Submission of

New South Wales Council for Civil Liberties

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The University of New South Wales Council for Civil Liberties

to the

New South Wales Attorney General's

Review of the Law of Manslaughter in New South Wales

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1. Executive Summary

1.1 Manslaughter generally

The law of manslaughter is inextricably linked to murder. The mental element of murder – and by implication manslaughter – is complicated and controversial. Any attempt to codify manslaughter should proceed, therefore, from a thorough examination of both forms of unlawful homicide.

Before a scheme of categories of manslaughter is introduced in NSW, the Councils recommend that a more detailed inquiry be held to examine unlawful homicide. Such an inquiry could, among other things, review the adverse effect of the 1997 changes to the partial defence of substantial impairment, and examine ways to correct the unfair treatment by the law of manslaughter of those with lower than average intelligence.

Manslaughter covers a broad range of conduct and moral culpability. It ranges from the mere accident right up to murder. For this reason the Councils believe that manslaughter is not suited to the scheduling of minimum sentences. Even if a scheme of categories of manslaughter is devised, the range of conduct and criminal liability *within* each category will vary widely and be unsuited to a single standard non-parole period.

1.2 Manslaughter and the foetus

It is important in any discussion on this topic to employ neutral language. A foetus is not an 'unborn child' and should not be referred to as such by the law.

1.2.1 recognising the foetus as a legal person

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

If the legal definition of personhood was extended to include the foetus, then the law would recognise mother and foetus as two distinct legal persons. This leads inevitably to a conflict of rights between mother and foetus and the policing of pregnancy to ensure that the mother does nothing to harm the foetus in any way.

In the United States pregnant mothers considered a danger to the foetus have been detained until the birth of their child. Pregnant mothers have been charged with child abuse of the foetus, assault of the foetus, delivering prohibited drugs to the foetus via the umbilical cord, and even child neglect of the foetus for failing to follow medical advice and for continuing to have sexual intercourse.

If the foetus is a legal person, then will a pregnant woman be charged for the motor manslaughter of her own foetus? Will pregnant women be prohibited from playing sport etc. in order to ensure that the foetus is not endangered? How will this impact on young inexperienced mothers who do not necessarily know what will endanger the foetus?

If a foetus is to be granted personhood, then how will this affect Australia's treaty obligations under the *Convention on the Rights of the Child*? Will a foetus accrue all the rights of a child under that Convention?

What would be the impact on civil law? Will a father be able to sue a mother if she chose to terminate her pregnancy? Will the father be able to sue the doctor who performs the operation? Will a court be able to issue a writ of *habeas corpus* for the foetus, forcing a non-consenting mother to submit to an immediate caesarean birth?

1.2.2 knowledge of pregnancy

Any offence relating to the harm of a foetus must involve full knowledge on the part of the accused that the foetus exists. To hold a person criminally liable for conduct that they might very well have altered, had they been in full possession of the facts, is harsh in the extreme.

There is a big difference in terms of moral culpability between a person who holds a knife to a pregnant woman's stomach and says "I'm going to kill your baby", and the person who substantially contributes to the loss of a foetus by inadvertently knocking over a pregnant woman whom they never realised was pregnant in the first place.

The Councils believe that the prosecution must prove that the accused knew that the mother was pregnant in any such offence.

1.2.3 Child Destruction

The usual way at law to deal with the destruction of a viable foetus is to prosecute for child destruction. New South Wales does not currently have such an offence.

Such an offence should not be introduced unless it explicitly exempts lawful abortion, the pregnant mother acting lawfully, acts done to preserve the life of the mother or foetus, and any kind of legitimate medical procedure carried out in a competent manner.

The offence should require full intent to destroy the life of a foetus capable of being born alive. Recklessness is not sufficient *mens rea* for this offence. If it were sufficient *mens rea* then issues of policing pregnancy would again arise to ensure that the conduct of the mother did not harm the foetus.

In order to maintain the neutral language of the law, the Councils suggest that the Attorney General refer to this offence as "foeticide".

2. Manslaughter Generally

2.1 Murder and manslaughter

Manslaughter in New South Wales, as in most jurisdictions, is defined as all unlawful killing that is not murder.[1] This means that murder and manslaughter are inextricably linked. Any attempt to codify manslaughter should proceed, therefore, from a thorough examination of both forms of unlawful homicide.

[1] *Crimes Act* 1900 (NSW) s 18(1)(b)

2.1.1 mental element of unlawful homicide

The physical elements of homicide are identical for both murder and manslaughter.[2] The two offences differ only in their mental element – reflecting the degree of moral culpability of the accused.

The mental elements of murder and manslaughter differ between jurisdictions. The following table summarises how different Australian jurisdictions differentiate between murder and the lesser offence of manslaughter.

mental element	NSW [3]	common law (SA, Vic.) [4]	ACT [5]	Tas. [6]	other codes (Qld, WA, NT) [7]
intent to cause death	*murder*	*murder*	*murder*	*murder*	*murder*
knowledge of probability of causing death[8]	*murder*	*murder*	*murder*	*murder*	*silent*
intent to inflict GBH[9]	*murder*	*murder*	*manslaughter*	*murder*	*murder*
knowledge of probability of inflicting GBH	*manslaughter*	*murder*	*manslaughter*	*murder*	*silent*

New South Wales is unique in defining murder as intent to cause death or grievous bodily harm and recklessness as to death, while considering recklessness as to causing grievous bodily harm manslaughter.

2.1.2 recent reform proposals

Recent proposals for law reform of unlawful homicide have differed in their formulation of the mental element.

In the table below the recommendations of the Victorian Law Reform Commission (VLRC)[10], the draft Model Criminal Code (MCC)[11] and the English Law Commission (LC)[12] are compared with the existing law in NSW and with Australian common law.[13]

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[2] a voluntary act (or omission) causing the death of a living human being. See "two legal definitions of life" on page 10 for more information.

[3] *Crimes Act* 1900 (NSW) s 18(1)(a) (intention to cause death or GBH and recklessness as to death). The phrase "reckless indifference to human life" is interpreted as meaning recklessness as to death only, so recklessness as to GBH is manslaughter in NSW: *Royall v R* (1990) 172 CLR 378

[4] *Pemble v R* (1971) 124 CLR 107; *Crabbe v R* (1985) 156 CLR 464

[5] *Crimes Act* 1900 (ACT) ss 12(1)(a) & 12 (1)(b)

[6] *Criminal Code* 1924 (Tas) ss 157(1)(a) (intent to kill), 157(1)(b) (intent to cause GBH) & 157(1)(c) (recklessness)

[7] *Criminal Code* 1899 (Qld) s 302(1)(a); *Criminal Code* 1913 (WA) ss 278 ('wilful murder'=intent to cause death) & 279 (intent to cause GBH); *Criminal Code* 1983 (NT) s162(1)(a). These codes are silent on the question of recklessness. The question of whether recklessness constitutes murder or manslaughter in these jurisdictions is still open: see Draft Model Criminal Code, note 11 at 57.

[8] "recklessness" is knowledge, or subjective foresight, on the part of the accused of the probability that their conduct will result in death or grievous bodily harm: *Crabbe* (1985) 156 CLR 464 per Gibbs CJ, Wilson, Brennan, Deane & Dawson JJ

[9] GBH stands for "grievous bodily harm"

[10] Law Reform Commission of Victoria, *Homicide*, Report No. 40, 1991: recommendations 14 (abolish murder based on intent to cause GBH) & 18 (abolish murder based on recklessness as to GBH)

[11] Model Criminal Code Officers Committee, *Discussion Paper, Model Criminal Code – Chapter 5: Fatal Offences Against the Person*, June 1998: at 53 (intent to cause GBH is not murder) & at 59 (recklessness as to GBH is

mental element	VLRC & MCC	LC	NSW	common law
intent to cause death	*murder*	*murder*	*murder*	*murder*
knowledge of probability of death	*murder*	*manslaughter*	*murder*	*murder*
intent to cause GBH	*manslaughter*	*murder*	*murder*	*murder*
knowledge of probability of GBH	*manslaughter*	*manslaughter*	*manslaughter*	*murder*

It is worth noting that, with only one change to the legal definition of murder, the law in New South Wales could be made to comply with the Australian or the English reform proposals or Australian common law.

2.1.3 conclusion

As can be seen from the tabular summaries above, the question of the mental element of murder – and by implication manslaughter – is complicated and by no means settled. It illustrates "the very difficult nature of drawing the perimeters of moral culpability for murder and manslaughter".[14]

The Councils for Civil Liberties recommend that manslaughter not be codified in NSW until a thorough review of unlawful homicide, examining the mental elements of both murder and manslaughter, has been conducted by a body such as the NSW Law Reform Commission.

Such a review should include public consultation and examine such complex issues as:

- whether the murder and manslaughter offences of the Draft Model Criminal Code should be adopted in New South Wales;[15]
- whether separate offences of child destruction and corporate killing should be introduced in New South Wales;
- repealing the offence (and defence) of infanticide;[16]
- abolishing constructive murder;[17]

not murder). Note: MCCOC has still not released their final report on this chapter and so this part of the Model Criminal Code remains at the draft stage.

[12] The Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter*, No. 237, 1996: recommendation 2 (introduction of the offence of 'reckless killing')

[13] Both of the Australian reform proposals distinguish murder from manslaughter by the *type of harm*, i.e. defining murder as intent or recklessness as to causing *death* and defining manslaughter as intent or recklessness as to inflicting *grievous bodily harm* (that substantially contributes to the death: *R v Smith* [1959] 2 QB 35 per Lord Parker CJ; *Hallett v R* [1969] SASR 141 per Bray CJ, Bright & Mitchell JJ). The English proposal, on the other hand, distinguishes murder from manslaughter by the *state of mind* of the accused, i.e. *intending* to cause death or grievous bodily harm is defined as murder, while *recklessness* as to causing death or grievous bodily harm attracts a charge of manslaughter.

[14] Yeo, Stanley, *Fault in Homicide*, Federation Press, Sydney, 1997 at 60

[15] 5.1.9 (murder), 5.1.10 (manslaughter) and 5.1.11 (dangerous conduct causing death)

[16] this was recommended by the NSWLRC in *Partial Defences to Murder: Provocation and Infanticide*, Report 83, October 1997 at §3.16 & (more generally) at 107-133. The defence was to be subsumed by the partial defence of diminished responsibility (substantial impairment). Abolition was also recommended by the Model Criminal Code Officers Committee (MCCOC): note 11 at 139.

- reformulating the offence of involuntary manslaughter;[18]
- introduction of adherence to aboriginal customary law as a partial defence to murder;[19] and
- addressing existing problems with the law of manslaughter, specifically:
    - the harsh impact of the 1997 changes to substantial impairment;
    - the capacity of a person to advert to risk; and,
    - the different legal definitions of life.

2.2 Codifying manslaughter

Despite our recommendation that the codification of manslaughter should form part of a thorough review of all unlawful homicide, if the Attorney-General intends to proceed with codifying manslaughter, then careful examination of the different categories of manslaughter should be undertaken.

The Councils have identified eight types of manslaughter[20] recognised in different Australian and other common law jurisdictions:

1. voluntary manslaughter
2. manslaughter by reckless infliction of grievous bodily harm
3. manslaughter by dangerous and unlawful act
4. manslaughter by gross negligence
5. motor manslaughter
6. corporate manslaughter
7. infanticide
8. child destruction[21]

The remainder of this section addresses issues we believe the Attorney-General should bear in mind when codifying manslaughter in the *Crimes Act*.

2.2.1 voluntary manslaughter

When a defendant possesses the full mental element for murder but also has a (partial) excuse, he or she is guilty of manslaughter rather than murder. This is known as voluntary manslaughter. The most common partial defences to murder are provocation,[22] excessive self-defence,[23] substantial impairment[24] and infanticide.[25]

While the draft Model Criminal Code effectively recommended the abolition of this form of manslaughter,[26] the Councils for Civil Liberties, supporting the traditional view that

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[17] this has been recommended by, *inter alia*, the MCCOC (note 11 at 65) and the Victorian Law Reform Commission (note 10, recommendation 19).
[18] see "manslaughter by gross negligence" on page 8 below.
[19] this was recommended by the Australian Law Reform Commission: *The Recognition of Australian Customary Laws*, Report #31, Vol.1 at 323. It was also recommended by the Victorian Law Reform Commission: note 10, recommendation 30 at 100. This proposal was rejected by the MCCOC, which recommended the abolition of all partial defences: note 11 at 143.
[20] a ninth type – battery manslaughter – has been abolished by the High Court of Australia: *Wilson v R* (1992) 174 CLR 313.
[21] the offence of child destruction, which is not enacted in NSW, is discussed later: see "Child Destruction" on page 19.
[22] *Crimes Act* 1900 (NSW) s 23
[23] *Crimes Act* 1900 (NSW) s 421
[24] *Crimes Act* 1900 (NSW) s 23A (also known as *diminished responsibility* in other jurisdictions)
[25] *Crimes Act* 1900 (NSW) s 22A
[26] Model Criminal Code, note 11 at 117-143

partial defences to murder are a concession to human frailty, do not recommend this course of action.

2.2.2 involuntary manslaughter

2.2.2.1 manslaughter by dangerous and unlawful act

This is one of two common law offences of involuntary manslaughter. It is also known as constructive manslaughter because it is constructed on the lesser "offence" of committing a dangerous and unlawful act.

As a constructive offence, this category of manslaughter bears no relationship to the guilty state of mind of the accused. Constructive criminal liability violates the fundamental legal principle of correspondence between the mental element and the consequence of an offence.[27] In Canada some constructive offences have been held to be a violation of fundamental rights.[28]

2.2.2.2 manslaughter by gross negligence

The second common law offence of involuntary manslaughter is gross negligence, also known as criminal negligence. It involves a very high degree of negligence, much higher than the civil standard.[29]

The legal test is fully objective.[30] One important failure of this objective test is that it does not take into account the capacity of the accused to advert to the risk of death or grievous bodily harm,[31] leading to injustice for defendants of lower than average intelligence.[32] This results in a grave injustice for people with severe intellectual disabilities.

2.2.2.3 recent reform proposals

The Model Criminal Code,[33] the Victorian Law Reform Commission[34] and the English Law Commission[35] have all recommended that the two common law offences of involuntary manslaughter be abolished and replaced by one statutory offence based on criminal negligence. It should be noted that the High Court of Australia has recommended caution in any statutory attempt to combine these two offences.[36]

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[27] Yeo, note 14 at 44-5 & 59

[28] for example, the Canadian Supreme Court held that constructive murder is inconsistent with the Canadian Charter of Rights' constitutional guarantees to the presumption of innocence (s 11(d)) and the right not to be deprived of liberty except in accordance with 'the principles of fundamental justice' (s 7): *Vaillancourt* [1987] 2 SCR 636 per Dickson CJ & Estey, Lamer & Wilson JJ. In short, if one does not have the *mens rea* for an offence, then one ought not to be prosecuted for that offence.

[29] *Andrews v DPP* [1937] AC 576

[30] the conduct of the accused: (1) amounted to a great falling short of the standard of care which a reasonable person would have exercised; and (2) involved a high risk that death or GBH would ensue: *Nydam v R* [1977] VR 430 per Young CJ, McInerney & Crockett JJ

[31] as was the case for the intellectually disabled accused in *Stone & Dobinson v R* [1977] 1 QB 354

[32] see "harsh effect on those of less than average intelligence" on page 10.

[33] note 11 at 149 & 155 (offence of 'dangerous conduct causing death')

[34] note 10, recommendation 33 (replaced by offence of 'dangerous act or omission manslaughter'), 34 (objective 'reasonable person' test for gross breach of duty) & 35 (defence of physical and mental deficiency)

[35] note 12, recommendations 3 & 4 (offence of 'killing by gross carelessness' with a reasonable person test and requirement that defendant is capable of appreciating the risk)

[36] *Wilson v R* (1992) 174 CLR 313 per Mason CJ, Toohey, Gaudron & McHugh JJ. Their Honours noted that manslaughter by criminal negligence does not require proof of an unlawful act, and that the test for dangerousness involves a *risk that death or GBH would follow* (*Nydam*) while the test for dangerousness in

The Attorney-General should examine these reform proposals carefully. The following important factors should be considered:

- the statutory abolition of constructive manslaughter because it punishes the defendant for manslaughter when he or she does not possess the necessary mental element; and
- requiring that the defendant be capable of appreciating the risk associated with their conduct.

2.2.3 corporate manslaughter

In common law jurisdictions the conviction of corporations for manslaughter is a difficult process.[37] Prosecutions are rare and convictions almost non-existent.[38] It has been argued that a separate offence of corporate manslaughter might help to correct this problem in much the same way as the introduction of a separate offence of motor manslaughter addressed the problem of jury perceptions of reckless drivers who kill.[39]

Under the Model Criminal Code corporations can be prosecuted for all offences, including murder.[40] The English Law Commission recently proposed the introduction of a separate offence of corporate killing.[41]

The ACT Parliament currently has a government-sponsored Bill[42] before it to introduce an offence of "industrial manslaughter" with penalties including a $250,000 fine, an order to publicise the defendant's wrongdoing and something similar to a community service order (CSO) to undertake a stated project for community benefit. The total cost of all fines and orders must not exceed $5,000,000.[43]

There is no separate offence of corporate manslaughter in NSW. However, the prosecution of a corporation for manslaughter – and conceivably for murder – is technically possible with a maximum fine of $220,000.[44]

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manslaughter by dangerous & unlawful act involves an *appreciable risk of serious injury* (*Wilson*). Though their Honours did not mention it, it should also be noted that the test for negligent manslaughter is purely objective, while the test for dangerous act manslaughter is a reasonable person (objective) in the accused's position (subjective).

[37] English Law Commission: note 12, especially at 4-9 & 67-125. More generally: "5.9 Corporate Homicide" in Brown D, Farrier D, Egger S & McNamara L, *Criminal Laws: Material and Commentary on Criminal Law and Process in New South Wales*, 3rd edition, Federation Press, Sydney, 2001 at 562-9

[38] Brown (et al.) report that in 1992 Civil & Civic were charged with manslaughter, but the Victorian DPP later dropped the charges: Brown et al, note 37 at 564. Brown (et al.) also report that, in Victoria in 1994, Denbo Pty Ltd pleaded guilty to a charge of manslaughter & was fined $120,000 [*Denbo Pty Ltd & Nadenbousch* (unreported, VSC, 14 June 1994)]: Brown et al, note 37 at 564. Perhaps the most (in)famous of prosecutions involves the English case of the *Herald of Free Enterprise*: English Law Commission, note 12 at 5-6 & 114-6; Brown et al, note 37 at 565-7.

[39] Model Criminal Code, note 11 at 9-10; Brown et al, note 37 at 569. Note: the Victorian Law Reform Commission found that the problem was a procedural and not a substantive one: note 10, §21 at 11-12.

[40] note 11 at 9-11; also, Part 2.5 (Corporate Criminal Responsibility) of the Model Criminal Code. The ACT has recently passed legislation implementing the criminal liability chapter of the Model Criminal Code that includes corporate prosecution for crimes (Part 2.5): *Criminal Code* 2002 (ACT), effective immediately for all new offences enacted after 1 January 2003, and effective from 1 January 2006 for existing offences.

[41] note 12, recommendation 11

[42] *Crimes (Industrial Manslaughter) Amendment Bill* 2002 (ACT)

[43] *Crimes (Industrial Manslaughter) Amendment Bill* 2002 (ACT) s 49E(5)

[44] *inter alia* the Supreme Court, Court of Criminal Appeal and District Court can impose a fine, not exceeding 2000 penalty units, on a 'body corporate' where an offence has a sentence of imprisonment only: *Crimes (Sentencing Procedure) Act* 1999 (NSW) s 16. A similar legislative regime exists in Victoria, where the Law Reform Commission recommended a maximum fine of $500,000 for corporate manslaughter and an unlimited amount for corporate murder: note 10, recommendations 41 & 42.

The Attorney-General should consider carefully how to codify this offence in NSW. Possibilities include:

- creating a new and separate offence of corporate manslaughter; or
- introducing a fine as a penalty for each category of manslaughter.[45]

To avoid the difficulties associated with the prosecution of corporations for manslaughter, the Councils for Civil Liberties encourage the Attorney-General to consider recommending the introduction of a separate offence of corporate manslaughter.

2.3 Problems with the existing law of manslaughter

The Attorney-General should take the opportunity of this review, especially with regards to the potential introduction of a structured statutory scheme of manslaughter offences, to correct any existing problems with the law of manslaughter. Following are a few significant suggestions.

2.3.1 substantial impairment

There is an urgent need to review the impact of the 1997 statutory changes to the partial defence of diminished responsibility.[46] The new statutory offence has unjustly and harshly impacted on defendants.

The Councils are aware of one recent murder case in which a woman, affected by drugs at the time, stabbed a man who died of his injuries. The defendant was left with no choice other than to plead guilty to murder, when, in the circumstances of the case, diminished responsibility ought to have been available to reduce murder to manslaughter.

2.3.2 harsh effect on those of less than average intelligence

The legal tests for involuntary manslaughter unjustly hold the intellectually disabled to the objective standard of care of the 'reasonable' person.[47] Someone who is incapable of appreciating that their conduct is endangering the life of another is obviously not as morally culpable as someone who can advert to the risk but who fails to advert.

The law of manslaughter should be reformed to take account of the defendant's capacity to advert.

The English Law Commission has recommended such a reform to the English law of involuntary manslaughter.[48]

2.3.3 two legal definitions of life

For the purposes of all homicide in NSW death is defined as the irreversible cessation either of all brain function or of all circulation of the blood.[49]

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[45] a fine would make it implicitly clear that a corporation can be prosecuted for each offence: *Crimes Act* 1900 (NSW) s 24 (penalty for manslaughter). It might also be possible to include an unlimited fine for murder: s 19A. Note: any fine expressly inserted in the *Crimes Act* will override the default maximum of 2000 penalty units: *Crimes (Sentencing Procedure) Act* 1999 (NSW) s 16.

[46] *Crimes Act* 1900 (NSW) s 23A

[47] see "manslaughter by gross negligence" on page 8.

[48] note 12, recommendation 4. See also §§4.20-4.22 of the Law Commission's report.

[49] *Human Tissue Act* 1983 (NSW) s 33

However, the definition of life in New South Wales currently differs for the offences of murder and manslaughter.

In the case of murder, the definition comes from statute: a child is held to have been born alive if it has breathed and been wholly born into the world, whether with or without an independent circulation.[50]

In the case of manslaughter, the definition comes from the common law: a child is held to have been born alive once it is "fully extruded from the mother's body and is living by virtue of the functioning of its own organs".[51]

While the Councils for Civil Liberties have no preference for either definition of life, the Councils recommend that, in the interest of simplifying the law, the Attorney-General consider adopting the same legal definition of life for both murder and manslaughter.

The Attorney-General might find it useful to examine the Model Criminal Code's definition of life, which closely follows the common law definition.[52]

2.4 Minimum Sentencing

2.4.1 manslaughter not suited to minimum sentencing

The offence of manslaughter covers a wide range of moral culpability. As Lord Lane CJ noted: "…[manslaughter] ranges in its gravity from the borders of murder right down to those of accidental death".[53] The general public and the popular press rarely seem to appreciate the large range of culpability that may exist between different incidents of manslaughter, as well as murder, offences.

To illustrate this range of criminal liability: at one extreme we have the car driver who is blinded by the glare of the sun just long enough to lose control of his or her vehicle and kill a pedestrian.[54] At the other extreme we have a drunk speeding motorist who loses control of his or her vehicle and kills a pedestrian. The result is the same, but the moral culpability is very different.

This broad range of criminal liability means that it makes no sense to nominate a single standard non-parole period for all of manslaughter.

Furthermore, it makes no sense to schedule a minimum sentence for each of the eight categories of manslaughter[55] for two main reasons:

1. because within each category of manslaughter a similar broad range of moral culpability exists, from mere accident to something resembling murder; and

[50] *Crimes Act* 1900 (NSW) s 20 (child murder)
[51] *Hutty* [1953] VLR 338 per Barry J
[52] note 11, s 5.1.5
[53] *Walker* (1992) 13 Cr App R (S) 474 at 476
[54] the defence of automatism (or involuntariness) would be available to this driver in these circumstances.
[55] see "Codifying manslaughter" on page 7.

2. because any attempt to rank the different categories by moral culpability would be purely arbitrary. For example, is motor manslaughter more serious than infanticide?

The Councils believe that a grid system of sentencing is not suited to an offence with such a large range of moral culpability.

2.4.2 sentencing policy

The general public and popular media frequently fail to understand the complexities involved in the determination of manslaughter sentencing policy.

Sentencing judges, who at the time of sentencing are in possession of all the facts of an individual case, currently have a wide discretion when sentencing offenders found guilty of a manslaughter offence, commensurate with the wide range of culpability of different offenders.

While judicial adherence to standard non-parole periods is not strictly mandatory,[56] the existence of such provisions runs against the principle, fundamental to the rule of law, that each case should be judged on its own facts and that sentencing reflect those facts.

A codified manslaughter regime, when combined with minimum sentencing legislation, poses a threat to this judicial discretion.

2.4.3 political interference

A codified manslaughter regime, when combined with minimum sentencing legislation, hands further control over sentencing to the political arm of government. The Councils for Civil Liberties are concerned that such a transfer of power, over offence categories and associated minimum penalties, could be cynically manipulated for electoral advantage. As such, sentencing policy could be dictated by considerations other than those of community protection, retribution and rehabilitation.

Finally, it is also a principle of the separation of powers that sentencing, including the setting of non-parole periods, is a judicial, rather than an executive or parliamentary, function.[57] The scheduling of minimum sentences would appear to violate this principle.

2.4.4 conclusion

In the interests of justice, not revenge on the accused, the Councils for Civil Liberties strongly recommend that there be no standard non-parole period scheduled for any category of manslaughter.

If, however, standard non-parole periods are to be introduced for manslaughter offences, then they should not differentiate between public officials and the public at large.[58] All citizens are equally entitled to life and liberty. The killing of all citizens is equally

[56] *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 (NSW) s 54B(2)
[57] see, for example, *R v Secretary of State, ex parte Venables* [1997] 3 All ER 97 at 147f per Lord Steyn. Of course, this point should be read in the light of the High Court's decision that the *Constitution Act* 1902 (NSW) does not entrench a separation of powers in NSW: *Kable v DPP (NSW)* (1996) 189 CLR 51.
[58] this is effectively what was achieved by the division of the offence of murder into two categories in the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 (NSW): one attracting a standard non-parole period of 25 years for the murder of public officials; and the other attracting 20 years for the murder of all other citizens.

reprehensible and the attachment of increased value to the lives of some members of the community over others should not be a feature of the criminal law.

3. Manslaughter and the foetus

3.1 A foetus is not a child

From the outset the Councils for Civil Liberties believe it is extremely important that this discussion use neutral terminology. This ensures that the language employed does not serve any one ideological agenda.

The law, therefore, should not refer to an "unborn child" because the description is neither accurate nor neutral.

As Professor Glanville Williams has noted:

> …it is legally incorrect to suppose that an 'unborn child' is a child. A woman who claimed a social security benefit on account of her 'child', without mentioning that it was unborn, would get into trouble.[59]

Other illustrations of the difference between foetus and child will be discussed in due course.

3.2 Legal personhood

At a more general level, the difference between a foetus and a child is found in the legal definition of personhood. This is highly significant in the law of homicide because a victim of murder or manslaughter must be a legal person before they can be killed. [60]

It has long been a principle of the criminal law that life begins at birth.[61] The suggestion to alter the existing law of manslaughter to encompass the killing of a foetus means altering the legal definition of personhood such that it commences at some point *prior* to birth.

Granting legal personhood to the foetus raises many difficult legal issues. Many of them arise from the attempt to treat the foetus as a legal entity separate from the mother, when in fact they exist in a symbiotic relationship.

3.2.1 conflict of rights: mother v foetus

The treatment of a foetus and its mother as separate legal entities will result in a conflict of rights between mother and foetus. This will inevitably lead to questions of whose rights should prevail.[62]

In the United States, where attempts have been made to recognise the foetus as a legal person distinct from the mother, this has resulted in the **policing of pregnancy**. For example, there have been attempts to prosecute pregnant mothers for:[63]

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[59] Glanville Williams, *The Fetus and the "Right to Life"*, (1994) 53(1) Cambridge Law Journal 71 at 73
[60] *Crimes Act* 1900 (NSW) s 20: legal definition of life. See also "two legal definitions of life" on page 10.
[61] the law of manslaughter in NSW recognises the common law definition of life from *Hutty v R* [1953] VLR 338: see "two legal definitions of life" on page 10.
[62] When Canadian courts examined the right to life guaranteed under the constitutional Charter of Freedoms, the Saskatchewan Court of Appeal held that such a right does not apply to a foetus: *Borowski v. Canada (Attorney General)* (1987) 33 C.C.C. (3d) 402 . On appeal, the Supreme Court of Canada left this question open: *Borowski v. Canada (Attorney General)* [1987] 1 S.C.R. 342..
[63] the US examples in this section are taken from: The Center for Reproductive Law & Policy, *Part I. Punishing Women for their Behavior During Pregnancy: An Approach That Undermines Women's Health and Children's*

- child abuse for methamphetamine use during pregnancy;[64]
- aggravated child abuse for cocaine use during pregnancy;[65]
- child abuse for drinking alcohol during pregnancy;[66]
- delivering drugs to a minor via the umbilical cord;[67]
- assault with a deadly weapon ("Crack" cocaine) and delivery of a controlled substance to a minor (i.e. the foetus);[68]and
- homicide when child of a drug-using mother died at birth.[69]

One pregnant mother was even charged with a criminal child support offence for "failing to follow doctor's advice to get bed rest, to abstain from sexual intercourse, and to seek prompt medical attention when she experienced bleeding".[70]

An attempt was made to civilly commit a pregnant mother because she was a danger to an "other" person (i.e. the foetus).[71] Some juvenile courts in the US have declared the foetus a "dependent child" and ordered the mother *detained* until the birth.[72]

These examples serve to illustrate the legal chaos that would accompany the inclusion of the foetus in the definition of legal personhood. They also demonstrate how these charges are used to target and punish the disadvantaged in society.

3.2.2 involuntary manslaughter

Any change to the definition of legal personhood could severely restrict the lifestyle of pregnant mothers. For example, could a mother be prosecuted for the manslaughter of her foetus if she was engaged in some risk-taking activity at the time, e.g. playing sport, rock climbing, etc.?

Mothers of lower than average intelligence might also be held to the standard of care of the 'reasonable' person, even if they are unable to advert to any risk to the foetus from their conduct.[73]

The Model Criminal Code cautioned against the introduction of gross negligence as a mental element of the offence of child destruction because it could adversely impact on

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Interests, New York: Center for Reproductive Law & Policy, 1996. Available at: http://www.drugpolicy.org/library/womrepro.cfm.

[64] *Sherriff v Encoe*, 885 P.2d 596, 598 (Nev. 1994) (charges dismissed). The judge held that to find otherwise would "open the floodgates to prosecution of pregnant women who ingest such things as alcohol, nicotine, and a range of miscellaneous, otherwise legal, toxins").

[65] *State of Florida v Gethers* 585 So. 2d 1140; 1991 Fla. App. LEXIS 9143; 16 Fla. L. Weekly D 2434 (4 October 1991, FL Ct. App.) (dismisses appeal of lower court dismissal of charges)

[66] *State v. Pfannenstiel*, No. 1-90-8CR (Wyo. Cty. Ct. Albany Cty. Jan. 5, 1990)

[67] *Johnson v. State*, 602 So. 2d 1288; 1992 Fla. LEXIS 1296; 17 Fla. L. Weekly S 473 (23 July 1992, FL Sup. Ct.) (overturned in this Supreme Court appeal)

[68] *State v Inzar*, Nos. 90CRS6960, 90CRS6961 (N.C. Super. Ct. Robeson Cty. Apr. 9, 1991) (charges dismissed)

[69] *People v. Jones*, No. 93-5, Reporter's Transcript (Cal. Juv. Ct. Siskiyou Cty. July 28, 1993) (dismissed)

[70] *People v. Stewart*, No. M508197, Reporter's Transcript, at 4 (Cal. Mun. Ct. San Diego Cty. Feb. 26, 1987) quoted in *Punishing Women for their Behaviour During Pregnancy*, note 63 at footnote 11

[71] *Addington v Texas*, 441 US. 418, 431-34 (1979)

[72] *In re Steven S.*, 178 Cal. Rptr. 525, 527-28 (1981) (state appeal court later overruled the decision). In Wisconsin the Court of Appeal upheld juvenile court's jurisdiction in this area: *State ex rel. Angela v Kruzicki*, 541 N.W.2d 482 (Wis. Ct. App. 1995) (state supreme court later overruled decision: *State ex rel. Angela v Kruzicki*, 561 N.W.2d 729 (22 April 1997)).

[73] this is similar to the issue in *Stone & Dobinson*: see note 31 above.

inexperienced or ignorant mothers who inadvertently do something that causes the death of the foetus.[74] The same caution rings true when applied to the "involuntary manslaughter" of a foetus.

Finally, what would happen to a mother who was engaged in a dangerous and unlawful act (e.g. assault) that incidentally contributed to the non-viability of her foetus? Would she be charged with constructive manslaughter?

3.2.3 motor manslaughter

It is the understanding of the Councils for Civil Liberties that this part of the review was prompted by tragic events in which an unborn child was killed in a motor accident allegedly caused by a grossly negligent driver.

Motor manslaughter is an offence of strict liability in NSW.[75] This means that if anyone is killed as a result of the conduct of a dangerous driver, then the driver will be held criminally liable for the death.

While a dangerous driver could reasonably be held to realise that his or her conduct might endanger the lives of others, to suggest that a driver should consider that he or she might be endangering the lives of the unborn is a far more remote proposition.

Unless he or she has prior knowledge, there is no way that a driver of a motor vehicle could know that an occupant of another vehicle is pregnant. If his or her dangerous driving destroyed the viability of the foetus, then imposing criminal liability on such a driver, who never intended to kill a foetus, is extremely harsh.

The loss of a foetus due to dangerous driving is a tragedy, but such an offender should not be punished for destroying a foetus that he or she could not possibly have known existed at the time.

More disturbingly, could a pregnant mother be charged with the motor manslaughter of her own foetus? A mother would be devastated by the loss of her foetus and also suffering from any personal injuries sustained in the accident. If manslaughter of a foetus becomes a chargeable offence, then the mother might be further punished by having to endure a trial and possible imprisonment.

3.2.4 lawful abortion

An overlap between manslaughter and abortion would exist if the current proposal went ahead. This would lead to uncertainty in the law. For example, if a woman chose to self-abort, could she be charged with manslaughter? Even if a statutory exemption for mothers was enacted, what would happen to her boyfriend who agreed to help the mother self-abort?

The defence of necessity is used to provide for lawful abortion.[76] Would the defence of necessity be available to a mother who procured a termination and was subsequently charged with manslaughter of the foetus? What about the medical staff who performed the operation?

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[74] note 11 at 195

[75] *Crimes Act* 1900 (NSW) s 52A

[76] *CES v Superclinics (Australia) Pty Ltd* [1995] 38 NSWLR 47 per Kirby P & Priestley JA (Meagher JA dissenting), adopting the *Wald* test: "to preserve the [mother] from serious danger to [her] life, or physical or mental health which the continuance of the pregnancy would entail".

If changing the definition of legal personhood were to allow a prosecution for murder of the foetus, then such a charge could be brought in the circumstances of an abortion. The famous criminal case of *Dudley & Stevens* stands for the legal principle that necessity is no defence to murder.[77] This means that necessity might not be a defence to a charge of murder of the foetus. Such a charge could be used to circumvent the practice of lawful abortion and to deprive the mother of her right to health.

3.2.5 pregnancy: a licence to kill?

Another consequence of treating mother and child as two separate legal entities would be to give a pregnant woman licence to murder. How do you treat a defendant who, when attacked by a pregnant woman, kicks or punches her stomach in self-defence, incidentally damaging the viability of the foetus? Is this really manslaughter of the foetus? On the other hand, to treat this as a case of the mother endangering the foetus is to embark on the dangerous path of policing pregnancy in order to ensure the safety of the foetus from its own mother.

Another related scenario from the United States involves a pregnant woman who premeditated the murder of her boyfriend. The defendant claimed that the victim had threatened to punch her in the stomach and that she was just acting in defence of her unborn children (she claimed to have been carrying quadruplets at the time).[78]

3.2.6 an alternative offence

A possible alternative to prosecuting someone for the manslaughter of a foetus, would be to introduce an offence of deliberately, knowingly and intentionally assaulting a pregnant woman.

Such an offence attracts a high degree of moral culpability. It is drafted in terms of the mother rather than the foetus, thereby avoiding the problems associated with treating the foetus as a legal person.

3.2.7 impact on civil law

If the newfound legal personhood of the foetus were to find its way into the civil law, then the possibilities for litigation would be almost endless. Could a father sue a mother if she chose to terminate her pregnancy? Could a father sue the doctor who performed the abortion? Could the courts issue a writ of *habeas corpus* for the person of the foetus, forcing the mother, without her consent, to undergo a caesarean?

Other legal implications flow from recognising the foetus as a legal person. For example, would the foetal 'child' fall within Australia's international obligations under the *Convention on the Rights of the Child*?

3.2.8 conclusion

The Councils for Civil Liberties believe that while a foetus is a potential human being, its rights should not prevail over those of the mother. If the foetus' rights are to prevail over its mother's, then the reproductive rights of women will be severely reduced by the

[77] *Dudley & Stephens* (1884) 14 QDB 273 per Lord Coleridge CJ

[78] *People v Kurr* (4 October 2002) 253 Mich. App. 317; 654 N.W.2d 651; 2002 Mich. App. LEXIS 1380. NOTE: Supreme Court of Michigan denied an appeal of her conviction: *People v Kurr* (22 January 2003) Mich. Lexis 35

criminal law and the criminal law will effectively treat mothers as incubators, rather than human beings with dignity.

The usual way to deal with the killing of an unborn child is by charging the offender with child destruction. This offence is currently not available in NSW. It is discussed in detail below.[79]

In short: the law does not recognise the personhood of the foetus for good reason. The example of the United States demonstrates that treating the foetus as a legal person is fraught with uncertainty and litigation.

The Councils for Civil Liberties do not recommend that the legal definition of personhood be changed to begin at any point prior to birth.

The Councils for Civil Liberties do not recommend that the law of manslaughter be altered to incorporate the killing of an unborn child.

3.3 Knowledge of pregnancy

This review has been asked to examine the question of whether the prosecution should have to prove that the accused knew that the mother was pregnant. The comments made in this section apply to any proposed offence related to the destruction of a foetus.

3.3.1 intent

If the offence involves only *intent* to destroy a foetus, then it is a pre-requisite element that the defendant knew that the mother was pregnant. Otherwise the accused could not possess the requisite intent to attract a conviction. You cannot *intend* to destroy a foetus if you do not know that it exists.

3.3.2 recklessness

In law, recklessness means knowledge.[80] So again, if the offence charged is based on recklessness as to the destruction of a foetus, then it is a pre-requisite element that the defendant knew that the mother was pregnant.

3.3.3 gross negligence

Any offence involving the destruction of a foetus in which the fault element falls below that of intent or recklessness, for example gross negligence, demands proof beyond reasonable doubt that the accused *knew* that the mother was pregnant.

To legislate otherwise could lead to circumstances where a class of luckless victims would be created. For example: an impatient city office worker who, not realising that the woman in front of him on the footpath is pregnant, inadvertently knocks her to the ground[81] destroying the viability of the foetus.

3.3.4 criminal liability

In any event, it is highly probable that the courts will imply this element of knowledge of the mother's pregnancy. This is because this element of the offence would otherwise

[79] see "Child Destruction" on page 19
[80] note 8
[81] this constitutes assault (an unlawful act)

become one of *absolute* liability, i.e. the defence of honest and reasonable mistake of fact would not be available to the accused. The courts have been reluctant to interpret statutory offences as being based on absolute liability.[82]

The Councils for Civil Liberties recommend that any offence involving the destruction of a foetus should require the prosecution to prove that the accused knew that the woman was pregnant.

3.4 Child Destruction

Currently, NSW and SA are the only two Australian jurisdictions without a statutory offence of child destruction.[83]

Though the offence differs between jurisdictions, the general purpose of the offence is to fill in the gap between abortion and homicide.[84] The offence of child destruction is meant to provide for the period in which the foetus is said to be viable, i.e. when it is capable of being born alive, but before it is has been born and becomes a (legally) living being.[85]

In the interests of maintaining neutral terminology,[86] the Councils suggest that the Attorney General call this offence "foeticide", rather than "child destruction".

3.4.1 exceptions to the offence

Before proceeding to the elements of child destruction, the Councils for Civil Liberties believe it is imperative to identify conduct that should fall outside the scope of the offence of child destruction.

Different jurisdictions have enacted different exemptions,[87] but the Council was interested in the attempt of a Bill currently before the ACT Parliament to list conduct that should be exempt from the offence of child destruction:

(a) a lawful abortion; or
(b) anything done by a pregnant woman in relation to her own unborn child; or
(c) anything done to save the life of a woman who is pregnant or her unborn child; or
(d) anything done otherwise within the usual and customary standards of medical practice.[88]

The explicit exemption of a mother to the effect of this offence is extremely important. It ensures that the life of the mother and her rights over her own body are not made

[82] see *He Kaw Teh* (1985) 157 CLR 523 per GibbsCJ & Brennan J
[83] *Crimes Act* 1900 (ACT) s 40; *Crimes Act* 1958 (Vic) s 10; *Criminal Code* 1924 (Tas) s 165; *Criminal Code* 1983 (NT) s 170; *Criminal Code* 1899 (Qld) s 313; *Criminal Code* 1913 (WA) s 290
[84] *Halsbury's Laws of Australia*, Butterworths at [130-3340]; *Laws of Australia*, LawBook Company, Vol 10.1, Ch 8, Part A, Div 2 at [176] and [177]
[85] *Crimes Act* 1900 (NSW) s 20: legal definition of life. See "two legal definitions of life" on page 10.
[86] see "A foetus is not a child" on page 14
[87] this goes to the question of lawfulness. See the "physical element: an unlawful act" element of this offence on page 21.
[88] *Crimes Amendment Bill* 2002 (ACT) s 42A(1) (Bill presented by Mr Steve Pratt). The Bill includes a form of child destruction: s 42A(2) (intentional destruction of the life of an unborn child). The UNSW Council for Civil Liberties was less impressed by the other offences in the Bill. The Council was especially alarmed by the definition of an 'unborn child' as "a foetus at any stage of its development".

subordinate to that of the foetus. The drafting in sub-section (b) does, however, give a pregnant woman a licence to kill.[89] Perhaps a solution to this problem is to insist that the mother be "acting lawfully".

The Council is also deeply concerned that the offence could be used to further victimise women experiencing difficulties such as substance abuse, homelessness, intellectual disability and poverty. The Council believes that such serious social and health problems cannot be adequately solved by the criminal law.

The Councils for Civil Liberties *strongly* recommend that any new offence of child destruction explicitly exempt lawful abortion, the pregnant mother acting lawfully, acts done to preserve the life of the mother or foetus, and any kind of legitimate medical procedure carried out in a competent manner.

The Councils for Civil Liberties do not support the introduction of any offence of child destruction unless it includes these express exemptions.

3.4.2 physical element: child must be capable of being born

The definition of an "unborn child" differs between jurisdictions. In Victoria the definition is based on the common law phrase of a foetus "capable of being born alive".[90] While this capability is implied in other jurisdictions, only Victoria makes it explicit.[91] The phrase used in Tasmania is "a child which has not become a human being".[92] Legislation in the other code jurisdictions deals only with a foetus about to be delivered.[93]

In the interest of clarity in the law, the Councils for Civil Liberties recommend that the drafting of any child destruction offence expressly state that the foetus must be "capable of being born alive".

In South Australia and Victoria, evidence that the mother was pregnant for 28 weeks or more is considered *prima facie* proof of the viability of the foetus.[94] No exact age is given at common law. The test is only that the foetus can live & breathe independent of the mother.[95]

[89] see "pregnancy: a licence to kill?" on page 17

[90] the offence of 'killing of an unborn child' in most code jurisdictions is restricted to circumstances in which a mother is 'about to be delivered of a child': *Criminal Code* 1983 (NT) s 170; *Criminal Code* 1899 (Qld) s 313; *Criminal Code* 1913 (WA) s 290.

[91] *Halsbury's Laws of Australia*, Butterworths at [130-3345]

[92] this is similar to the common law jurisdictions: *Criminal Code* 1924 (Tas) s 165.

[93] the offence of 'killing of an unborn child' in most code jurisdictions is restricted to circumstances in which a mother is 'about to be delivered of a child': *Criminal Code* 1983 (NT) s 170; *Criminal Code* 1899 (Qld) s 313; *Criminal Code* 1913 (WA) s 290.

[94] In Victoria: *Crimes Act* 1958 (Vic) s 10(2). In South Australia this phrase is used to distinguish child destruction from abortion at 28 weeks: *Criminal Law Consolidation Act* 1935 (SA) ss 82A(7) & 82A(8). The common law is unclear on the point of viability: see discussion in Model Criminal Code, note 11 at 191-3.

[95] *Rance v Mid-Downs Health Authority* [1991] 1 QB 587 at 621 per Brooke J

3.4.3 physical element: an unlawful act

The foeticide must be unlawful. Abortion is illegal in NSW,[96] however the common law defence of necessity provides that such a procedure is lawful to protect the mother from any serious danger to her life or physical and mental health.[97] It is arguable that such a defence would also be available to a charge of child destruction.[98]

The unlawful killing element of this offence is made explicit in Victoria by the use of the words "Any person who…*unlawfully* causes…".[99] The Councils for Civil Liberties believe that a similarly drafted offence, when combined with the approach of express exemptions already mentioned above,[100] would provide the flexibility of leaving the courts to interpret unlawful conduct.

The UNSW Council for Civil Liberties recommends that any offence of child destruction expressly indicate that the conduct causing death must be unlawful.

3.4.4 mental element

The mental element of child destruction differs throughout Australia, however *intent* and *recklessness* are the most common mental elements for this offence.[101]

When considering recklessness, problems similar to those associated with a mental element of gross negligence arise.[102] For example, pregnant mothers who take calculated risks might fall into this category. It should not be forgotten that a person whose reckless conduct occasions the death of a foetus is not as morally culpable as the person who intends to kill a foetus.

For these reasons, the Councils for Civil Liberties believe that knowledge of the probability of foeticide is not sufficient *mens rea* for the offence of child destruction.

Commending the statutory example of Victoria, the Councils for Civil Liberties recommend that intent to destroy the life of a foetus capable of being born alive be the required mental element for any offence of child destruction.

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[96] *Crimes Act* 1900 (NSW) ss 82-83: procuring a miscarriage

[97] *CES v Superclinics (Australia) Pty Ltd* [1995] 38 NSWLR 47 per Kirby P & Priestley JA (Meagher JA dissenting), adopting the *Wald* test: "to preserve the [mother] from serious danger to [her] life, or physical or mental health which the continuance of the pregnancy would entail".

[98] *Halsbury's Laws of Australia*, Butterworths at [130-3345]; *Laws of Australia*, LawBook Company, Vol 10.1, Ch 8, Part A, Div 2 at [181]. This is the law in New Zealand: *R v Henderson* (1991) 15 Crim LJ 376 (NZ Court of Appeal).

[99] *Crimes Act* 1958 (Vic) s 10(1)

[100] see "exceptions to the offence" on page 19

[101] *Crimes Act* 1958 (Vic) s 10(1): intent; *Criminal Code* 1924 (Tas) s 165: intent , recklessness & constructive murder; *Criminal Code* 1983 (NT) s 170, *Criminal Code* 1899 (Qld) s 313 & *Criminal Code* 1913 (WA) s 290: intent or recklessness; *Crimes Act* 1900 (ACT) s 40: intent or recklessness. Note: intent is the *mens rea* of the proposed new child destruction offence before the ACT Parliament: *Crimes Amendment Bill* 2002 (ACT) s 42A(2).

[102] see "Manslaughter and the foetus" above on page 14.