

By Catherine Henry

Embracing FOETAL PERSONHOOD in NSW



In March this year, the NSW Parliament was set to debate the Crimes Amendment (Zoe's Law) Bill 2013 (No. 2). The Bill was drafted in response to what was claimed to be an inadequacy in the criminal law in dealing with injury to a developing foetus.

BACKGROUND TO ZOE'S LAW

The factual circumstances and the reason for the colloquial name given to the Bill derive from a tragic accident in which a Central coast woman, Brodie Donegan, was knocked down by the driver of a vehicle outside her home. At the time, she was 36 weeks' pregnant. She sustained significant injuries and delivered a stillborn baby. The parents called their stillborn baby 'Zoe'.

The driver of the vehicle was charged with grievous bodily harm in respect of the injuries caused to Brodie but there was no separate charge available to charge her in respect of the injury to the foetus.

THE PROPOSED LEGISLATION

The debate in the Upper House was delayed but the Bill is now expected to be debated in the second half of this year. While its outcome presently appears politically uncertain, the issues it raises are still worthy of critical analysis.

If the Bill were to be passed, it would significantly change Australian law by introducing the concept of 'foetal personhood' into the NSW *Crimes Act*. At present, the *Crimes Act* 1900 defines grievous bodily harm (GBH) 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'.¹ Such a definition recognises the loss of a foetus as an injury to the woman.

The proposed amendment to the *Crimes Act* under Zoe's law creates a new offence of 'destruction' of an 'unborn child': the latter being defined as a foetus of at least 20 weeks' gestation or weighing at least 400 grams.³ Such a change shifts the focus from injury to the pregnant woman to injury to the foetus itself, thus effectively granting the foetus legal personhood.

Until now, the law in Australia has adopted the principle that until a child is born and takes a breath, it cannot be regarded as a legal person. This principle has been termed the 'born alive rule'. In *R v Lby*, it was stated:

'The rule consists of two distinct components. First, that the foetus must have completely left its mother's body (although the umbilical cord did not have to be cut, see *R v Trilloe* (1842) Car & M 650, 175 ER 674). Secondly, the child must be alive at or after birth, in that sense, had occurred. The case law does not always clearly distinguish between the two elements.'⁴

The Bill has been met with strenuous opposition by a wide range of legal and medical professional bodies: the NSW Bar Association, the Law Society of NSW, Women Lawyers' Association of NSW, Women's Legal Services NSW, Office of the Director of Public Prosecutions, Community Legal Centres of NSW, the Royal Australian College of Obstetricians and Gynaecologists, the AMA, Women's Health NSW, Family Planning NSW, the Medical Women's Association of NSW and medical indemnity insurers. Much of that concern flows from the bestowing of legal rights upon a foetus and the implications for reproductive rights, including access to abortion.

ACCESS TO ABORTION

Few people realise how precarious a woman's right to termination currently is in NSW; fewer still would be aware that it remains a criminal offence. Sections 82 and 83 of the *Crimes Act* create an offence in the case of a woman (s82) and also in the case of a third party (generally a doctor) (s83) to *unlawfully* administer or do something to 'procure a woman's miscarriage'. The interpretation of a lawful abortion therefore hinges on the word 'unlawfully', with no assistance being provided within the Act as to the meaning this term should be given.

Defining when an abortion is 'lawful' has fallen to the courts, which have essentially determined that the person carrying out the abortion must be found to have formed the honest belief on reasonable grounds that the woman would suffer serious danger to her life or physical or mental health if she did not undergo the procedure.⁵ This principle – providing the legal foundation for access to abortion in NSW – is derived from a judge's ruling to a jury during the course of a criminal trial – *R v Wald* – and is therefore of flimsy legal worth. Further, unlike all other offences contained in the *Crimes Act*, the elements of abortion offences are not clearly stated.

The proponents of the Bill claim that there would be no impact on access to abortion, as the proposed new offence is expressed not to apply to 'medical procedures'.⁶ Those opposing the Bill argue, however, that there is no justification for complacency about this so-called protection. Proposed s54 of the Bill creates the separate offence of causing grievous bodily harm – *unlawfully* or negligently – to the foetus of a pregnant woman independently of any offence of grievous bodily harm involving the pregnant woman. Given this potential context, it is easy to imagine the arguments that would call into question the 'medical procedure' exemption. 'Medical procedure' is nowhere defined, but should *any* 'medical procedure' designed in the best interests of the mother be permitted to harm, let alone result in the destruction of, another 'person'?⁷

There is a second limb to the exemption in proposed s8A(4)(a), which excludes anything done by or with the consent of the pregnant woman. But can a woman consent to a procedure that constitutes a criminal offence? It also raises the spectre of a court having to determine issues of mental or intellectual capacity in relation to the actions of the mother.

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The concept of foetal personhood is likely to produce a conflict between the rights of a pregnant woman and her foetus under the law.

CONFLICTING RIGHTS

Many experts fear that the concept of foetal personhood is likely to pit an expecting mother against the foetus under the law. This is certainly the view of Melbourne-based lawyer, Hannah Robert, who lost her baby while eight months pregnant in strikingly similar circumstances and, strangely enough, in the same time period as Brodie Donegan. Ms Robert does not support the introduction of Zoe's law due to its central reliance upon the adoption of foetal personhood, which she sees as producing an immediate conflict between a pregnant woman and her foetus and as therefore undermining a woman's right to choose. She has said 'once the foetus is defined as a legal person, the law has a direct relationship with it, and the mother's consent becomes irrelevant. She becomes invisible in the eyes of the law, despite the physical realities of pregnancy meaning that any interaction with the foetus necessarily involves her.'⁸

Ms Robert instead advocates alternative legal models – requiring detailed consideration and workup – to recognise the type of loss suffered both by Brodie Donegan and herself. These include remedies outside the confines of the *Crimes Act*, which has been the approach taken in some other jurisdictions, including Tasmania.⁹

CRIMINALISING CONDUCT DURING PREGNANCY

In the United States, not only has 'foetal personhood' been the cornerstone of laws limiting access to abortion, but it has also been used to criminalise any conduct that might pose a risk to the foetus during pregnancy. Women have been prosecuted for drinking, smoking and/or taking anti-depressant drugs while pregnant – with the charge being causing grievous bodily harm to the foetus. Recognition of the legal rights of the foetus has also given rise to a number of disturbing cases. For example, in 2004, a woman in Utah was charged with murder when she refused to undergo a caesarean section when pregnant with twins after one of the twins died at birth.¹⁰ A terminally ill woman was forced to undergo a caesarean against her will.¹¹ In another case, a male who assaulted his pregnant girlfriend causing the still birth of twins was charged with two counts of murder but no charge for assaulting the woman herself.¹² In a recent case, a woman was kept on life support against her express wishes and those of her family so that her body could continue to gestate a foetus.¹³

In Australia, and despite the known risks associated with smoking during pregnancy, many Australian women (as

many as one in seven) keep smoking during pregnancy. Could these women – subjecting the foetus to the increased risk of intra-uterine growth restriction and still birth – be prosecuted for acting contrary to the interests of the other 'person'?

Doctors practising in reproductive medicine raise clinical scenarios which they see as troubling in the event that the Bill were to be passed. Examples include the situation of the pregnant woman who has an aggressive, invasive form of cancer requiring surgery and/or chemotherapy? Or a pregnant woman with fulminating pre-eclampsia who needs to be delivered, despite the foetus being at 22 weeks' gestation and non-viable. In both cases, the required medical treatments would cause grievous bodily harm to the foetus and would put the pregnant woman in clear conflict with those advocating for foetal rights. These doctors ask whether it is right that these decisions should be made by someone other than the pregnant woman.¹⁴

DEFINITIONAL PROBLEMS

There would also appear to be a number of definitional problems within the legislation. The Bill introduces the new label of 'unborn child' into the *Crimes Act* (s8A). The definition of an 'unborn child' (being a living person) is said to be completely arbitrary. One of the first professional bodies to publicly state its opposition to the Bill, the NSW Bar Association, explained the definitional problem in its submission to Parliament. Why, it said, 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? Similarly, why should a foetus of 399 grams be treated differently from a foetus of 400 grams for purposes of the criminal law? No (sensible) principle has been advanced by the drafters of the Bill to justify such arbitrary classifications.¹⁵

Many opponents of the Bill see the term 'unborn child' as inappropriate and emotive, as well as simply incorrect. As the Women's Legal Services of NSW has repeatedly pointed out, 'pregnancy involves a zygote and then an embryo in the early stages, which develops into a foetus. Upon live birth the foetus becomes a child.'¹⁶

Then there is the obvious argument that the phrase 'unborn child' has traditionally been closely associated with the abortion debate. Although those who support the Bill claim that it would have no impact on access to abortion,¹⁷ the likelihood is that once Parliament has declared a foetus to be a living person in one context, the notion of a foetus as an 'unborn child' will flow into other legal scenarios or be utilised to support anti-abortion stands. Julie Hamblin, health lawyer of HWL Ebsworth, puts the concern succinctly: 'Zoe's law would add a new weapon to the armoury of those seeking to secure a conviction for unlawful abortion.'¹⁸

LEGAL INCONSISTENCIES

The Bill would create inconsistency with other legislation in NSW such as the *Victims Rights and Support Act 2013*. In this proposed criminal legislation, a woman who experiences the destruction of a foetus of 20 weeks or weighing more than 400 grams will be ineligible to claim the higher

victim support payment as a woman who experiences the destruction of a foetus not defined in this way. The loss of a foetus needs to be consistently interpreted as an injury to the pregnant woman.¹⁹

In a similar vein, the law already provides protection for the foetus, irrespective of its gestational age or size, while it is *in utero*. The issue of whether a change to the law was required has already been comprehensively considered in the context of the Campbell Review in 2010. The situation of Brodie Donegan was one of the cases providing impetus to that Review. It was the recommendation of the Hon Michael Campbell QC that there was no need to change the current law.

CONCLUSION

No one would underestimate the sense of personal loss that has been experienced by the Donegan family. However, changes to the criminal law may not be the best way to acknowledge the tragic loss of a foetus.

The wider implications of the Bill are troubling to all those who oppose it and should be of concern to all women. That the Bill is legally unnecessary and poorly drafted makes these concerns even more significant. ■

Notes: 1 Section 4. 2 Section 8A. 3 Section 8A(1).
 4 *R v Iby* (2005) 63 NSWLR 278 at 27 (Spigelman CJ).
 5 *R v Davidson* [1969] VR 667; *R v Wald* (1971) 3 NSWDCR 25.

6 Section 8A (4)(a). 7 Dr Lachlan de Crespigny and Prof Michael Permezel, 'Laws are to Protect, not add risk', *Medical Observer*, 11 February 2014. 8 Hannah Robert 'Why losing my daughter means I don't support Zoe's law', *The Conversation*, 12 November 2013. 9 *Reproductive Health (Access to Terminations) Act 2013* (Tas); *Criminal Code Act 1924* (Tas) (s178E) – termination without woman's consent. 10 Marshall L Wilde, 'Rowland Case Illustrates Maternal-Fetal Conflict' 2003, University of Houston <<http://www.law.uh.edu/healthlaw/perspectives/Reproductive/040325Rowland.html>>. 11 Jessica Murphy, 'Angela Carder: A Case Study on Maternal and Fetal Rights', 28 May 2009. New York Medical College, <www.nymc.edu/Clubs/quill_and_scope/volume2/murphy>. 12 Craig Malisow, 'Stomped Out', *Houston Press* (Houston), 28 April 2005. 13 Nick O'Malley, 'Marlise Munoz, brain-dead and pregnant, is the latest focal point for US abortion debate', *Sydney Morning Herald* (Sydney), 17 January 2014, <<http://www.smh.com.au/world/marlise-munoz-braindead-and-pregnant-is-the-latest-focal-point-for-us-abortion-debate-20140117-hv8v8.html#ixzz32KSVjoT2>>. 14 Dr Philippa Ramsay, Zoe's Law Forum, University of New England, 3 February 2014. 15 NSW Bar Association Submission to Legislative Assembly on Zoe's Law, 6 September 2013. 16 Women's Legal Services NSW Submission to Legislative Assembly on Zoe's Law, 30 August 2013. 17 See, for example, remarks of the Hon Chris Spence MP in introducing the Bill on 29 August 2013. 18 Julie Hamblin, 'Zoe's law attacks reproductive rights in NSW', *Sydney Morning Herald*, 18 September 2013. 19 Women's Legal Services NSW Submission to Legislative Assembly on Zoe's Law, 30 August 2013.

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