CRIMES AMENDMENT (ZOE’S LAW) BILL 2013 (NO 2): PARADOXICAL COMMERCIAL IMPACTS OF THE CONSERVATIVE AGENDA ON FETAL RIGHTS

In 2013, Liberal MP Chris Spence introduced a Private Member’s Bill to the New South Wales Parliament, reinvigorating an earlier Bill introduced by Christian Democrat MP Fred Nile. If passed, the Bill would have bestowed legal personhood on fetuses of 20 weeks or more for the purpose of grievous bodily harm offences in the Crimes Act 1900 (NSW). The Bill had the potential to undermine freedom of choice for women in relation to abortions prior to the point of viability (capacity for fetal existence outside the womb) as well as other decisions concerning pregnancy and childbirth. One hypothesis is that legislative measures such as this that support the rights of the fetus are well intentioned initiatives by those for whom the fetus is an essentially independent entity or symbol of innocence and moral purity whose existence must be protected over and above the interests and independent decision-making capacity of the mother. This column explores this hypothesis in the context of the paradoxical negative commercial implications of such legislation on multiple areas involving fetal-maternal interaction including surrogacy.

INTRODUCTION

In November 2014, the 55th Parliament of New South Wales saw the defeat by lapsing in the upper house of the Crimes Amendment (Zoe’s Law) Bill (No 2) 2013 (NSW) (Zoe’s Law), a Bill that would have declared unborn children “legal persons”, and might have resulted in restrictions on abortion. The lower house passed the Bill in a conscience vote (63 votes to 26 on 21 November 2013), but the upper house delayed debating it against a backdrop of mounting controversy.

Originally introduced as a Private Member’s Bill to the New South Wales Legislative Council by the Christian Democrat MP Reverend Fred Nile, and later in the Legislative Assembly by Liberal MP Chris Spence, Zoe’s Law was named after the unborn daughter of Brodie Donegan, Zoe, who died at 32 weeks’ gestation after Ms Donegan was hit by a drug-affected driver while walking on Christmas Day 2009. Ms Donegan’s legal representatives had argued the law failed to fully account for the death of her child in sentencing the driver, who was given a nine-month prison term. Zoe’s Law sought to grant legal status to the unborn child in order to facilitate compensation and/or punishment.

Schedule 1 of Zoe’s Law proposed the following amendment to the Crimes Act 1900 (NSW):

41AA Harm to or destruction of child in utero

(1) A person who engages in any conduct that causes serious harm to or the destruction of a child in utero, being reckless as to whether the conduct causes serious harm to any person, is guilty of an offence. Maximum penalty: Imprisonment for 10 years.

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This section does not apply:
(a) to anything done in the course of a medical procedure, or
(b) to anything done by or with the consent of the mother of the child in utero.

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

In this section:
child in utero means the prenatal offspring of a woman.

Section 52A Dangerous driving: substantive matters
Insert after section 52A(7):
(7A) Protection of child in utero
A reference in this section and in section 52AA to the death of a person, or grievous bodily harm to a person, includes a reference to the destruction of, or serious harm to, a child in utero.

In practical terms, the amendment would have recognised the independent legal rights of a class of victim currently unrecognised in Australian law as having a legal personality. Specifically, it sought to give legal personality to fetuses older than 20 weeks or weighing over 400 grams. This would enable the Director of Public Prosecutions to bring a criminal claim in a New South Wales court against a person who had caused the fetus harm. Although provision is made for acts done by or with the consent of the pregnant mother, serious concern has nevertheless been raised in relation to the Bill’s potential to provide the first step on a road to the erosion of women’s reproductive rights.

ZOE’S LAW IN CONTEXT: FETAL RIGHTS IN AUSTRALIA AND THE UNITED KINGDOM

New South Wales is not the only Australian State legislature to grapple with the question of fetal legal personality. The common law had recognised that a fetus prior to viability did not have independent legal existence, but once born alive those rights crystallised and the child could sue for damage that occurred while it was a fetus. This left grey areas where, for example, a fetus was killed in utero and perpetrators of the crime seemed inadequately punished.

One of the problems, of course, is that the perpetrator could be a doctor performing an abortion (including one for severe fetal abnormality or to save the life of the mother, or where the mother had been raped) and not just the driver of an automobile or initiator of a violent crime. Legislative reforms to give rights to the fetus have been proposed in other Australian States. By way of example, the Queensland Police Union’s submission to the 2013 Queensland Child Protection Inquiry argued for strengthening the Child Protection Act 1999 (Qld) to protect unborn children, in particular proposing that provisions clarifying that the law is not intended to infringe upon rights or liberties of pregnant women be abolished, empowering authorities to overrule the decisions of medically competent women where those decisions may deleteriously affect their unborn child.

The compromise of allowing the fetus to sue once it is born and becomes a child is not without its own difficulties. In November 2014, a United Kingdom Court of Appeal in CP (A Child) v First-tier Tribunal (Criminal Injuries Compensation) unanimously ruled that a mother who inflicted lifelong damage on her child after drinking heavily (half a bottle of vodka and eight cans of strong lager a day) during her pregnancy did not commit a criminal offence that could be prosecuted on behalf of the child.

5 Faruqi M, “Premier Baird’s Call for Zoe’s Law Will Further Threaten a Woman’s Right to Choose” (Media Release, 23 October 2014).
7 Child Protection Act 1999 (Qld), s 21A(5).
Medical law reporter

The claim was brought by a local authority in the north-west of England which cares for the young girl, now seven, who is suffering from fetal alcohol spectrum disorder. The council argued that the girl, known as CP, was entitled to payments from the Criminal Injuries Compensation Authority because her mother had damaged the child by drinking alcohol to excess, despite knowledge of the potential harmful consequence to the child of doing so. The authority declined to compensate on the grounds that there had been no crime of violence.

The case revolved around s 23 of the Offences Against the Person Act 1861 (UK), which created the offence of poisoning and requires the victim to be “another person”. The three judges – Dyson, Treacy and King LJJ – agreed that for the purposes of the law the unborn baby was a “unique organism” but not a person who had separate personality known to law. As many as 80 other claims on behalf of children suffering from fetal alcohol spectrum disorder had been awaiting the outcome of the case.

The British Pregnancy Advisory Service had opposed the potential criminalisation of expectant mothers, arguing that it would inevitably deter some of those who needed support with addiction from disclosing their condition or contacting health professionals during pregnancy. It might even result in some women feeling compelled to terminate their pregnancy, rather than continue and face potential sanctions. The Conservative MP Fiona Bruce stated “the only loser in this case is the child who has been denied compensation to help with her care costs”.

The maternal-fetal conflict: implications for women of recognising separate fetal legal personality

Recognition of fetal personhood of the type proposed by legislative measures such as Zoe’s Law and cases such as CP (A Child) v First-tier Tribunal (Criminal Injuries Compensation) is opposed by the New South Wales Bar Association, the New South Wales branch of the Australian Medical Association, Women’s Legal Services NSW, the Public Health Association of America, and the American Congress of Obstetricians and Gynaecologists, among others. This opposition is based primarily on the impact of such a law on the autonomy and wellbeing of pregnant women, especially those who are disadvantaged and vulnerable.

Recognition of fetal moral status might have the effect of preventing all abortions that did not pose medical risk to the mother. Such a result would be inconsistent with existing law in many Australian jurisdictions. The law might go even further, rendering the sufferer of an accidental miscarriage criminally liable for murder or manslaughter. In addition to these problems, it should be emphasised that reform to this area of law would impose obligations upon and restrict the liberty of women who have fallen pregnant. It is seriously questionable that legal restriction of freedoms with such specific application could coexist with Australia’s human rights obligations.

Although it is difficult to predict with any accuracy the eventual extent of the effects the passing of legislation like Zoe’s Law would have upon Australian women, some instruction is available

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8 CP (A Child) v First-tier Tribunal (Criminal Injuries Compensation) [2014] EWCA Civ 1554.
9 CP (A Child) v First-tier Tribunal (Criminal Injuries Compensation) [2014] EWCA Civ 1554.
10 CP (A Child) v First-tier Tribunal (Criminal Injuries Compensation) [2014] EWCA Civ 1554.
12 Letter from Women’s Legal Services NSW to the Premier, New South Wales (18 November 2014).
14 See, for example, Crimest (Abolition of Offence of Abortion) Act 2002 (ACT); Abortion Law Reform Act 2008 (Vic).
15 See, for example, Lynch v Lynch [1992] 3 Med LR 62; Bonte v Bonte 616 A 2d 464 (NH, 1992); Dobson v Dobson [1999] 2 SCR 753 for policy analysis of imposing maternal liability.
through the lens of the American experience. Thirty-eight State jurisdictions in the United States have laws criminalising fetal homicide, many of which in creating the offence of “feticide” give unborn children legal rights of their own. This has created the counterintuitive circumstance where the rights of the women carrying these infants are infringed, and not only are prohibitions on particular kinds of conduct imposed upon them, but so are positive duties. In theory, many of these laws apply even to women who may not know that they are pregnant, so not only are two entities – mother and child – competing for rights in one body, but by extension, recognition of fetal rights creates a legal obligation for all fertile women to know at all times whether or not they are pregnant, and to modify their behaviour and decision-making accordingly.17

A comprehensive survey of United States cases in which pregnant women were deprived of their physical liberty because their behaviour might be considered a threat to the wellbeing of their fetus, for instance, found 413 cases between 1973 and 2005.18 The researchers thought they had underestimated the number of cases because it was difficult to identify them.19 In 86% of the cases (354), women were charged with criminal offences, the majority (295) of which were punishable by more than one year in prison. As well as being arrested and jailed, they underwent forced medical interventions including caesarean sections, forced bed rest, drug and alcohol treatments, and in-hospital detention for drug addiction or mental illness.20

The authors note that, in most cases, efforts to deprive the women of their liberty “occurred through use of existing criminal statutes intended for other purposes”,21 and 71% involved disadvantaged, poor women.22 They conclude that “personhood measures would not only provide a basis for recriminalising abortion, but would also provide grounds for depriving pregnant women of their liberty”.23

Any law that raises the possibility of criminal liability for maternal choices that may be considered to contravene the interests of the fetus, such as refusing a recommended medical intervention, could well be viewed as detrimental both to women and the broader interests of the public in social ideals of health care. In seeking to protect pregnant women by creating a second set of rights that are not necessarily mutually inclusive, proposed legislation such as Zoe’s Law fails to recognise and respect that women have the right to autonomy, bodily integrity and informed consent. Consequently, they pose a serious challenge not only for women but for all patients who value their personal medical sovereignty.

Laws recognising fetal personhood also have more practical implications. Criminalising and enforcing medical intervention for drug addiction and mental illness deters pregnant women with the conditions from seeking antenatal care, and may lead to worse health outcomes. Given that these sorts of effects are seen disproportionately in populations of vulnerable and disadvantaged women, proponents often fail to appreciate how they potentially increase health and social inequality.

The only certain thing about the consequences of fetal personhood on women’s rights in pregnancy and childbirth, and for abortion, is that those rights would be eroded to some degree. Clearly, only significant benefits can justify taking such a serious risk in recognising separate fetal legal personality. What, then, is the core argument for the conferral of this new set of rights? The obvious rationale is the uncontroversial good of enhanced protections for vulnerable infants. However,

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18 Paltrow and Flavin, n 13 at 304.
19 Paltrow and Flavin, n 13 at 322.
20 Paltrow and Flavin, n 13 at 321.
21 Paltrow and Flavin, n 13 at 311.
22 Paltrow and Flavin, n 13 at 335.
this aim might easily be achieved through, for example, increasing the penalties available for the existing offence of grievous bodily harm; so it must be greater than this alone.

THE POLITICAL CONTEXT FOR BALANCING FETAL AND MATERNAL INTERESTS

Lawyers with a limited appreciation of the political dynamics that shape legal developments tend to view the question of whether the fetus is capable of possessing moral status as one that can best be dealt with in an abstracted system of reasoning. Thus, it is argued, the common law accepts that a child’s rights crystallise upon live birth, at which point the child may bring an action for prenatal harm suffered. This has seemed to many to be an adequate compromise. It remains controversial whether a fetus is a person with accompanying rights and interests, and if so, at what point of pregnancy personhood is attained. It has been suggested that fetal legal rights should be recognised as a means to protect the interests of the “subsequently born child”. But this argument fails to circumvent the problem of the indivisibility of mother and baby, especially where threats to fetal rights are posed by its mother. In addition, the currently recognised crystallisation of personhood at birth depends on the mother’s decision to carry to term. It thus seems counterintuitive that the expected live birth of the fetus itself gives rise to prenatal personhood capable of competition with that of the mother, particularly in the arbitrary terms contemplated by Zoe’s Law.

Even if the fetus is considered a person, the rights of all are “equal and inalienable”. Fetal personhood at its fullest can therefore be no greater than that of its mother. At such an impasse, the “deciding vote” must surely be given to the party possessing not only the capacity for decision-making and articulation thereof, but also parental rights to consent on the child’s behalf. Indeed the practical choices of continuation of pregnancy and presentation of the fetus to medical professionals for care.

While it is arguably reasonable (and has been ordered by foreign courts) to allow intervention in the form of forced, medically necessary, caesarean sections, it seems less so to suggest that pregnant women must be legally obliged to, for example, avoid “permitted-smoking” areas in order to discharge some duty owed to the fetus. If any intervention is justifiable, there must be a turning point at which the undesirability of contravening fetal “rights” or risking fetal harm exceeds the undesirability of infringement of the mother’s autonomy to such an extent that the interests of the baby should be given legal primacy over the mother’s interest in medical self-determination.

At this point the argument focuses on the point at which the state should step in. Must the fetus’ life be at risk or is it merely sufficient that the subsequent child suffer any slight medical burden? Should a mother refuse medical treatment, must her motivation be religious belief, or is a fear of needles enough to preserve her autonomy at the expense of satisfying a duty to the fetus? It should also be remembered that, in a medical context, such prioritisation of fetal interests over the wishes of

24 Crimes Act 1900 (NSW), s 4.
29 Crimes Amendment (Zoe’s Law) Bill 2013 (No 2) (NSW), s 8A.
31 See, for example, Harrison v Stephens (2004) 59 NSWLR 694.
33 Rodrigues et al, n 28 at 220.
35 Walsh, n 4.
the mother breaches the doctrine of consent, a foundational pillar of medical ethics. Risk of harm to the fetus must therefore be significant and outweigh adverse consequences suffered by the mother, if it can ever be considered to render interference of the state in the personal liberty, physical integrity and right to consent of pregnant women legally permissible.

The recognition of fetal rights correspondingly is presented as a moral slippery slope. The argument is steered towards the perspective that while prima facie constituting a moral and social good enabling enhanced protection for vulnerable infants, it can also be seen as a tool to erode women’s rights and autonomy.

But might it not be that at least one hitherto largely unexplored dimension of the fetal rights debate is about the conservative side of politics showing it has a strong moral stance on something? For example, in an oligarchy of political and corporate leaders with the power to advocate and implement policies that withdraw financial support for babies and mothers in terms of public education and public health expenditure, while allowing large corporations to avoid tax and while spending the bulk of the budget buying military fighter aircraft or submarines with a questionable role in protecting fetal, child and maternal health, it might be very useful to have an issue where the oligarchy can be seen in public to champion some strong moral position, particularly where the issue is unlikely to conflict with other interests.

Perhaps it may seem that business interests may not be impeded by advocating fetal rights. Yet, this may not be quite the case. Advocates who support initiatives such as Zoe’s Law may also paradoxically be supporting a heavily restrictive approach to, for example, the nascent commercial industry of assisted reproductive technology. This possibility is explored below.

THE BUSINESS OF BABIES: COMMERCIAL ASSISTED REPRODUCTION IN AUSTRALIA

A large and very profitable industry is emerging around remuneration for fertility services above reasonable incurred expenses. For many infertile couples, assisted reproduction technologies render it possible and realistic to “buy a baby”. Aspects of this industry include the sale of either gametes or embryos, infertility treatments, embryo creation and storage and commercial surrogacy.

The existing law is complex, but does not unduly restrict growing commercial opportunities in this sector. Australian law recognises a property interest in bodily samples, including blood, urine, and histology. Likewise, property interests in gametes exist, in favour of the producer of the gametes. However, they cannot be bought and sold, and any contracts contravening that prohibition are void. They are thus property but not commodities, with conceptual status somewhere along the middle of the “property to person” spectrum. Similarly, courts recognise property rights in embryos to enhance donors’ rights of control of use, but not for profit or gain.

58 See, for example, Human Tissue Act 1982 (Vic).
59 See, for example, Human Tissue Act 1983 (NSW).
They may be donated altruistically but not be subject to commercial sale. Generally, sperm and oocyte donors are considered not to have parental rights or obligations, unless the ovum donor performs traditional surrogacy, as the birth mother of a child is considered its parent regardless of any lack of biological relationship. Health risks are associated with these procedures, particularly to egg donors who risk death, serious injury and future infertility, and surrogate mothers face an expanded range of pregnancy-related risk. More concerning is the risk of exploitation, and certainly horror stories of human rights abuses abound.

Commercial surrogacy (creation of a fetus that is brought to term in a uterus that is not biologically related to that of the fetus) is prohibited in Australia. Reproductive tourism to secure such surrogacy is criminalised in the Australian Capital Territory, New South Wales and Queensland. Altruistic surrogacy is permitted, but is subject to intense scrutiny to establish genuine altruistic motivation, and all parties are required to submit to police checks and counselling. Further restrictions are also imposed; Victoria, for example, limits eligibility to clinically infertile applicants, while South Australia precludes singles, homosexual couples and short-term heterosexual couples pursuing surrogacy, although such limitations constitute unlawful discrimination under the Sex Discrimination Act 1984 (Cth).

Many of the arguments around supporting the burgeoning commercialisation of reproductive services focus on the supposed facts that these procedures are now scientifically possible, readily accessible and would-be parents would in any event circumvent Australian law to procure them. It is not difficult to do so: no international regulations exist, enabling engagement in reproductive tourism.

However, while potential for exploitation exists, commercial reproduction is not in itself fundamentally exploitative. Rather, this depends upon treatment of donors and surrogates, procurement of informed consent, and fairness of compensation, all matters dealt with through implementation of a thorough legislative scheme. Problems with exploitation are largely a consequence of global economic inequality, with unregulated trade operating in countries with undefined legal frameworks, whose governments subsidise the industry due to its profitability, which would not be the case in Australia.

Commercial dealings in gametes, embryos and pregnancy inevitably engender an expectation of the right to income and capital. This affects personal fertility treatment, but also has a significant impact on genetic and fertility research. The already limited number of altruistic donations that are crucial in enabling continued scientific study would erode, increasing costs of research and decreasing

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49 Status of Children Act 1974 (NSW).
55 Surrogacy Act 2010 (NSW).
56 Assisted Reproductive Treatment Act 2008 (Vic).
60 Davis, n 53.
61 Drabiak et al, n 52.
62 Ramskold and Posner, n 37.
output. However, this loss would likely be ameliorated given the profits recouped through a domestic assisted reproduction technologies market.

CONCLUSION: FETAL RIGHTS AND COMMERCIAL PROSPECTS

Perhaps there is a move towards a position where widening human sympathy will incorporate legally enforceable rights for animals and ecosystems through adult human guardians. Could such a system also work to protect fetal rights in utero – the mother or some significant other being legally appointed the guardian of the fetus? Such a legal development could be welcomed as coherent with the capacity of a legal system in tune with fundamental harmonics of existence to respect the interests of all life. Yet, this avenue of law reform may not be a dominant focus of those championing fetal rights. Bolstering the social authority of religious or corporate ideologies could well be more central to the motivations of such fetal rights advocates.

The commercialisation of human reproduction at first glance appears opposed on basic ethical principles to the concept of recognising fetal personality. The idea of making a fetus to make money seems to conflict with many well-established and conservatively supported religious and ethical canons and doctrines. Manipulation of human building blocks to create children is said to eliminate the distinctive humanity of reproduction, positing, in turn, diminished respect for human life and dignity, and progressing dangerously close to slavery and human trafficking. But what distinguishes commercial initiatives that acquire profit from the sale of fertility from those that similarly benefit the sale of a public health service, or the sale of a tertiary education sector or other assets development and maintained with public funds for the public good? The answer, paradoxically, is “not much”. The willingness of the conservative-corporate alliance to support fetal rights runs into a quandary when it confronts the growing opportunity for large-scale commercial profits in the reproductive sector.

The very recognition of fetal personhood necessarily renders any transactions enabling would-be parents to access assisted reproduction technology services in pursuit of starting or growing a family subject to blanket prohibition by law, except in very limited circumstances. The “pro-life” position naively adopted by many proponents of laws like Zoe’s Law thus, by implication, stands in direct tension with a major ideal that often characterises the policy positions of political leaders comfortable with turning the social contract over to control by corporate entities predicated on greed and shareholder profit. Such leaders often ostentatiously support fetal rights.

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65 Cohen, ibid.
66 Ramskold and Posner, n 37.