

## ABORTION AND DISABILITY: REFORMING THE LAW IN SOUTH AUSTRALIA\*

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### I INTRODUCTION

Since 1998, major changes have been made to the law on abortion in Western Australia, Tasmania and the ACT. Pressure for abortion law reform now mostly focuses on New South Wales, Victoria and Queensland where, to a much greater extent than elsewhere in Australia, the law on abortion is the subject of judicial interpretation. My argument in this article, however, is that it is the law in South Australia (and the Northern Territory) that stands in greatest need of reform. This might sound paradoxical, as there is apparently greater certainty in South Australia and the Northern Territory about what constitutes a lawfully performed abortion. That is, both jurisdictions have detailed statutory provisions relating to the medical termination of pregnancy, which are absent from the law in the three eastern states. Moreover, the South Australian provisions, at one point, formed the preferred approach to abortion law reform of the Model Criminal Code Committee.

I argue against such an approach to reform. My argument is made with specific regard to one of the criteria for the lawful performance of abortion in South Australia: the opinion of two doctors that, if born, the child would 'suffer from such physical or mental abnormalities as to be seriously handicapped'. I argue that there should be no special legal or policy provisions distinguishing foetuses in terms of disability, or defining access to abortion by reference to foetal characteristics. The South Australian provisions endorse, as a matter of public policy, the view that life with disabilities is *intrinsically* less valuable or worthy of being lived than other lives. The special provision for disability creates 'handicap' as a category of intrinsic vulnerability, and hence its significance also goes beyond questions about abortion and the unborn.

Part II of the article briefly sets out the legal position in South Australia. Part III explores what is flawed about that approach; I look at the language used in the

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South Australian law, and what that language *does*. Part IV concerns the problem posed by the legal non-recognition of the foetus as a person. I conclude by reflecting on the wider significance of the South Australian approach to abortion, with reference to the controversial 2000 case of a late-term abortion in Melbourne. My argument as a whole also applies to other jurisdictions with similar provisions to South Australia, notably the Northern Territory.

## II PROVISION FOR FOETAL DISABILITY IN ABORTION LAWS

In South Australia, the law on abortion is set out in sections 81 and 82 of the *Criminal Law Consolidation Act 1935* (SA). Following the sections criminalising the unlawful procurement of miscarriage, the provision entitled 'Medical termination of pregnancy' in section 82A sets out that a person shall not be guilty of an offence in relation to procurement of an abortion under the following conditions:

- (a) if the pregnancy of a woman is terminated by a legally qualified medical practitioner in a case where he and one other legally qualified medical practitioner are of the opinion, formed in good faith after both have personally examined the woman –
  - (i) that 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; or
  - (ii) that there is a substantial risk that, if the pregnancy were not terminated, and the child were born to the pregnant woman, the child would suffer from such physical or mental abnormalities as to be seriously handicapped ...

These provisions give more detailed meaning to the conception of unlawfulness in the preceding section. Other provisions as to time limits, prescribed locations, and residence requirements also apply,<sup>1</sup> but do not affect my argument in this article.

The wording of the South Australian provisions is taken, often verbatim, from the UK *Abortion Act 1967*, which also formed the model for other abortion law reform projects such as that in Israel.<sup>2</sup> Roughly similar provisions are set out in section 174 of the Northern Territory *Criminal Code*,<sup>3</sup> but are not found in any other Australian jurisdiction. In NSW, in contrast, understandings of lawful abortion are set out in Judge Levine's ruling in *R v Wald*,<sup>4</sup> drawing on Justice

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

2 *Penal Amendment (Interruption of Pregnancy) Act 1977*. Subsequent amendments to this Act have not affected its 'defect' clause: see Noga Morag Levine, 'Abortion in Israel: Community, Rights, and the Context of Compromise' (1994) 19 *Law and Social Inquiry* 324, 324–5. For tables of countries having such clauses, see Population Division of the United Nations Secretariat, *World Abortion Policies 1999* (1999) Population Division of the United Nations Secretariat at <<http://www.un.org/esa/population/publications/abt/abt.htm>> at 19 July 2006.

3 *Criminal Code Act (NT)* s 174.

4 *R v Wald* [1971] 3 NSWDCR 25 ('Wald').

Menhennitt's statement of law in the Victorian case of *R v Davidson*<sup>5</sup>. *Davidson*, and arguably *Wald*, was accepted as the basis of the law in Queensland in the 1986 case of *R v Bayliss & Cullen*.<sup>6</sup> In none of these cases does the lawfulness of an abortion hinge upon potential or actual characteristics of the foetus. Rather, lawfulness is defined with regard to the honest and reasonable belief of a practitioner as to the danger posed by the pregnancy to the *mother's* physical or mental health (understood in more or less broad terms).<sup>7</sup>

When abortion law reform is canvassed in Australia, it is rarely the case that South Australia or the Northern Territory is mentioned as candidate for reform, or that any attention is drawn to the disability provision in South Australian law. Indeed, the most high-level recent proposal for reform of Australian abortion law, in its discussion stages, specifically singled out the South Australian legislation as a recommended model for reform of the law in other jurisdictions. The Model Criminal Code project is a comprehensive attempt to make criminal law uniform across Australia, steered by a committee of the Standing Committee of Attorneys-General chaired by Judge Rod Howie of the NSW District Court. In 1996, the Committee published its Discussion Paper on non-fatal offences against the person.<sup>8</sup> Division 29 of the proposed model code addressed abortion, and the Committee took 'the basic policy decision to follow the South Australian legislation in this area as closely as possible'.<sup>9</sup> The Committee did not give any detailed reasons for this policy preference, apart from the difficulty of getting reform through Australian legislatures: 'With the exception of South Australia and the Northern Territory, the political process in Australia has been unable to deal with the issue for a century, and that position is unlikely to change'.<sup>10</sup>

By the time of its report on non-fatal offences in 1998, however, the Committee had drawn back from its earlier preference and instead noted its decision not to present a recommended legislative position, but rather 'to record background information' for Ministers wishing to make a decision on this issue. Nevertheless, the Committee refers to the 1998 Western Australian reform experience as showing 'clearly' that its argument for a statutory scheme like that of South Australia had been 'justified'.<sup>11</sup> In its *1998 Report*, the Committee expresses no rethinking of its position on the South Australian law, and makes

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5 *R v Davidson* [1969] VR 667 ('*Davidson*').

6 *R v Bayliss & Cullen* (1986) 9 Qld Lawyers Reps 8 ('*Bayliss & Cullen*').

7 For a general survey of Australian abortion law and policy up to 1998, see Helen Pringle, 'Is Abortion Illegal?' (1997) 32 *Australian Journal of Political Science* 93; post-1998, 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; Mark J Rankin, 'Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory' (2003) 29 *Monash University Law Review* 316.

8 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Discussion Paper: Chapter 5 – Non Fatal Offences against the Person* (1996).

9 *Ibid* 80–1.

10 *Ibid*.

11 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Report: Chapter 5 – Non Fatal Offences against the Person* (1998) 147, 155  
<<http://www.aic.gov.au/links/mcc.html>> at 13 July 2006 ('*1998 Report*').

only desultory reference to submissions it received on abortion and disability.<sup>12</sup> If South Australian law is no longer *the* recommended approach, I think it is fair to characterise it as a preferred approach of the Committee.

Even if the Committee were to remain committed to the superiority of statutory change, there is another possible approach available in the 1998 changes in Western Australia. These changes took a significantly different path from that of the South Australian legislation.<sup>13</sup> An early draft of the ‘tiered’ bill proposed by WA Attorney-General Peter Foss made allowance for abortion, *inter alia*, if ‘[t]he foetus has an abnormality that would prevent live birth from occurring or would, if life had occurred, cause the perinatal death of or seriously endanger the quality of life of the person unborn’. This provision was dropped by Foss even prior to the acceptance of Cheryl Davenport’s alternative proposal as the basis of reform in the state.<sup>14</sup>

Some other arguments for abortion law reform, however, favour the making of specific provision for foetal disabilities. For example, Loene Skene has argued that the now routine character of genetic screening makes it advisable to amend the law in Victoria and NSW so as to provide explicitly for abortion on the grounds of ‘serious fetal abnormality’, in order to ‘support’ terminations done by doctors on those grounds.<sup>15</sup> In a widely reported article in the *Medical Journal of Australia* in 2004, published in the context of a controversial case of late-term abortion in Victoria in 2000,<sup>16</sup> Lachlan de Crespigny and Julian Savulescu argued for reform of abortion laws in order to provide ‘certainty’ for doctors in performing terminations for reasons of foetal disability.<sup>17</sup> The question of making explicit legal provision for disability is also sometimes raised in connection with cases of medical negligence where a child with disabilities is born who might otherwise have been aborted but for the alleged negligence.<sup>18</sup>

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12 Ibid 158.

13 The changes involved amendments to the *Criminal Code*, the *Health Act 1911* (WA), the *Evidence Act 1906* (WA), and the *Children’s Court of Western Australia Act 1988* (WA).

14 See Chip LeGrand and Matt Price, ‘Rival Bills muddy WA abortion vote’, *The Australian* (Sydney), 6 March 1998, 4; Chip LeGrand and Natalie O’Brien, ‘Abortion: MPs look into their hearts’, *The Australian* (Sydney), 11 March 1998, 2. See generally Cheryl Davenport, ‘Achieving Abortion law Reform in Western Australia’ (1998) 15 *Australian Feminist Studies* 299; David Black and Harry Phillips, ‘A Bicameral Case Study: The 1998 Western Australian Abortion Legislation’ (1999) 13 *Legislative Studies* 7.

15 Loene Skene, ‘Prenatal Diagnosis and Late Termination: A Legal Perspective’ (1995) 35 *Australian and New Zealand Journal of Obstetrics and Gynaecology* 3.

16 Dr de Crespigny gave the lethal injection to the foetus: see Commonwealth, *Parliamentary Debates*, Senate, Thursday 6 June 2002 (Brian Harradine); see also Lachlan J de Crespigny and Julian Savulescu, ‘Abortion: Time to Clarify Australia’s Confusing Laws’ (2004) 181 *Medical Journal of Australia* 201.

17 Lachlan J de Crespigny and Julian Savulescu, ‘Abortion: Time to Clarify Australia’s Confusing Laws’ (2004) 181 *Medical Journal of Australia* 201. See also Julian Savulescu, ‘Is Current Practice around Late Termination of Pregnancy Eugenic and Discriminatory? Maternal Interests and Abortion’ (2001) 27 *Journal of Medical Ethics* 165.

18 See, most recently, *Harriton v Stephens* (2006) 226 ALR 391 and *Waller v James; Waller v Hoolahan* (2006) 226 ALR 457. See also *Veivers v Connolly* [1995] 2 Qd R 326. Cf, on the significance for disability of this case Jennifer Fitzgerald, ‘Selective Abortion and Wrongful Birth in Queensland: *Veivers v Connolly*’ (1995) 25 *Queensland Law Society Journal* 189; Lynda Crowley-Smith, ‘*Veivers v Connolly* Revisited’ (1995) 25 *Queensland Law Society Journal* 391.

### III WHAT, IF ANYTHING, IS WRONG WITH DISABILITY PROVISIONS IN ABORTION LAW?

The implicit assumption of much debate on abortion in Australia is that the South Australian provisions on abortion, and proposals to widen their application, are entirely unexceptionable. Clearly this is so with the Model Criminal Code Committee deliberations. And one might note that the provisions do not *require* the mother of a foetus with actual or potential disabilities to have an abortion. In this respect, the South Australian provisions are in apparent contrast to the position in China, for example, where sections of the *Law of the People's Republic of China on Maternal and Infant Health Care 1995* ('*Maternal and Infant Health Law*') seem to be not merely permissive, but coercive and mandatory, especially when read in conjunction with other provisions, policy and implementation measures. Article 18 of the *Maternal and Infant Health Law*, for example, reads:

If one of the following cases is detected in the pre-natal diagnosis [made 'if a physician detects or suspects an abnormality with the fetus' at antenatal examination], the physician shall explain the situations to the married couple and give them medical advice on a termination of gestation:

- (1) The fetus is suffering from a genetic disease of a serious nature [defined in Article 38 as 'diseases that are caused by genetic factors congenitally, that may totally or partially deprive the victim of the ability to live independently, that are highly possible to recur in generations to come, and that are medically considered inappropriate for reproduction'];
- (2) The fetus is with a defect of a serious nature; or
- (3) Continued gestation may jeopardize the safety of life of the pregnant woman or seriously impair her health, due to the serious disease she suffers from.<sup>19</sup>

I am not persuaded that the South Australian provisions are *so* radically different that they altogether escape some of the criticisms that are appropriately made of China's law. For example, it is unclear why abortion of foetuses with potential disabilities is singled out in the South Australian legislation in the way it is. I have explored elsewhere the rationale given by legislators at the time of the 1969 reform of the South Australian law,<sup>20</sup> and I am here more concerned with the possible defences that could *now* be made of the provisions. My argument is that the provisions not merely support discrimination against disability, but create and construct such discrimination. Imagine, for example,

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19 The provisions I have cited are combined with sterilisation measures, and with marriage being contingent on sterilisation in the case of those suffering 'defects' detected at 'pre-marital medical examination'. Laws aimed at preventing 'inferior births' have been implemented at the provincial level in China since at least 1988. The *Maternal and Infant Health Law* gained its present title after protests against a preliminary draft entitled 'Eugenics Law'. See generally Frank Dikötter, 'Throw-away babies: The growth of eugenic policies and practices in China', *Times Literary Supplement*, 12 January 1996, 4–5; for a wider historical perspective see Frank Dikötter, *Imperfect Conceptions: Medical Knowledge, Birth Defects, and Eugenics in China* (1998).

20 See Select Committee, House of Assembly, Parliament of South Australia, *Report on the Criminal Law Consolidation at Amendment Bill, 1968* (1969); South Australia, *Parliamentary Debates*, October–December 1969.

that a passage were to be inserted in the South Australian criminal law allowing for abortion on the grounds that there is a substantial risk that, if the pregnancy were not terminated, and the child were born to the pregnant woman, the child would be female [as to be seriously handicapped].<sup>21</sup> Or consider allowing for abortion on the grounds that there is a substantial risk that, if the pregnancy were not terminated, and the child were born to the pregnant woman, the child would be black [as to be seriously handicapped]. Or this passage: that there is a substantial risk that, if the pregnancy were not terminated, and the child were born to the pregnant woman, the child would be homosexual [as to be seriously handicapped].

It would be difficult to deny that discrimination, often serious, persists against women, Aborigines and homosexuals in Australian society. But the fact that members of these groups are ‘handicapped’ by linguistic and non-linguistic practices, institutions and stereotyping would provide no justification for citing them as a category of special treatment in abortion law. As Martha Field has noted about a hypothetical rule allowing abortion more liberally when the child would be born female:

If such a rule were put into effect, it is safe to predict that existing women would be outraged that *their* gender was the more susceptible to extermination. They would feel devalued by the regulation; they would feel it as a slur upon them, which it would doubtless be. Parents of Down’s syndrome children who value their own child’s life feel the same way, as amniocentesis becomes part of the dominant culture at least for pregnant women over thirty-five and as those who do not want amniocentesis, or who do not want to abort because of mental retardation, are increasingly considered odd, or even socially irresponsible.<sup>22</sup>

Even though these three hypothetical provisions above are clearly permissive and not coercive in form, an appropriate response to their inclusion in law would be ‘outrage’, to use Field’s term.<sup>23</sup> There appears to be little ‘outrage’ at the similar provisions in regard to disability that remain on the South Australian statute books. Indeed, not merely is there an absence of outrage, there is an at least muted enthusiasm to implement similar provisions elsewhere, as noted above. In part, it may be possible to trace this enthusiasm to a sympathy that people might feel for a pregnant woman who considers that a life with disabilities is a burden to place on a child *in this particular society*.<sup>24</sup> However, the South

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21 Note in this context that Article 32 of the *Maternal and Infant Health Law* expressly forbids sex identification of the foetus except on medical grounds.

22 Martha A Field, ‘Killing “the Handicapped” – Before and After Birth’ (1993) 16 *Harvard Women’s Law Journal* 116. I have learnt a great deal from Field’s work, and owe a lot to this article in particular in thinking about Australian abortion law.

23 See, eg, Victoria McDonald, ‘Laureate advocates abortion of “gay babies”’, *Sydney Morning Herald* (Sydney), 17 February 1997, 10, describing reactions to Dr James Watson’s statement that ‘[i]f you could find the gene which determines sexuality and a woman decides she doesn’t want a homosexual child, well, let her.’ Mr Nick Partridge, chief executive of an AIDS charity, responded: ‘[i]t is outrageous to suggest there is a right for termination because there is a possibility the child might be homosexual’. See also Alan Bennett, ‘Where I was in 1993’, *London Review of Books*, 16 December 1993, 4, commenting on Lord (ex-Chief Rabbi) Jakobovits’ support of genetic identification of foetal homosexuality: ‘I wonder whether he’s always been in favour of medical experiments’.

24 See Simo Vehmas ‘Parental Responsibility and the Morality of Selective Abortion’ (2002) 5 *Ethical Theory and Moral Practice* 463.

Australian provisions do not merely recognise, but create, a category of vulnerability in a manner that goes beyond the demands of sympathy for the position of an individual woman. As can be seen from considering the hypothetical examples, the meaning of provisions that single out disability falls little short of outright discrimination.

The language of the South Australian provisions is the type of language that would be readily recognised as discriminatory in other contexts. To take one word from the South Australian provisions: the potential child is characterised as one who ‘suffers’ his or her disability. The language of the provision concerning the unborn is continuous with popular language commonly used of the living, as ‘suffering from’ rather than, say, ‘living with’ a disability. For example, in all the newspaper reports about the victims of the 1999 Glenbrook train crash, Scott Neal was described as ‘suffering from Downs syndrome’.<sup>25</sup> The term ‘abortion’ is at times even used as a way of denigrating people with disabilities.<sup>26</sup>

#### IV DISCRIMINATION AGAINST THE ‘PERSON’

Nevertheless, one problem in the recognition of the South Australian provisions as *unlawful* discrimination is that anti-discrimination legislation in Australia (and elsewhere) is typically directed at discriminatory behaviour against ‘a person’ on the basis of their disability or assumed disability.<sup>27</sup> However, for almost all purposes at law, the foetus as such is not a ‘person’. A possible exception in this context concerns a 1997 amendment made to the *Criminal Code 1899* (Qld), now at section 313(2), which appears to criminalise harm to an unborn child even if the child is not born alive: ‘[a]ny person who unlawfully assaults a female pregnant with a child and destroys the life of, or does grievous bodily harm to, or transmits a serious disease to, the child before its birth, commits a crime.’<sup>28</sup> This amendment was prompted by a case in which a man kicked his pregnant girlfriend in the stomach, causing miscarriage and the death of the late-term baby.<sup>29</sup> The section appears to be untested at law, although

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25 See John Stapleton and David Tanner, ‘The families mourn their dead’, *The Australian* (Sydney), 6 December 1999, 3; Daniel Dasey, ‘Victim who fought for independence’, *Sun-Herald* (Sydney), 5 December 1999, 6: the reports make much of how ‘despite’ suffering Down syndrome, Scott Neal was ‘getting on with his life’. I suppose ‘suffer from’ is some advance on ‘afflicted by’: see the film critic Evan Williams writing of blindness in ‘The eye of the beholder’, *Review, Weekend Australian*, 9–10 September 2000, 21.

26 See the case of a man assaulted and vilified as ‘an abortion gone wrong’ by a nurse: *McDonald v NSW* [1999] NSWSC 350.

27 I am leaving aside the problem of the costs of raising a complaint, especially under the toughened legal aid rules for disability discrimination introduced in 1998, and the *Human Rights Legislation Amendment Act 1999* (Cth) with its revised schedule of fees and costs.

28 *Criminal Code 1899* (Qld) s 313(2).

29 *R v Lippiatt* (Unreported, District Court of Queensland, Hoath J, 24 May 1996).

Queensland police count unborn fatalities on roads as ‘deaths’ in the state road toll.<sup>30</sup>

In New South Wales, a proposal to address the status of the unborn in cases of assault and injury was set out by the Attorney-General in the wake of a case of assault by Philip King upon Kylie Flick.<sup>31</sup> A similar proposal had been canvassed during the case of Renee Shields, who lost her unborn child in a road rage incident in 2001, and was recommended in the 2003 *Review of the Law of Manslaughter in New South Wales*.<sup>32</sup> The Crimes Amendment (Grievous Bodily Harm) Bill 2005 (NSW) amended the definition of grievous bodily harm in the *Crimes Act 1900* (NSW) so as to include ‘the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, whether or not the woman suffers any other harm’.<sup>33</sup>

The significance of these Queensland and New South Wales changes for the more general question of the status of the unborn in those jurisdictions is however as yet unclear.

Martha Field has argued that special legal provisions for disability in the American context of abortion amount to unlawful and unconstitutional discrimination. While acknowledging that a foetus is not a child, Field suggests that it is not so easy to cordon off the way we talk about abortion from the way we talk more broadly about the worth of life and about the different ways of leading or enduring it. Field argues that provisions similar to those in South Australia and the Northern Territory harm people with disabilities, conveying the idea that a disability (or ‘abnormality’ to use the language of the South Australian provisions) is *necessarily* too great a misfortune to be faced. The language of the provisions is the language often used to deny respect and flourishing to full-blown ‘persons’ living in our society.

Moreover, it is not always easy to preserve the distinction between permissive and mandatory in looking at the significance of provisions like those of South Australia. The provisions form part of the background against which pressure is placed on pregnant women to undergo genetic testing, and to see abortion as the best response to foetal chromosomal variation or disability.<sup>34</sup> In a 1990 address entitled ‘The Sanctity of Human Life’, Ronald Dworkin set out what he saw as the existing social ‘consensus’ on abortion, one part of which for him was the idea that there is not merely a right but a moral *duty* to abort a foetus if the child

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30 See Cameron Atfield, ‘Dreams shattered as smash claims mum, unborn child’, *Courier-Mail*, 29 December 2005, 1: ‘A police spokeswoman said Ms Jarrett’s unborn baby was included in the road toll in accordance with the national road guidelines. “After 20 weeks a baby is considered a life, that is why in this incident it was considered there were two lives lost.”’

31 *R v King* (2003) 59 NSWLR 472 and *R v King* (2004) 150 A Crim R 409 (sentence increased from 10 to 12 years).

32 Hon Mervyn D Finlay QC, *Review of the Law of Manslaughter in New South Wales* (2003) 87–140 <[http://www.lawlink.nsw.gov.au/lawlink/clrd/ll\\_clrd.nsf/pages/CLRD\\_manslaughter](http://www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/pages/CLRD_manslaughter)> at 13 July 2003.

33 *Crimes Act 1900* (NSW) s 4.

34 See Ruth Keszia Whiteside and Della L Perry, ‘Stereotype, Segregate and Eliminate: “Disability”, Selective Abortion and the Context of Choice’ (2001) 15(2) *Interaction* 17.

would be born ‘deformed’.<sup>35</sup> There are many people yet to be fully persuaded to be part of Dworkin’s consensus. However, the choices we make are constrained by and created in a context shaped by law and the values it embodies.<sup>36</sup> To cite ‘handicap’ as the justification of differential treatment of fetuses with ‘abnormalities’ is to argue in a circle: our focus should be on how to address the handicap assigned to disability by a culture of abuse and discrimination, not on the creation of new handicaps for the disability. Special provision against disability in abortion laws creates ‘abnormality’ as a category of intrinsic vulnerability, and converts social ‘handicap’ into a foetal characteristic.

## V LATE-TERM ABORTIONS AND DISABILITY

I want to conclude by placing my argument in the context of discussion about late-term abortions. The latest round of discussion was sparked by an abortion performed at 32 weeks gestation in a Melbourne hospital in 2000. At the time, the hospital noted that it performs about 80 late-term (for unspecified reasons) abortions a year.<sup>37</sup> I have no direct knowledge of the precise circumstances of this case, and I do not wish to comment on it directly.<sup>38</sup> I would like instead to draw attention to the way in which the case was reported. In an article on the case, published in *The Australian* on 4 July 2000, Nicole Strahan and Ben Mitchell noted that the abortion had been performed on an ‘actively suicidal’ woman, at her request and with her consent. The immediate cause of the

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- 35 Ronald Dworkin, ‘The Sanctity of Human Life’ (Paper presented at the Oliver Wendell Holmes Lecture at Harvard Law School, 24 September 1990) quoted in Field, above n 22, 126–7.
- 36 I acknowledge the importance of questions about ante-natal genetic screening to the topic of disability and abortion, but for the purposes of this article, I want to bracket those questions. On women’s responses to genetic testing, see Rayna Rapp, ‘Accounting for Amniocentesis’, in Shirley Lindenbaum and Margaret Lock (eds), *Knowledge, Power, and Practice: The Anthropology of Medicine and Everyday Life* (1993); see also Erik Parens and Adrienne Asch (eds), *Prenatal Testing and Disability Rights* (2000); Sophia Isako Wong, ‘At Home with Down Syndrome and Gender’ (2002) 17 *Hypatia* 90; Annette Patterson and Martha Satz, ‘Genetic Counseling and the Disabled: Feminism Examines the Stance of those Who Stand at the Gate’ (2002) 17 *Hypatia* 118; Janice McLaughlin, ‘Screening Networks: Shared Agendas in Feminist and Disability Movement Challenges to Antenatal Screening and Abortion’ (2003) 18 *Disability & Society* 297.
- 37 See Meaghan Shaw and Darren Gray, ‘Doctors under investigation over “abortion”’, *Sydney Morning Herald* (Sydney), 3 July 2000, 5. Cf John Kerin, ‘Hospital’s “44 late abortions”’, *The Australian* (Sydney), 30 November 2000, 1; ‘Late abortion not uncommon’, *Sydney Morning Herald* (Sydney), 30 November 2000, 3; Ben Mitchell, ‘Late abortions illegal, says senator’, *The Australian* (Sydney), 1 December 2000, 2. See also Nicole Strahan and Ben Mitchell, ‘Doubts cast over inquiry on abortion’, *The Australian* (Sydney), 4 July 2000, 9; Fiona Stewart, ‘Public women’s business: Medical privacy is under threat’, *The Australian* (Sydney), 12 July 2000, 11; Nicole Strahan, ‘Abortion doctors acted “in good faith”’, *The Australian* (Sydney), 12 July 2000, 1, 2; Mary-Anne Toy, ‘Legal termination was done in good faith, says report’, *Sydney Morning Herald* (Sydney), 12 July 2000, 9; Misha Schubert, ‘Late-abortion hospital head resigns’, *The Australian* (Sydney), 22–23 July 2000, 11; Mary-Anne Toy and Caroline Milburn, ‘Whose Life Is It Anyway?’, *The Age* (Melbourne), 8 July 2000, 3. See also The Medical Practitioners Board of Victoria, *Report on Late Term Terminations of Pregnancy* (1998) <http://www.dhs.vic.gov.au/ahs/archive/report/> (which pre-dates the Melbourne late-term abortion).
- 38 Access to the records of the Melbourne late-term abortion case is the subject of contention in *Royal Women’s Hospital v Medical Practitioners Board* [2005] VSC 225; *Royal Women’s Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85. These cases also set out the facts of the abortion and ensuing controversy.

woman's distress was reported to be the apprehension that her foetus had been diagnosed with skeletal dysplasia, most likely achondroplasia (dwarfism). The article characterised the case as one concerning 'a suspected late-term abortion on a deformed foetus'.<sup>39</sup> If you had read the newspapers that day and that week, you would have also read of the story of James Strahan, a boy greatly loved by his parents, who had been killed by his biological mother. James' parents, Jack Gilding and Fiona Strahan, recalled their child in an article published in the *Sydney Morning Herald* at the conclusion of the court case.<sup>40</sup> The pictures of the court case showed Jack Gilding and Fiona Strahan. Fiona Strahan has the condition referred to as a 'deformity' in reports on the late-term abortion case.<sup>41</sup>

What I want to highlight from the conjunction of these stories is that the way in which we might, and do, think and speak of the unborn has important and often dramatic implications for how we think and speak of people more generally – and how we consider it appropriate to speak and act towards them. In the months following the initial reports of the Melbourne late-term abortion case, pro-life groups signalled their intention to challenge late-term abortions performed on the basis of foetal disabilities, as a breach of anti-discrimination laws.<sup>42</sup> For various reasons noted above, the legal basis for such a challenge is weak. An English case underlines this weakness. In December 2003, the Rev Joanna Jepson gained the consent of the High Court to a judicial review of police refusal to prosecute the performance of a late-term abortion where the foetus had been diagnosed with a cleft lip and palate.<sup>43</sup> Following the judicial review, a new police investigation was completed, and in March 2005, the chief Crown prosecutor for West Mercia announced that there would be no charges against the doctors concerned.<sup>44</sup> Nevertheless, the point remains that how we understand the foetus/unborn child and its position *is* connected to the way we understand the status of persons, a point frequently made by people with disabilities and by disability groups in the course of the Jepson action.

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39 Nicole Strahan and Ben Mitchell, 'Doubts cast over inquiry on abortion', above n 37.

40 'Memories of a little boy lost', *Sydney Morning Herald* (Sydney), 11 July 2000, 10.

41 See Monica Videnieks, 'Blurred jigsaw of child's final moments', *The Australian* (Sydney), 4 July 2000, 3; Allison Jackson, 'Parents ordered Sette to give up baby, court told', *Sydney Morning Herald* (Sydney), 5 July 2000, 7; Monica Videnieks, 'Mother who killed baby walks free', *The Australian* (Sydney), 7 July 2000, 3; Anthony Peterson, 'Couple mourns "guardian angel" James', *The Daily Telegraph* (Sydney), 7 July 2000, 3. See also Rodney Dalton, 'Grieving Town Takes James on Last Walk', *The Australian* (Sydney), 24 February 1999, 6.

42 See Sharon Verghis, 'Abortions performed on handicapped fetuses may breach anti-discrimination laws', *Sydney Morning Herald* (Sydney), 21 November 2000, 1; Paolo Totaro, 'Taking the rights of the unborn to extreme lengths', *Sydney Morning Herald* (Sydney), 23 November 2000, 18. See also Angela Shanahan, Letter to the Editor, *Sydney Morning Herald* (Sydney), 24 November 2000, 17; Chris Puplick (then head of the NSW Anti-Discrimination Board), Letter to the Editor, *Sydney Morning Herald* (Sydney), 27 November 2000, 11.

43 See Steve Bird, 'First round to curate in battle over abortion', *The Times* (London), 2 December 2003, 7; Joanna Jepson, *Latest News* (2005) <<http://www.jjepson.org/>> at 13 July 2006.

44 As reported by Ruth Gledhill, 'Curate loses legal challenge over cleft-palate abortion', *The Times* (London), 17 March 2005, 14.

## VI CONCLUSION

The formulation of public policy and law about abortion on the basis of foetal characteristics is quite different from a woman deciding that in her circumstances she is unable to take on the tasks of raising a child. An individual woman seeking an abortion is not *necessarily* making a judgment about the intrinsic value of life with disabilities. Few people would want to underestimate the difficulties and sorrows often involved in raising children, with or without disabilities. But some of that sorrow and difficulty stems from actions and attitudes to disability, as well as from the lack of recognition, honour and support accorded parents and families, notably by mean-spirited governments. In these conditions, as the former Disability Commissioner Elizabeth Hastings noted, equality under the law is 'nothing more than a fairy tale'.<sup>45</sup>

Whatever approach in policy and law is adopted to abortion, there should be no special provisions distinguishing foetuses on the basis of their characteristics or of their actual or potential 'suffering'. Governments have no moral authority to differentiate good choices from bad in relation to abortion. If laws restrict abortion, there should be no exceptions in regard to the quality of a foetus. Or if laws allow abortion, one set of reasons should not be privileged over another. In the sections of its *Report* that concern abortion, the Model Criminal Code Committee holds that it is not possible for the law to stay completely out of questions of abortion, noting that '[t]he law must be involved in abortion decisions because they are decisions to end or not to end *potential* human life'.<sup>46</sup> However, the law that gets involved in abortion decisions must take a certain form not only because it deals with potential human life, an important enough matter, but also because it has implications for life lived. The South Australian provisions are not an appropriate way to address human life at all.

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45 Quoted in Tim Pegler, 'Disabled nine-year-olds sterilised', *The Australian* (Sydney), 24 August 1998, 3.

46 *1998 Report*, above n 11, 162.