



The New South Wales Bar Association

02/808

6 September 2013

Mr C Spence MP
Member of the Legislative Assembly
Parliament House
6 Macquarie Street
SYDNEY NSW 2000

Dear Mr Spence

Crimes Amendment (Zoe's Law) Bill 2013 (No 2)

The Bar Association opposes this Private Member's Bill.

The current law in New South Wales is that the 'the destruction of the foetus of a pregnant woman' is taken to be grievous bodily harm to the woman (unless it takes place in the course of a medical procedure): *R v King* [2003] NSWCCA 399. This is the position under the criminal law irrespective of the length of gestation or body mass of the foetus.

The Bill would introduce a new s 8A into the New South Wales *Crimes Act*:

8A Offences in relation to the destruction of or harm to the foetus of a pregnant woman

(1) In this section:

applicable offence means an offence against section 33 (1), 33A (1), 35, 46, 51A, 52A (3) or (4), 52B (3) or (4), 54, 95 or 110.

unborn child means the foetus of a pregnant woman that:

- (a) is of at least 20 weeks' gestation, or
- (b) if it cannot be reliably established whether the period of gestation is more or less than 20 weeks, has a body mass of at least 400 grams.

(2) For the purposes of an applicable offence:

- (a) an unborn child is taken to be a living person despite any rule of law to the contrary, and
- (b) grievous bodily harm to an unborn child is taken to include the destruction of the unborn child.

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(3) For the purposes of an applicable offence, the destruction of the foetus of a pregnant woman (not being an unborn child) is taken to be grievous bodily harm to the woman, whether or not the woman suffers any other harm.

(4) This section does not apply to or in relation to:
(a) anything done in the course of a medical procedure, or
(b) anything done by, or with the consent of, the pregnant woman concerned.

In addition, the Bill alters the definition of 'grievous bodily harm' in the *Crimes Act*. Currently, 'grievous bodily harm' is defined in s 4 to 'include':

(a) 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.

This provision will be replaced by the following:

(a) for the purposes of section 8A—any destruction of the foetus of a pregnant woman that is taken to be grievous bodily harm by the operation of section 8A (2) or (3).

The Bill will significantly change New South Wales law. In respect of the offences to which it will apply pursuant to clause 1, a foetus that satisfies the definition of an 'unborn child' will be treated as a 'person'. 'Grievous bodily harm' to that 'unborn child' (defined to include 'destruction' of the 'unborn child') may be prosecuted directly under the nominated provisions.

The Bar Association has consistently taken the position that the current New South Wales criminal law in this area is satisfactory. That remains the position of the Bar Association.

As recently as 2010, an extensive review was made of this area of the law by the Honourable Michael Campbell QC (Review of Laws Surrounding Criminal Incidents Involving the Death of an Unborn Child) and he recommended that the current law should not be changed.

The Bar Association has two particular concerns with the current Bill.

1. The definition of 'unborn child'

The Bar Association is concerned that the definition designed to distinguish between a foetus which is treated as part of the pregnant woman and an 'unborn child' which is treated as a distinct 'living person', is arbitrary.

In the context of the law defining a 'stillbirth' for the purposes of the New South Wales *Births, Death and Marriages Registration Act 1995*, the definition serves an important function, allowing for the stillborn foetus to be given a name, which will be registered, and for giving of a perinatal medical certificate of cause of death. However, the application of that definition in the different context of the criminal law requires very careful consideration.

It is not apparent to the Bar Association what principle is being applied in respect of the definition. Why should a foetus of 19 weeks and 6 days be treated differently from a foetus of 20 weeks for the purposes of the criminal law? Why should a foetus of 399 grams be treated differently from a foetus of 400 grams for the purposes of the criminal law? The arbitrary nature of the definition does not have the same significance in the context of recognition of a 'stillbirth' under the *Births, Death and Marriages Registration Act*, but it has great significance in the context of New South Wales criminal law.

For example, while the maximum penalty for an offence of intentionally cause grievous bodily harm will be the same (25 years) whether the grievous bodily harm is understood as having been caused to the mother or to the foetus, the implications for the purposes of sentencing may be great. Where a foetus falls within the definition of an 'unborn child', the level of grievous bodily harm to the foetus which has been destroyed will be at the highest level, pointing to the imposition of the maximum penalty in the absence of any significant mitigating circumstances. In contrast, if the foetus does not fall within the definition, the level of grievous bodily harm caused to the mother may be assessed differently, with significant implications for the resulting sentence. The arbitrary nature of the definition will require substantially different sentencing outcomes based on which side of the lines created by the definition the foetus falls and will be unjust and embarrassing in the legal sense of the latter expression.

2. The broader implications of the Bill

There is legitimate concern about the broader implications of this Bill. It may be accepted that the Bill is limited in its application to offences involving the causing of 'grievous bodily harm'. It would not apply to offences of murder or manslaughter. However, the Bar Association believes that legislative acceptance of the principle on which the Bill is premised – that a foetus which satisfies the definition of an 'unborn child' is to be treated as a 'person' under New South Wales criminal law – is very likely to lead to further changes to that law.

Once legislation is enacted which provides that 'an unborn child', as defined in the Bill, 'is taken to be a living person' for the purposes of some offences, it will be very difficult to resist comparable changes to other offences, including murder and manslaughter.

Adoption of the principle in this Bill would have obvious implications for late term abortions, notwithstanding the explicit limitations in the Bill relating to medical procedures. Acceptance of the principle that some foetuses which satisfy the definition of an 'unborn child' are to be treated as 'persons' would necessarily call into question the 'medical procedure' exception. When can a medical procedure designed in the interests of the mother be permitted to harm, let alone result in the destruction of, another 'person'? Equally, can a mother consent to the destruction of the foetus where what is occurring involves the destruction of another 'person'?

If an 'unborn child' within the meaning of that expression under this Bill is to be treated as a 'person' under some New South Wales criminal laws, it would be difficult to resist its adoption in respect of other New South Wales criminal laws.

While this concern with regard to the wider implications of the Bill might not justify opposition to it if changes to the criminal law were necessary, the Bar Association considers that the concern has much greater significance given that there is no compelling need for the proposed change to that law. As explained above, the existing law provides protection for the foetus, irrespective of its length of gestation or size, while it is in utero. 'The destruction of the foetus of a pregnant woman' is taken to be grievous bodily harm of the woman, with the result that proper punishment may be imposed for offences which cause that harm.

Should you or your officers require any further information, please do not hesitate to contact me or the Association's Executive Director Mr Philip Selth on 9232 4055 or at pselth@nswbar.asn.au.

Yours sincerely

A handwritten signature in cursive script that reads "Phillip Boulten".

Phillip Boulten SC
President