



20 January 2011

L120, 73.22  
RB;rp

The Secretary  
Legislative Review Committee  
Parliament House  
North Terrace  
ADELAIDE SA 5000

Dear Sir/Madam

### **Inquiry into stillbirths**

I refer to a letter of 6 December 2010 received from the Honourable Russell Wortley MLC, inviting the Society to comment upon the adequacy of current mechanisms for the investigation of stillbirths in South Australia, and in particular, the need for coronial jurisdiction for stillborn children and the circumstances in which stillbirths should be investigated by the Coroner. The matter has been considered by the Society's Children and the Law Committee. We provide the following comments.

It is noted that the inquiry arises out of the fact that the South Australian Coroner does not have jurisdiction to investigate stillbirths under the current provisions of the *Coroner's Act 2003 (SA)* which vests the Coroner with jurisdiction to investigate, inter alia, the State death of a person by unexpected, unnatural, unusual, violent or unknown cause.<sup>1</sup>

In order for the Coroner to have jurisdiction to investigate the death of an infant, that death must be the "death of a person" for the purposes of the definition under the Act.

There is no definition of "person" under the *Coroner's Act* and as such, the Coroner must rely upon the common law definition to determine whether the infant is a "person" whose death is within the jurisdiction of the Coroner's Court. The "born alive" rule holds that for a foetus to achieve legal personhood the infant must have been born alive.<sup>2</sup>

The Society has no comment upon the contentious issue of whether the unborn foetus should properly be considered as a "person" for the purposes of the law. However, the Society does consider that there is a basis for arguing that the coronial jurisdiction in South Australia should be expanded to enable the Coroner to investigate the deaths of stillborn children in certain circumstances.

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<sup>1</sup> *Coroners Act 2003 (SA)* Section 3

<sup>2</sup> *Paton v British Pregnancy Advisory Service Trustees* [1979] 1 QB 276

The Society notes that the “*born alive*” rule was reviewed recently by Spigelman CJ in the case of *R v Iby*.<sup>3</sup> He noted that the “*born alive*” rule was adopted at a time when live birth was statistically less common and could not be taken for granted. Due to the then primitive state of medical knowledge, birth was a process fraught with risk and accordingly, there was a high probability that a stillbirth had natural causes.<sup>4</sup>

Consequently, the law required proof that a child was born alive before it would ascribe criminal responsibility for conduct causing its death. According to the Court in *R v Iby*, the purpose of the “*born alive*” rule was not to articulate the conditions of personhood in any substantive sense. It was, rather, to establish as a matter of evidence that the child was “*alive at the time of the alleged criminal conduct and that the child would have lived but for the Act*”.<sup>5</sup>

As Spigelman CJ noted “*the viability of the foetus can now be both established and ensured in a manner which was beyond the realms of contemplation when the ‘born alive’ rule was adopted*”<sup>6</sup>. As such, he noted that having regard to the evidentiary basis for the rule and improvements to medical knowledge and technology, “*there is a strong case for abandoning the born alive rule completely as has occurred by statute in many states of the United States*”.<sup>7</sup>

The Society considers that whilst there is a basis for arguing that the coronial jurisdiction in South Australia should be expanded to enable the Coroner to investigate the deaths of stillborn children in certain circumstances, it does not consider that such an argument should be predicated on whether the unborn foetus should be considered as a “person” who is “born alive” for the purposes of the law but rather on the grounds of the general public interest that is served by the conduct of inquests by the Coroner.

As White J stated in the recent case of *Barrett v Coroner’s Court of South Australia*<sup>8</sup>

*“the purposes of a coronial inquiry have been said to include the determination of the medical cause of death; the advancement of medical knowledge; the investigation of deaths to allay suspicions; recommendations to avoid future fatalities; and the monitoring of death investigation systems. The importance and values of these purposes suggests that the jurisdiction of the Coroner’s Court should not be construed narrowly”.*

We note that leave to appeal to in respect to this Judgment has recently been sought from the High Court. The outcome of this appeal or any decision of the High Court may impact on the Committee’s deliberations.

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<sup>3</sup> [2005] NSW CCA 178

<sup>4</sup> *Ibid* [32].

<sup>5</sup> *Ibid* [33]

<sup>6</sup> *Ibid* [63]

<sup>7</sup> *Ibid*

<sup>8</sup> [2010] SASFC 70

In the case of stillbirths, an ability to carry out an independent investigation by the Coroner could have an impact upon lowering the rates of stillbirths along similar lines to previous coronial cases regarding Sudden Infant Death Syndrome.<sup>9</sup>

It is also arguable that it is in the public interest to ensure that antenatal and obstetric services are optimised to avoid as far as possible adverse outcomes during the antenatal period and the birthing process.

However, in acknowledging the valid public interest reasons for such a review of the Coroner's powers, the Society considers that careful consideration needs to be given to how that change would be implemented and to the ramifications that may impact upon many other areas of law.

In particular, it is noted that commentators have recognised that if the "born alive" rule was to be abandoned, this may have far reaching impact upon the criminal and civil law. In particular, it would change the criteria recognised as evidence that a foetus was the sort of being that could be victim of homicide. Legal liability for the death of a foetus could extend beyond third party assailants to include the doctors performing late terminations of pregnancy and even pregnant women themselves. In the event that abandonment of the rule extended into the civil law, this may result in wardship jurisdiction being exercised over a foetus.<sup>10</sup>

It is noted that the legal significance of birth remains a crucial factor in safeguarding the autonomy of women in decisions concerning pregnancy, termination and obstetric treatment and offers a measure of protection against oppressive state supervision in the interests of the foetus.<sup>11</sup>

Taking the above into consideration the Society considers that any changes to the Coroner's jurisdiction in relation to stillborn children should be made on a strictly circumscribed basis which is not predicated on the contentious issue of whether the unborn foetus has rights or whether the unborn foetus should properly be considered as a "person" for legal purposes.

Consideration should be given to the flow on effect of any change, in relation to the registration of both births and deaths. If South Australia was to implement a rule that included some stillbirths as "births" (that is, registerable) and other States and Territories do not, then the statistics collected nationally by Australian Bureau of Statistics, and State by State by bodies similar to South Australia's Child Death and Serious Injury Review Committee, will become even more difficult to correlate and analyse. Spigelman CJ makes a good point about the changed technologies of pregnancy and birth. The Society suggests that this is an area where concurrence at a national level should be sought before legislation is drafted.

Finally, if the Coroner is to be vested with power over stillbirths, the consequences to the workload of the Coroner need to be considered and it is important that the Coroner be properly resourced to deal with these matters.

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<sup>9</sup> For example *Findings of Inquest into deaths of Naomi Kade, Jaia Nelson, James Cleland, Diesel Phelan and Hannah Francis 30 September 2010*.

<sup>10</sup> Savell K, "The Legal Significance of Birth" (2006) 29(2) *UNSWLJ* 200 at 205

<sup>11</sup> *Ibid*

Thank you for providing the Society with the opportunity to respond to this matter. I trust this response is of assistance. Should you require any further information, please do not hesitate to contact me.

Yours sincerely



Ralph Bönig  
**PRESIDENT**