilised in the landmark abortion decision of *R v Bourne* [1939] 1 KB 687, in which Macnaghten J held that it was possible to perform a lawful abortion on the same grounds — that is, in good faith for the purpose only of preserving the woman’s life: at 690–1.

⁶⁶ *Criminal Code* (Qld) s 282; *Criminal Code* (WA) s 259.

⁶⁷ *Criminal Code* (WA) s 25; *Criminal Code 2002* (ACT) s 41; *Criminal Code* (NT) s 33.

⁶⁸ Any suggested defences to the offence of child destruction are speculative, with the exception of South Australia and Tasmania (which both expressly provide for statutory defences to child destruction), and Queensland, where *Bayliss* (1986) 9 Qld Lawyer Repts 8 has suggested the availability of a legislative defence to the crime: at 37 and 41.

lawful,⁶⁹ and solely regulated by health services law.⁷⁰ The only condition is that the medical abortion be performed in an approved facility,⁷¹ whereas the possible defence options for a medical practitioner charged with child destruction may be limited to ‘sudden or extraordinary emergency’,⁷² or perhaps the common law defence of necessity.⁷³

Broadly comparable discrepancies between the legal tests for justified medical abortion, and those for justified child destruction, exist in other jurisdictions. To summarise:⁷⁴ in South Australia, as noted above, the defence for child destruction demands that it was necessary to preserve the mother’s life,⁷⁵ whereas the defence for unlawful abortion is made out if ‘the continuance of the pregnancy would involve greater risk to the life of the pregnant woman, or greater risk of injury to the physical or mental health of the pregnant woman, than if the pregnancy were terminated’;⁷⁶ in the Northern Territory a medical abortion is lawful on similar ‘greater risk’ grounds,⁷⁷ but the defence to child destruction, if there is a defence, is probably limited to the excuse (that is, not a justification) of ‘sudden and extraordinary emergency’;⁷⁸ and in Western Australia a medical abortion is considered lawful if performed with the woman’s ‘informed consent’,⁷⁹ whereas the defence to child destruction might be constrained to ‘emergency’⁸⁰ or the ‘surgical and medical treatment’ defence,⁸¹ which is only made out when the treatment was necessary ‘for the preservation of the mother’s life’.⁸²

As stated above, the possible exception to this is Queensland, as the appropriate defence for unlawful abortion — the ‘surgical operations and medical treatment’ defence⁸³ — may also apply to child destruction. Although the defence would only be applicable in order to ‘preserve the mother’s life’,⁸⁴ this aspect of the s 282 defence has been interpreted quite broadly when applied to the offence of

⁶⁹ *Crimes (Abolition of Offence of Abortion) Act 2002* (ACT). For a discussion of this Act, see Mark J Rankin, ‘Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory’ (2003) 29 *Monash University Law Review* 316, 329–32.

⁷⁰ *Health Act 1993* (ACT) ss 80–4.

⁷¹ *Ibid* s 82.

⁷² *Criminal Code* (ACT) s 41.

⁷³ See, eg, *R v Davidson* [1969] VR 667, 670–2. For a brief discussion of issues that may arise in applying this defence to child destruction see Kristin Savell, ‘Is the “Born Alive” Rule Outdated and Indefensible?’ (2006) 28 *Sydney Law Review* 625, 649–50.

⁷⁴ The following brief statements about the law of abortion in each jurisdiction are simplistic in the extreme and serve only to highlight what is necessary to prove the point being made: that different and more limited defences may be applicable to child destruction than to abortion. For a more detailed description and analysis of current Australian abortion law see Rankin, above n 6.

⁷⁵ *Criminal Law Consolidation Act 1935* (SA) s 82A(7).

⁷⁶ *Ibid* s 82A(1)(a)(i).

⁷⁷ *Medical Services Act* (NT) s 11.

⁷⁸ *Criminal Code* (NT) s 33.

⁷⁹ *Health Act 1911* (WA) s 334(3)(a). ‘Informed consent’ is defined under the legislation as only possible subsequent to mandatory counselling and referral (s 334(5)).

⁸⁰ *Criminal Code* (WA) s 25.

⁸¹ *Ibid* s 259.

⁸² *Ibid* s 259(1)(b). Of course, this phrase might be interpreted quite broadly, as it was with respect to the similar provision in Qld: *Bayliss* (1986) 9 Qld Lawyer Repts 8.

⁸³ *Criminal Code* (Qld) s 282.

⁸⁴ *Ibid* s 282(1)(b).

unlawful abortion.⁸⁵ One may reasonably assume that it would be similarly constructed if held to be also appropriate to the offence of child destruction. If s 282 is applicable to both abortion and child destruction, then justified medical abortion is simultaneously justified child destruction; if the defence under s 282 is satisfied, then the medical practitioner is thereby exculpated for both offences. However, the applicability of s 282 to the offence of child destruction in Queensland is by no means certain,⁸⁶ and until a superior court,⁸⁷ or the legislature, expressly makes this connection between child destruction and s 282, the overlap between otherwise justified medical abortion and unlawful child destruction remains a possibility in Queensland. Thus, it remains the case in all jurisdictions that one cannot rely on the fact that the abortion is otherwise lawful: it may nonetheless be child destruction if that abortion was performed on a child protected by that offence; a child capable of being born alive.

B *The Latent Scope of the Offence: Defining 'A Child Capable of Being Born Alive'*

There have been no Australian decisions turning on the offence of child destruction, nor the interpretation of the phrase 'child capable of being born alive', but in the UK two higher courts have dealt specifically with the phrase. The matter of *C v S*⁸⁸ was the first time a UK court had considered the meaning of the phrase 'child capable of being born alive' in the context of the offence of child destruction.⁸⁹ The case focused on a foetus of approximately 18–21 weeks gestation, and concerned an application by the father of this foetus to obtain an injunction to prevent the mother from terminating the pregnancy. The father sought the injunction on the basis that any such abortion would constitute an offence, as the foetus was a child capable of being born alive pursuant to *1929 UK Act* s 1.

Justice Heilbron delivered the decision at first instance. Her Honour felt that the phrase 'child capable of being born alive', although 'ambiguous',⁹⁰ and 'capable of different interpretations',⁹¹ should nonetheless be interpreted consistently with the common law born alive rule.⁹² Her Honour held that the born alive rule required that a child actually breathe for it to be said to be 'born alive', and accordingly determined that the capacity to breathe was essential for a child to be described as 'capable of being born alive'.⁹³ As it was not clear on the evidence before the court whether the foetus in question was capable of breathing, Heilbron J held that no (hypothetical) offence could be established, as the (hypothetical) prosecution would thus be unable to prove that the foetus was a 'child capable of

⁸⁵ See *Bayliss* (1986) 9 Qld Lawyer Reps 8.

⁸⁶ The court in *Rance* [1991] 1 QB 587 held that legislation providing defences for unlawful abortion does not provide defences to the offence of child destruction: at 628.

⁸⁷ McGuire J implied that s 282 may be applicable to the offence contained in s 313, but made no specific finding on this point: *Bayliss* (1986) 9 Qld Lawyer Reps 8, 37, 41.

⁸⁸ [1987] 1 All ER 1230.

⁸⁹ For a detailed contemporaneous study of the case see David P T Price, 'How Viable is the Present Scope of the Offence of Child Destruction?' (1987) 16 *Anglo-American Law Review* 220, 220–5.

⁹⁰ *C v S* [1987] 1 All ER 1230, 1238.

⁹¹ *Ibid* 1239.

⁹² *Ibid* 1238–9.

⁹³ *Ibid*.

being born alive'.⁹⁴ Justice Heilbron's decision was upheld on appeal.⁹⁵ The case is thus strong authority contrary to the view that viability is required by the phrase,⁹⁶ as the capacity to breathe is reached prior to most concepts of viability,⁹⁷ and the court was quite clear in rejecting viability as a necessary condition for a child capable of being born alive.⁹⁸

In the other UK case to deal with the phrase, that of *Rance*,⁹⁹ the court essentially followed *C v S*. In *Rance*, the parents of a child born with severe disabilities brought an action against the health authority and a medical practitioner for negligently failing to diagnose the child's handicap when an ultrasound was performed when the mother was 26 weeks pregnant. The plaintiffs claimed damages for the cost of raising the child, as they claimed that, had they known of the child's disabilities when the ultrasound was performed, the mother would have aborted the child. The defendants contended that the mother could not have lawfully terminated her pregnancy because a foetus of 26 weeks gestation was a child capable of being born alive, and thereby protected by the *1929 UK Act* s 1(1).

In delivering a decision in favour of the defendants, Brooke J, in line with the court in *C v S*, was in no doubt that the phrase 'child capable of being born alive' was to be interpreted in accordance with the 'born alive' rule.¹⁰⁰ His Honour felt that this interpretation of the phrase was consistent with Parliament's intention in 1929,¹⁰¹ and further that Parliament intended to protect the child so described even when in the mother's womb.¹⁰² Justice Brooke held that a child must be fully born and 'breathing and living by reason of its breathing through its own lungs alone, without deriving any of its living or power of living by or through any connection with its mother'¹⁰³ to be said to be born alive. His Honour subsequently held that if a foetus had reached a stage where it was capable, if it were to be born, of living and breathing through its own lungs without any connection to the mother, then it was a child capable of being born alive,¹⁰⁴ and thereby protected by the offence of child destruction.¹⁰⁵ This was the case even if such a foetus would probably only have breathed and lived for a few hours,¹⁰⁶ thus rejecting any notion

⁹⁴ Ibid 1239–41.

⁹⁵ Ibid 1242 (per Donaldson MR).

⁹⁶ Price, above n 89, 225–6. The case received contemporaneous criticism for not determining that the phrase 'child capable of being born alive' is synonymous with viability: see, eg, Keown, above n 14, 141–2. It also received contemporaneous support for this conclusion: see, eg, Price, above n 89, 231–4.

⁹⁷ Keown, above n 14, 141–2. Cf Victor Tunkel, 'Late Abortions and the Crime of Child Destruction: (1) A Reply' [1985] *Criminal Law Review* 133, 136, who argues that the capacity to breathe is virtually synonymous with viability.

⁹⁸ *C v S* [1987] 1 All ER 1230, 1242. Also see Price, above n 89, 231–5.

⁹⁹ *Rance* [1991] 1 QB 587.

¹⁰⁰ Ibid 620–1.

¹⁰¹ Ibid 620. See also Gerard Wright, 'The Legality of Abortion by Prostaglandin' [1984] *Criminal Law Review* 347, 348–9. Cf Keown, above n 14, 129–31, 138–40; Price, above n 89, 225; Tunkel, above n 97, 135–6. The Victorian Law Reform Commission, in its own assessment of the *1929 UK Act*, concluded that the legislative intent in this respect was uncertain: see VLRC, above n 62, 98.

¹⁰² [1991] 1 QB 587, 620.

¹⁰³ Ibid 621.

¹⁰⁴ Ibid 620–2.

¹⁰⁵ Ibid 628.

¹⁰⁶ Ibid 616–17, 626–7.

of viability, which would argue for a more sustained period of survival.¹⁰⁷ The court decided that a foetus of 26 weeks gestation was capable of breathing if born,¹⁰⁸ so the foetus in question was a child capable of being born alive, and consequently any abortion performed on that foetus would have been unlawful.¹⁰⁹

Although both of the above UK decisions focus on the capacity to breathe in establishing whether a child is capable of being born alive, it must be noted that this attention to breathing stems from a specific understanding of the born alive rule; an interpretation that relies almost solely on the 1874 case of *R v Handley*,¹¹⁰ which held that a child was born alive only if it breathed.¹¹¹ As will be shown, Australian courts have adopted a more expansive view of the born alive rule. At time of writing, no further cases have interpreted the phrase ‘child capable of being born alive’, either in the UK or Australia. In determining an appropriate meaning of the phrase for contemporary Australian law, we are therefore left with the paramount guiding principle, derived from the two UK cases discussed above, that the phrase should be interpreted consistently with the common law born alive rule.¹¹² It is thus not only instructive, but mandatory, to analyse what actually constitutes the born alive rule.

C *The Born Alive Rule*

The born alive rule has a long history,¹¹³ and has been described as ‘a fundamental part of our legal system.’¹¹⁴ It originated in the criminal law principle that only a born human being — one that has ‘completely proceeded into the world from its mother’s body’¹¹⁵ — may be the victim of homicide.¹¹⁶ A number of UK decisions in the 19th century cemented this principle within the common law canon,¹¹⁷ and

¹⁰⁷ Conversely, the court did provide obiter statements that suggested no definitive determination was being made on this point: *ibid* 621–2. Also see the earlier Court of Appeal case of *McKay v Essex Area Health Authority* [1982] 2 All ER 771, 780 (Stephenson LJ).

¹⁰⁸ [1991] 1 QB 587, 624.

¹⁰⁹ *Ibid* 628.

¹¹⁰ (1874) 13 Cox CC 79 (*‘Handley’*).

¹¹¹ *Ibid* 80–1 (Brett J); *Rance* [1991] 1 QB 587, 620; *C v S* [1988] QB 135, 151.

¹¹² *C v S* [1987] 1 All ER 1230, 1239 (Heilbron J); *Rance* [1991] 1 QB 587, 621.

¹¹³ Earliest references to a nascent rule may be found in the 16th century: see Stanley B Atkinson, ‘Life, Birth and Live Birth’ (1904) 20 *Law Quarterly Review* 134, 154. The earliest known judicial expression of the born alive rule is *R v Sims* (1601) Goldsborough 176; 75 ER 1075.

¹¹⁴ VLRC, above n 62, 97.

¹¹⁵ James Fitzjames Stephen, *A History of the Criminal Law of England Volume III* (MacMillan & Co, 1883) 2.

¹¹⁶ See Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* (W Clarke & Sons, 1791) 50; William Hawkins, *Pleas of the Crown* (S Sweet, R Pheney and A Maxwell, first published in 1716, 1824 ed) 94–5; Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (W A Stokes and E Ingersoll, first published in 1736, 1847 ed) 432–3; Stephen, above n 115, 2; Waller, above n 14, 37–9.

¹¹⁷ See *R v Poulton* (1832) 5 C & P 329, 330; 172 ER 997, 998; *R v Enoch* (1833) 5 C & P 539, 541; 172 ER 1089, 1090; *R v Brain* (1834) 6 C & P 349, 349–50; 172 ER 1272, 1272; *R v Crutchley* (1837) 7 C & P 814, 815–16; 173 ER 355, 356; *R v Sellis* (1837) 7 C & P 850, 851; 173 ER 370, 370.

Australian criminal courts in the 20th and 21st centuries have maintained the rule.¹¹⁸ The rule has also found expression in civil cases, with courts holding that a child *en ventre sa mere* does not have any legal rights (including being a party to an action), as it ‘has no legal personality and cannot have a right of its own until it is born and has a separate existence from its mother.’¹¹⁹

Although the law recognises that a child may bring an action for damages for injuries sustained before birth,¹²⁰ the law also emphasises that such a claim only ‘crystallises on the birth, at which date, but not before, the child attains the status of a legal persona, and thereupon can then exercise that legal right.’¹²¹ Thus, the creation of this ‘fictional construction’¹²² in order to benefit the born individual does not deviate from the born alive principle, as the child must subsequently be born alive to benefit from this fictional construction. In a sense, the courts have created a ‘potential right’, and ‘the child must attain by his birth the necessary capacity in order to enforce the right’.¹²³ This type of retrospective acknowledgment, provided the child is born alive, can also be found in the criminal law, in the sense that an intention to cause the death of the foetus in utero may amount to the mens rea for murder if the child is subsequently born alive (and then dies from those prenatal wounds intentionally inflicted), despite the fact that there existed no legal person at the time the requisite intention to kill that [non]-person was formed.¹²⁴

Notwithstanding such fictional construction anomalies, the common law is unambiguous in its demand that a child be born alive before it may be bestowed

¹¹⁸ See *R v Hutty* [1953] VLR 338, 339; *R v F* (1996) 40 NSWLR 245, 247–8; *R v King* (2003) 59 NSWLR 472, 490; *R v Iby* (2005) 63 NSWLR 278, 282–3 (‘Iby’); *Barrett v Coroner’s Court of South Australia* (2010) 108 SASR 568, 573–5 (‘Barrett’).

¹¹⁹ *In the Marriage of F* (1989) 13 Fam LR 189, 194. See also *A-G (Qld) ex rel Kerr v T* (1983) 57 ALJR 285, 286 (Gibbs CJ); *K v T* [1983] 1 Qd R 396, 401; *A-G (Qld) ex rel Kerr v T* [1983] 1 Qd R 404, 407. All these Australian decisions place great emphasis on the judgment of Baker P in *Paton v British Pregnancy Advisory Service Trustees* [1979] 1 QB 276, 279.

¹²⁰ See the landmark decision in *Watt v Rama* [1972] VR 35, 360 (Winneke CJ and Pape J); 376–7 (Gillard J). See also *Lynch v Lynch* (1991) 25 NSWLR 411, in which this reasoning was extended to enable a born child to even sue its mother for injuries sustained in car crash while in utero, but the court (aware of the obvious dangers of such an extension) expressly confined the decision to negligent driving: at 414–16.

¹²¹ *C v S* [1987] 1 All ER 1230, 1234 (Heilbron J).

¹²² This term was used as early as 1935 in *Elliot v Lord Joicey* [1935] AC 209, in which Lord Russell of Killowen explained that, provided it was ‘within the reason and motive of the gift’, a child *en ventre sa mere* may be considered ‘born’ or ‘living’ or ‘surviving’ for the purposes of a will, such that, if subsequently born alive, that child would then be within a class of children or issue described as ‘surviving’ at the particular point of time referred to in the will. His Lordship described this as a ‘fictional construction’ in order to benefit the born individual: at 233–4.

¹²³ *Watt v Rama* [1972] VR 353, 375. See also *R v Sood (Ruling No 3)* [2006] NSWSC 762 (15 September 2006) [45]–[49] (Simpson J).

¹²⁴ See *R v F* (1993) 40 NSWLR 245, 247–8 (Grove J); *R v Martin* (1996) 86 A Crim R 133, 139 (Murray J). See also P H Winfield, ‘The Unborn Child’ (1942) 8 *Cambridge Law Journal* 76, 78; Waller, above n 14, 52. The *Criminal Code* (Tas) s 153(5) expressly indicates that the killing of such a child may constitute homicide irrespective of whether the injuries that caused its death were received before, during, or after its birth. Cf *A-G’s Reference (No 3 of 1994)* [1998] AC 245.

with legal personality.¹²⁵ As to what actually constitutes ‘born alive’, perhaps the best exposition of the rule is that delivered by Barry J in *R v Hutty*:¹²⁶

Murder can only be committed on a person who is in being, and legally a person is not in being until he or she is fully born in a living state. A baby is fully and completely born when it is completely delivered from the body of its mother and it has a separate and independent existence in the sense that it does not derive its power of living from its mother. It is not material that the child may still be attached to its mother by the umbilical cord: that does not prevent it from having a separate existence. But it is required, before the child can be the victim of murder or of manslaughter or of infanticide, that the child should have an existence separate from and independent of its mother, and that occurs when the child is fully extruded from the mother’s body and is living by virtue of the functioning of its own organs.¹²⁷

The test for whether a child has been born alive thus has two components: first, that the child is fully extruded from the womb of its mother; and second, that it has a separate and independent existence after birth.¹²⁸ It is noteworthy that once separated and existing independently, the child is considered born alive, and there is no condition that it need survive for any specified period of time. Courts have been clear in holding that the ‘born alive rule has never encompassed a requirement of viability in the sense of the physiological ability of a newly born child to survive as a functioning being’.¹²⁹ Therefore, despite the fact that it is doomed and will not survive for any length of time, provided it lives for a moment, a pre-viable child born alive may be the victim of homicide.¹³⁰

Of the two limbs of the test for a child being born alive, the first is relatively straightforward — complete extrusion means ‘completely delivered from the body of its mother’¹³¹ (although the child may still be attached via the umbilical cord)¹³² — but the second limb of the test creates some uncertainty. In particular, the question may be posed as to what constitutes a ‘separate and independent existence in the sense that it does not derive its power of living from its mother’?¹³³ Or, as Spigelman CJ put it in *Iby*, ‘what constitutes “life” for the purposes of the born

¹²⁵ This article will not discuss whether birth is an appropriate point at which to bestow legal personhood, or whether other points of reference, such as foetal viability, are more suitable. For excellent discussion of these issues see Patricia A King, ‘The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn’ (1979) 77 *Michigan Law Review* 1647; Savell, above n 73. King argues that birth should be abandoned as the designator of personhood, and that viability is the more appropriate signifier of legal personality, while Savell persuasively defends the common law position, from both a legal and moral perspective.

¹²⁶ [1953] VLR 338.

¹²⁷ *Ibid* 339.

¹²⁸ See *R v F* (1996) 40 NSWLR 245, 247–8; *R v King* (2003) 59 NSWLR 472, 490; *Iby* (2005) 63 NSWLR 278, 283; *Barrett* (2010) 108 SASR 568, 573–5.

¹²⁹ *Iby* (2005) 63 NSWLR 278, 286 (Spigelman CJ). See also *Barrett* (2010) 108 SASR 568, 574, 579 (White J), 591–2 (Peek J).

¹³⁰ *R v Senior* (1832) 1 Mood 347; 168 ER 1298; *R v West* (1848) 2 C & K 784; 175 ER 329, 330; *Iby* (2005) 63 NSWLR 278, 286–7; *Barrett* (2010) 108 SASR 568, 579 (White J), 591–2 (Peek J).

¹³¹ *R v Hutty* [1953] VLR 338, 339 (Barry J).

¹³² *Ibid*; *Iby* (2005) 63 NSWLR 278, 283.

¹³³ *R v Hutty* [1953] VLR 338, 339.

alive rule?’¹³⁴ The real question is thus an evidentiary one: what physical (and thereby measurable) manifestation would satisfy this test?

In the 19th century the UK courts offered up a number of possibilities as to what particular indicator is required as evidence of ‘life’. For example, in *Handley*¹³⁵ the court felt that a child breathing, and living by reason of its breathing, through its own lungs alone, was indicative of an independent existence from its mother, and was therefore both sufficient and necessary to establish that the child had been born alive.¹³⁶ As noted above, the courts in *C v S* and *Rance* followed the decision in *Handley* in deciding that breathing was required to satisfy the born alive rule, and that therefore the capacity to breathe was essential for a child to be described as capable of being born alive. However, this focus on *Handley* is questionable given that equally authoritative cases prior to *Handley* had explained that this breathing requirement should not be the crucial indicator,¹³⁷ as a child might breathe prior to being fully born,¹³⁸ or not breathe unassisted for some time after birth.¹³⁹

Another early view put forward was that only a child with independent circulation (that is, independent of its mother’s circulation) could be described as having a separate and independent existence.¹⁴⁰ However, this too was soon discarded as the essential condition for establishing independent vitality.¹⁴¹ The issue remained largely unsettled in the UK until the decisions of *C v S* and *Rance* revived the *Handley* principle that breathing was the crucial indicator of life for the purposes of the born alive rule. In Australia courts tended not to place emphasis upon such specific indicators of life, preferring to adopt a broader field of inquiry, exemplified by Barry J’s conclusion that life was indicated by a child ‘living by virtue of the functioning of its own organs’.¹⁴² Two recent higher court decisions have continued this trend, and have arguably settled the issue as to what constitutes a sign of life or vitality for the purposes of satisfying the separate and independent existence test of whether a child has been born alive. Neither of these decisions fixated upon any particular indicator of life, but rather held that any sign of life will suffice.

¹³⁴ (2005) 63 NSWLR 278, 284. See also Atkinson, above n 113, 142, who, at the turn of last century, expressed that question as what “ocular demonstration” of a physiological token of vitality, however curtailed must be exhibited, after a child is born into the world? Atkinson answers that a ‘clear vital act’ (at 142) or ‘a clear sign of independent vitality’ is necessary: at 135.

¹³⁵ (1874) 13 Cox CC 79.

¹³⁶ *Ibid* 80–1 (Brett J).

¹³⁷ See *R v Poulton* (1832) 5 C & P 328; 172 ER 997, 998; *R v Enoch & Pulley* (1833) 5 C & P 539; 172 ER 1089.

¹³⁸ See *R v Poulton* (1832) 5 C & P 328; 172 ER 997; *R v Enoch & Pulley* (1833) 5 C & P 539; 172 ER 1089.

¹³⁹ See *R v Brain* (1834) 172 ER 1272. The recent Australian case of *Iby* came to the same conclusion: (2005) 63 NSWLR 278, 286.

¹⁴⁰ See *R v Enoch & Pulley* (1833) 5 C & P 539; 172 ER 1089; *R v Wright* (1841) 173 ER 1039.

¹⁴¹ See *Brock v Kellock* (1861) 3 Giff 58, 68–9; 66 ER 322, 326 (Lord Stuart); *R v Pritchard* (1901) 17 TLR 310, 311.

¹⁴² *R v Huttly* [1953] VLR 338, 339.

In *Iby*,¹⁴³ the New South Wales Court of Criminal Appeal considered the issue at length prior to reaching a decision.¹⁴⁴ The appellant in this case had been convicted of the manslaughter of a child that issued from its mother at 38 weeks gestation, and the appeal against that conviction was based on the claim that the child had not been born alive; hence, the appellant had not caused the death of a legal person. A particular focus of the appellant's case was the lack of evidence that the child had breathed independently.¹⁴⁵ In delivering the judgment of the Court dismissing the appeal, and holding that the child in question had been born alive, Spigelman CJ held that the second limb of the born alive test — that the child has a separate and independent existence after birth — was really just asking whether, once it was demonstrated that the child was fully extruded, the child actually lived.¹⁴⁶ His Honour felt that this could be shown by 'many overt acts including crying, breathing, heartbeat'¹⁴⁷ and so forth. His Honour also confirmed that breathing was not a necessary condition in this respect (and thereby declined to follow the reasoning in *Handley*),¹⁴⁸ but breathing independently of the mother was sufficient,¹⁴⁹ because 'any sign of life after delivery is sufficient'.¹⁵⁰ Thus, the second limb of the born alive test becomes relatively straightforward as a result of this decision: did the child show *any* sign of life?

In 2010 the Full Court of the South Australian Supreme Court delivered a judgment on the issue that applied this reasoning from *Iby* in the broadest sense. In *Barrett*¹⁵¹ the Court heard an application for judicial review of a decision of the Deputy State Coroner that the Coroner's Court had jurisdiction to conduct an inquest into the death of a newborn infant. The Court was thus asked to determine whether the child had been born alive, as the Coroner's Court would only have such jurisdiction if the child in question was a legal person. In interpreting the common law born alive rule, the Court, consistently with the decision in *Iby*, held that '*any* sign of life after the complete delivery of an infant will be sufficient to satisfy the rule'.¹⁵² The Court decided that even a very faint sign of life, and even in the absence of any other sign of life, was sufficient for the purposes of the born alive rule.¹⁵³ In the facts before the Court, the sign of life held to satisfy the test, and thus constitute a sign of life sufficient for the child to be said to have been born alive,¹⁵⁴ was the presence of a pulseless electrical activity ('PEA') in an infant's heartbeat.

¹⁴³ (2005) 63 NSWLR 278.

¹⁴⁴ For a more in-depth discussion of this aspect of the case see Ian Freckelton, 'The "Born Alive" Rule' (2006) 13 *Journal of Law and Medicine* 285, 285–8.

¹⁴⁵ *Iby* (2005) 63 NSWLR 278, 280.

¹⁴⁶ *Ibid* 284–5.

¹⁴⁷ *Ibid* 285.

¹⁴⁸ *Ibid*.

¹⁴⁹ *Ibid*.

¹⁵⁰ *Ibid* 288.

¹⁵¹ (2010) 108 SASR 568.

¹⁵² *Ibid* 575 (emphasis in original).

¹⁵³ *Ibid* 577.

¹⁵⁴ *Ibid* 602.

This is applying the phrase ‘any sign of life’ quite literally. The facts of the case, expressed by White J,¹⁵⁵ indicate that the child in question was born apparently lifeless, but that when an ambulance crew applied a heart monitor to the child’s body it registered a PEA. Despite attempts at resuscitation, no other signs of life were recorded or observed. There was no heartbeat, no pulse, no breathing, no moving, no crying, and ‘the only possible sign of life was the PEA registered on the heart monitor’.¹⁵⁶ The nature of a PEA is such that it is the weakest indication of heart activity, and is not a heartbeat or pulse as such, but rather an indicator of minor irregular contractions of the heart.¹⁵⁷ The Court held that, despite not being supported by any other indication of life, and despite being short in duration, it was nonetheless ‘an indication of vitality’,¹⁵⁸ and ‘[t]he prospect that death is almost certain does not deprive an indication of life of its effect as a sign of life’.¹⁵⁹

As a result of these two recent decisions on the born alive rule, one may now assert that Australian law recognises that there is no ‘single indicator’¹⁶⁰ or necessary criteria of life, and the test is ‘satisfied by any indicia of independent life’.¹⁶¹ Consequently, a child fully extruded from its mother that shows any sign of life, no matter how faint or fleeting, will have been born alive.¹⁶² This interpretation of the born alive rule is consistent with a literal interpretation of most Australian legislation that defines the attainment of legal personhood,¹⁶³ and with the current World Health Organisation (and South Australian government) definition of ‘live birth’.¹⁶⁴ As stated above, one might reasonably conclude that the matter is now settled, and any sign of life will suffice to constitute being born alive. This raises the question: does the phrase ‘child capable of being born alive’ carry similar connotations?

Returning to the UK decisions of *C v S* and *Rance*, one may state that those cases stand for three legal propositions that logically follow each other:

1. That the phrase ‘child capable of being born alive’ must be interpreted consistently with the born alive rule;

¹⁵⁵ Ibid 570–2.

¹⁵⁶ Ibid 572.

¹⁵⁷ For White J’s discussion of the details of a PEA: *ibid* 576–7. For Peek J’s analysis of the PEA: 580–3. Indeed, it was submitted by counsel that a PEA only indicates a potential for life, but the Court disagreed and decided that it was evidence of actual life: at 577–9 (White J); 588–91 (Peek J).

¹⁵⁸ Ibid 578 (White J).

¹⁵⁹ Ibid 579 (White J). See also identical comments by Peek J: at 591–2.

¹⁶⁰ Ibid 574 (White J). See also *Iby* (2005) 63 NSWLR 278, 284–90.

¹⁶¹ *Iby* (2005) 63 NSWLR 278, 287 (Spigelman CJ).

¹⁶² Ibid 287–8.

¹⁶³ *Criminal Code* (Tas) s 153(4); *Criminal Code* (Qld) s 292; *Criminal Code* (NT) s 1C; *Criminal Code* (WA) s 269. New South Wales and the ACT insist upon the ‘wholly born’ child having breathed before it can be described as a legal person: *Crimes Act 1900* (NSW) s 20; *Crimes Act 1900* (ACT) s 10.

¹⁶⁴ See World Health Organization, *Reproductive Health Indicators: Guidelines for their Generation, Interpretation and Analysis for Global Monitoring* (WHO, 2006) 16; Maternal, Perinatal and Infant Mortality Committee, *Maternal, Perinatal and Infant Mortality in South Australia 2010* (SA Health, Government of South Australia, 2012) 62.

2. That the born alive rule demands that a child be fully extruded from the mother, and be breathing independently (albeit briefly and with no hope of survival), in order to be labelled ‘born alive’; and
3. Accordingly, a foetus in utero that has the capacity to so breathe constitutes a child capable of being born alive, and is thereby protected by the offence of child destruction.

As stated previously, there are no Australian decisions on the phrase or the offence, so we may take these UK decisions as being particularly persuasive authority on how the phrase should be interpreted. However, the recent Australian decisions on the born alive rule — *Iby* and *Barrett* — serve to modify the above propositions as they apply in Australia; namely, proposition ‘2’ is no longer good law in Australia, and Australian common law now holds that a wholly extruded child showing any sign of life (albeit briefly and with no hope of continued survival) will suffice as a child born alive. This determination, in turn, amends proposition ‘3’ to: a foetus in utero that has the capacity, if fully born, to show any sign of life is a child capable of being born alive, and is thereby protected by the offence of child destruction.

What do these legal conclusions mean for the practice of medical abortion in those jurisdictions that retain the offence of child destruction? Put simply, an otherwise lawful medical abortion performed on a foetus that, if fully born, would show *any* sign of life, even for an instant, may constitute the offence of child destruction. As to how many otherwise lawful medical abortions may be caught by the offence of child destruction so enunciated, one must first determine how early in a pregnancy a foetus might be described as a child capable of being born alive. In other words, at what stage of gestation is a foetus likely to show any sign of life if fully born? As will be shown, current data suggests that this may occur at a relatively early stage in gestation, thereby bringing the potential operation of the offence of child destruction into the practice realm of a significant number of medical abortions.

D ‘Any Sign of Life’

There is no question that a viable foetus would satisfy the above definition of a child capable of being born alive, as ‘viability’ self-evidently indicates that such a born child would show signs of life; indeed, would be likely to survive. Although viability is an inherently ambiguous term,¹⁶⁵ the current medical consensus is that it is usually reached sometime between 23 and 24 weeks gestation.¹⁶⁶

Of course, a foetus may also show brief signs of life if fully born at a pre-viable stage. The World Health Organization holds that the beginning of the perinatal period starts at 22 weeks gestation, as this is assumed to be the age at which a foetus is capable of showing signs of life if born.¹⁶⁷ Indeed, it has been

¹⁶⁵ Price, above n 89, 226–31; King, above n 125, 1654, 1678–9; Savell, above n 73, 643.

¹⁶⁶ Noel French, ‘Consensus Statement on Perinatal Care’ (2007) 43 *Journal of Paediatrics and Child Health* 492; VLRC, above n 62, 101.

¹⁶⁷ World Health Organization, above n 164, 25, 29 and 36.

amply demonstrated that signs of life will be evident in a fully born foetus of only 20 weeks gestation.¹⁶⁸ In South Australia, where comprehensive records on both abortion and live births (defined as ‘complete expulsion or extraction from its mother...[and showing after such separation]...any...evidence of life’)¹⁶⁹ are available, in 2010 there were 26 live births of foetuses under 24 weeks gestation,¹⁷⁰ and 11 live births recorded of foetuses that weighed less than 400 grams.¹⁷¹ Given that the mean birth weight of foetuses born at 20 weeks gestation is between 385 grams and 418 grams,¹⁷² it is reasonable to extrapolate that some of these live births would probably have been of foetuses of less than 20 weeks gestation. The Maternal, Perinatal and Infant Mortality Committee of the Government of South Australia consequently presumes that a foetus of 20 weeks gestation is inherently capable of live birth.¹⁷³ One may therefore conclude that the overlap between the offence of child destruction (as defined in this article) and the practice of medical abortion occurs with certainty from 20 weeks gestation. The question presents itself: could this overlap occur even earlier?

In terms of relevant foetal development, although the heart begins to beat as early as 22 days,¹⁷⁴ it is not fully formed until about 10 weeks gestation,¹⁷⁵ and the vasculature or circulatory system is mostly completed at 12 weeks gestation.¹⁷⁶ In terms of brain development, at 16 weeks gestation a template for a recognisable human brain exists.¹⁷⁷ Consequently, it is not surprising that there exist reports that foetuses at 16 weeks gestation have survived birth (albeit briefly).¹⁷⁸ Given that any sign of life will suffice for a child to be described as being born alive, the evidence therefore leads to two conclusions: that a foetus of 20 weeks or more gestation *is capable* of being born alive; and that a foetus of between 16 and 19 weeks gestation *is probably capable* of being born alive. These conclusions have significant repercussions for the practice of medical abortion.

As said at the introduction to this article, medical abortion is permitted in a wide set of circumstances. In some jurisdictions (notably the Northern Territory and Western Australia for present purposes) the criteria for lawful abortion changes at certain points of foetal gestation,¹⁷⁹ but, with the exception of the

¹⁶⁸ J Bhatia, ‘Palliative Care in the Fetus and Newborn’ (2006) 26 (Supp 1) *Journal of Perinatology* 24; P I Macfarlane, S Wood and J Bennett, ‘Non-Viable Delivery at 20–23 Weeks Gestation: Observations and Signs of Life after Birth’ (2003) 88 *Archives of Disease in Childhood Fetal and Neonatal Edition* 199.

¹⁶⁹ Maternal, Perinatal and Infant Mortality Committee, above n 164, 62.

¹⁷⁰ *Ibid* 26.

¹⁷¹ Maternal, Perinatal and Infant Mortality Committee, above n 164, 24.

¹⁷² *Ibid* 82–3.

¹⁷³ *Ibid* 19–20.

¹⁷⁴ William Larsen, *Human Embryology* (Churchill Livingstone, 3rd ed, 2001) 177–9.

¹⁷⁵ *Ibid* 158.

¹⁷⁶ *Ibid* 196.

¹⁷⁷ *Ibid* 420.

¹⁷⁸ See Keown, above n 14, 133.

¹⁷⁹ In the Northern Territory medical abortion is permitted on relatively liberal grounds only up to 14 weeks gestation: *Medical Services Act* (NT) s 11(1)(d). From 14 to 23 weeks gestation an abortion must be ‘immediately necessary to prevent serious harm’ to the pregnant woman: s 11(3). After 23 weeks gestation, an abortion will only be lawful if it is necessary for the sole purpose of preserving the pregnant woman’s life: s 11(4)(a). In Western Australia, medical abortion is lawful on liberal grounds up to 20 weeks gestation: *Health Act 1911* (WA) s 334(7). After 20 weeks, two medical

Northern Territory, it is also the case that all jurisdictions that retain an offence of child destruction simultaneously allow lawful medical abortion, on liberal (but varied) terms, until the foetus is viable.¹⁸⁰ Given the finding that a foetus of 20 weeks gestation is a child capable of being born alive, and a foetus of 16 weeks is probably capable of being born alive, then one would assume that a not insignificant number of medical abortions are legally suspect.

As to exact figures nationwide, it is impossible to state conclusively, as South Australia is the only jurisdiction that publishes sufficiently detailed data on abortions.¹⁸¹ Although less specific data is available elsewhere,¹⁸² it cannot be relied upon to the same extent as the South Australian data.¹⁸³ Nonetheless, it would be reasonable to extrapolate from the South Australian data that broadly comparable figures might be found in most other jurisdictions.¹⁸⁴ In South Australia, approximately 1.8 per cent of all medical abortions that occur per year are performed at or after 20 weeks gestation,¹⁸⁵ and about 6.3 per cent of all medical abortions per year are performed between 15 and 19 weeks gestation.¹⁸⁶ Given previous conclusions, this means that, in South Australia, approximately 90 abortions per year are performed upon a child capable of being born alive (that is, a foetus of at least 20 weeks gestation), and approximately 320 abortions per year are performed on a child that is probably capable of being born alive (that is, a foetus of between 15 and 19 weeks gestation).¹⁸⁷ As stated above, it is not unreasonable to assume that most other jurisdictions would present with broadly equivalent figures. To state the obvious: the potential ramifications of the offence of child destruction to the practice of medical abortion are significant.

III Conclusion

If Australian courts were to follow the UK courts, and interpret the phrase ‘a child capable of being born alive’ consistently with the born alive rule, which in

practitioners, who are members of a panel of at least six medical practitioners (nominated by the Minister), must agree that the ‘mother, or the unborn child, has a severe medical condition that justifies the procedure’: *Health Act 1911* (WA) s 334(7)(a). The procedure must be performed in an approved facility for it to be considered lawful: s 334(7)(b).

¹⁸⁰ For a discussion of the varied time constraints in each jurisdiction, see Douglas, above n 6; Bennett, above n 6; Rankin, above n 6.

¹⁸¹ The Australian Capital Territory, New South Wales, the Northern Territory, Victoria and Western Australia also collect data concerning abortions, but do not regularly publish such data: Pratt et al, above n 11, 7.

¹⁸² For example, the Health Insurance Commission publishes data concerning certain items under the Medicare Benefits Schedule (‘MBS’) that may indicate an abortion has been performed. This data suggests that approximately 74 000 abortions are performed every year in Australia. However, this data is unpredictable as the items counted under the MBS often do not actually result in an abortion, and the Medicare data necessarily excludes any privately funded abortions. Furthermore, such data only indicates the total number of abortions, and not the gestational age of the foetus: *ibid* 3–6.

¹⁸³ *Ibid* 7, 9–10.

¹⁸⁴ *Ibid*; Petersen, above n 7, 356.

¹⁸⁵ Scheil et al, above n 11, 11, 54. Comparable figures have been found in previous years: see Chan et al, *Pregnancy Outcome in South Australia 2008* (Pregnancy Outcome Unit, SA Health, Government of South Australia, 2009) 11.

¹⁸⁶ Scheil et al, above n 11, 11, 54. Also see Chan et al, above n 185, 11.

¹⁸⁷ *Ibid*.

Australia is currently satisfied upon any sign of life, then there is clear overlap between the practice of medical abortion and the offence of child destruction.¹⁸⁸ Although most abortions are performed prior to the second trimester of pregnancy,¹⁸⁹ many abortions are performed in the second trimester,¹⁹⁰ which is the period during which the foetus might be said to be capable of exhibiting demonstrable signs of life if delivered during that gestational stage. In those jurisdictions that retain the offence of child destruction, such second trimester medical abortions may constitute that offence, leaving the medical practitioners who perform them 'vulnerable to criminal liability'.¹⁹¹

Of course, this conclusion presupposes two legal steps being satisfied: first, that the jurisdictions of the Australian Capital Territory, the Northern Territory, Queensland and Western Australia possess an offence of child destruction that not only protects a child in relation to childbirth or imminent delivery, but also a foetus that may be described as a child capable of being born alive (in South Australia, where the provision is based on the UK model, the phrase is expressly utilised in the legislation, so there is no doubt that this step is satisfied), second, Australian courts would determine the phrase 'child capable of being born alive' in the context of the born alive rule, resulting in a foetus capable of showing any sign of life if fully born being a child capable of being born alive for the purposes of the offence of child destruction.

There is no Australian case law directly on point, so no determinative assessment may be made of whether either of the above two legal preconditions would be met. However, this lack of an authoritative determination means that the possibility exists that the above presumptions represent an accurate statement of the law currently operating in the Australian Capital Territory, the Northern Territory, Queensland, South Australia, and Western Australia. In South Australia, where the relevant legislation is practically identical to the *1929 UK Act*, it might be said that the interpretation suggested above is probably correct. In the other jurisdictions mentioned one may only state categorically that the suggested interpretation is possible. However, in Queensland and Western Australia that possibility has been brought into sharper focus by comments made by the judiciary in those states consistent with the above stated presumptions.¹⁹² In any case, the important conclusion is that there exists a possibility that certain otherwise lawful medical abortions may be unlawful as they constitute the offence of child destruction. This is irrefutable: such a possibility exists. In those jurisdictions that retain the offence of child destruction it thus becomes unclear as to what actually constitutes a lawful medical abortion.¹⁹³

¹⁸⁸ See VLRC, above n 62, 7, 96–103.

¹⁸⁹ In 2010, 91.9 per cent of abortions in South Australia were performed prior to 14 weeks gestation: Scheil et al, above n 11, 11, 54. In 2008, 92.7 per cent of abortions in South Australia were performed prior to 14 weeks gestation: Chan et al, above n 185, 11.

¹⁹⁰ Scheil et al, above n 11, 11, 54; Chan et al, above n 185, 11.

¹⁹¹ VLRC, above n 62, 7.

¹⁹² See *Martin v The Queen (No 2)* (1996) 86 A Crim R 133, 138–9; *Bayliss* (1986) 9 Qld Lawyer Reps 8, 34–7.

¹⁹³ See VLRC, above n 62, 7.

The existence of an offence of child destruction thereby creates confusion, ‘unnecessary complexity’,¹⁹⁴ and inherent legal ambiguity with respect to the practice of medical abortion.¹⁹⁵ The offence remains entirely open to interpretation;¹⁹⁶ thus while the offence exists there is potential to utilise it to charge medical practitioners for performing otherwise lawful abortions.¹⁹⁷ There is obviously a case for reform, if only in the interests of achieving legal clarity and certainty. Only two jurisdictions, Tasmania and Victoria, have attempted to do so. For reasons already highlighted, the Tasmanian response should not be followed. Rather, the Victorian approach of simply abolishing the offence of child destruction is the reform template that other jurisdictions should adopt.

The major policy argument¹⁹⁸ against such reform may be that put forward by some members of the House of Lords in creating the offence of child destruction in the UK in 1929: that without the offence there is a ‘lacuna in the law’.¹⁹⁹ However, it is questionable whether abolishing the offence of child destruction would create such a gap in the law,²⁰⁰ as it is feasible that the offences of unlawful abortion and homicide sufficiently cover the field in this respect. To put the argument simply: as no person exists until born alive, the applicable charges should be unlawful abortion prior to birth, and murder, manslaughter or infanticide once the child is born alive. In effect, the offence of unlawful abortion protects the potential legal person, while the offence of homicide covers the actual legal person. In deciding the appropriate charge, a court need only determine whether or not the victim in question had been born alive for the purposes of the law; if so, then it may be homicide and, if not, then the appropriate charge should be unlawful abortion. This argument that there is no gap in the law is supported by the fact that prosecutions are extremely rare: it is an offence almost entirely unutilised.²⁰¹ If there is no gap in the law, then the crime of child destruction is superfluous to needs, and only serves to create uncertainty and needless legal complexity.²⁰²

¹⁹⁴ Ibid.

¹⁹⁵ Ibid 100–5.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid 105.

¹⁹⁸ There may exist additional policy arguments in favour of maintaining an offence of child destruction. For example, maintaining both offences of unlawful abortion and child destruction may be desirable in order to grant courts varied sentencing options. In the Northern Territory, Queensland and Western Australia, the penalty for child destruction is life imprisonment: *Criminal Code* (NT) s 170; *Criminal Code* (Qld) s 313; *Criminal Code* (WA) s 290. The penalty for unlawful abortion is seven years imprisonment in the Northern Territory: *Criminal Code* (NT) s 208B; 14 years imprisonment in Queensland: *Criminal Code* (Qld) s 224; in Western Australia the penalty for unlawful abortion is A\$50 000 if the defendant is a medical practitioner: *Criminal Code* (WA) s 199(2), and five years’ imprisonment if the defendant is not a medical practitioner: *Criminal Code* (WA) s 199(3).

¹⁹⁹ *Rance* [1991] 1 QB 587, 620 (Brooke J).

²⁰⁰ This was a point recognised by Lord Atkin at the time the original Bill was debated: *Parliamentary Debates*, above n 14, col 272. The VLRC adopted this view in its analysis of the offence of child destruction: VLRC, above n 62, 98–100.

²⁰¹ VLRC, above n 62, 106–9; Finlay, above n 50, 74–80.

²⁰² VLRC, above n 62, 7, 103.

On the other hand, one cannot ignore the reality that, in all jurisdictions other than South Australia,²⁰³ the elements of the offences of unlawful abortion and child destruction differ in one crucial respect: to obtain a conviction for unlawful abortion it is essential that the defendant intended to terminate the pregnancy in question,²⁰⁴ whereas such an intention is not necessarily an element of the offence of child destruction. This distinction may, in certain circumstances, be quite significant. For example, a defendant who physically assaults a pregnant woman, with the unintended result that the pregnancy is terminated, cannot be convicted of unlawful abortion, but may be convicted of child destruction. This assault example suggests that retaining the offence of child destruction meets a need of the criminal law. However, the fact that only one conviction for child destruction has ever been recorded in Australia suggests that this need must be negligible,²⁰⁵ and given the potential legal issues associated with maintaining the offence within a legal regime that otherwise allows for medical abortion, it therefore remains preferable to abolish the offence of child destruction and leave this need unmet. In any case, there exists an alternative, other than preserving an offence of child destruction, which would satisfactorily encompass the above assault scenario: simply define 'harm', for the purposes of an assault on a woman, as including the loss of her pregnancy.

This option was raised in the 2003 case of *R v King*,²⁰⁶ in which the respondent had been charged under the *Crimes Act 1900* (NSW) s 33 with the intentional infliction of grievous bodily harm. The respondent had assaulted a pregnant woman, kicking and stomping on her stomach when she was approximately 24 weeks pregnant, and had thereby caused the loss of her pregnancy.²⁰⁷ The question before the court was whether causing the death of the foetus might constitute grievous bodily harm to the mother.²⁰⁸ Chief Justice Spigelman, in delivering the judgment of the court, held that such action did constitute grievous bodily harm to the mother (at least for the purposes of s 33), as the foetus should be considered part of the mother.²⁰⁹

In accordance with the reasoning of this decision, the New South Wales legislature subsequently passed the *Crimes Amendment (Grievous Bodily Harm) Act 2005* (NSW),²¹⁰ which amended the *Crimes Act 1900* (NSW) such that s 4(1)(a) now defines 'grievous bodily harm' as the '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'. Thus, for the purposes of the various

²⁰³ In South Australia, the elements for unlawful abortion and child destruction are identical, except child destruction only applies to a child capable of being born alive: *Criminal Law Consolidation Act 1935* (SA) ss 81–2, 82A(7)–(9).

²⁰⁴ *Criminal Code* (NT) s 208B(1)(b); *Criminal Code* (Qld) s 224; *Criminal Code* (WA) s 199(5).

²⁰⁵ Finlay, above n 50, 74–9. In his comprehensive study of the offence throughout Australia, Finlay found seven instances of charges being laid, but cites the decision of *Molo* (Unreported, Supreme Court of Queensland, 10 December 1999) as being the only recorded conviction.

²⁰⁶ (2003) 59 NSWLR 472.

²⁰⁷ *Ibid* 474.

²⁰⁸ *Ibid* 479.

²⁰⁹ *Ibid* 479–91.

²¹⁰ For a discussion of this amendment see Savell, above n 73, 658–60; VLRC, above n 62, 106–7.

assault provisions,²¹¹ and the dangerous driving occasioning grievous bodily harm provision,²¹² the destruction of the foetus constitutes grievous bodily harm to the mother.

The obvious benefit of the above approach is that it results in a satisfactory reconciliation between allowing medical abortion (that is, medical terminations of pregnancy are expressly excluded from the above definition of grievous bodily harm), protecting (pregnant) women from assault, and appropriately acknowledging the death of the foetus 'through the persona of the person most responsible for actualising their personhood'.²¹³ Indeed, defining harm to the pregnant woman in this way effectively protects the foetus from conception.²¹⁴ Of course, this arrangement of the various interests is predicated upon there being no offence of child destruction in New South Wales. The advantages of this system were realised by the Victorian Parliament in 2008, when it simultaneously abolished the offence of child destruction²¹⁵ and amended the definition of 'serious injury' under the *Crimes Act 1958* (Vic) s 15 so that 'serious injury 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'.²¹⁶

Due to the dearth of case law or legislative clarification on the subject, many of the conclusions reached within this article may be described as speculative; however, the necessity of such conjecture serves to highlight one of the major problems with retaining the offence of child destruction: it is an untested area of the criminal law, and thus manifestly creates legal ambiguity. The uncertainty as to what actually constitutes the offence of child destruction flows into the practice of medical abortion. If it is unclear whether or not a particular medical abortion may constitute the offence of child destruction, then it is equally unclear whether or not a particular medical abortion may be described as lawful. This state of affairs is completely unsatisfactory and demands legislative reform. This is achieved most effectively by the concurrent abolition of the offence of child destruction, with the expansion of the definition of serious or grievous bodily harm to a (pregnant) woman to include the destruction of the foetus, other than in the course of a medical procedure.

²¹¹ See, eg. *Crimes Act 1900* (NSW) ss 33, 33A, 35, 35A, 39, 54, 59.

²¹² *Ibid* s 52A.

²¹³ Savell, above n 73, 660.

²¹⁴ *Ibid* 658–9.

²¹⁵ *Abortion Law Reform Act 2008* (Vic) s 9 (repealing *Crimes Act 1958* (Vic) s 10).

²¹⁶ *Crimes Act 1958* (Vic) s 15 (as amended by *Abortion Law Reform Act 2008* (Vic) s 10(2)).