



30 October 2013

The Hon. Greg Smith
Attorney General, and Minister for Justice
By email: office@smith.minister.nsw.gov.au

Dear Attorney General

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

1. We refer to our letter dated 30 August 2013 in relation to the Crimes Amendment (Zoe's Law) Bill (No 2) 2013 (Bill). Since that correspondence we have been following the passage of the Bill through the Legislative Assembly and have met with a number of Members of Parliament.
2. We acknowledge that the Bill raises many complex legal and ethical matters and we appreciate the considerable amount of time and thought that is being given to deliberating these issues. However, we remain concerned about the potential for the Bill to erode the human rights of women and in particular how it may disproportionately impact on the already vulnerable and disadvantaged women we work with.

Foetal personhood

3. To introduce a legislative definition of prenatal personhood is a major departure from our current legal position. There is no similar statute under any Australian law. Additionally, that such a change may be made in the face of overwhelming opposition from key legal, medical and community stakeholders is deeply concerning.
4. We ask you to consider the potential ramifications if this Bill were to pass. In the United States hundreds of anti-reproductive rights provisions have been enacted by relying on concepts of pre-natal personhood, foetal viability or foetal pain. Significantly, the number of these provisions is increasing; in 1995 there had been 18 such measures and by 2012 there have been 755.¹ These provisions include bans on abortion care, restrictions on access to both state funding and private insurance funding for abortion care, regulation of abortion providers, laws preventing state funding for family planning and health services for women, as well as mandatory counselling, waiting periods or ultrasounds for women before they can access abortion care.
5. We are concerned by legislation that could follow in the NSW Parliament, such as the Crimes Amendment (Pre-natal Termination) Bill. The legal recognition of a foetus as a person under

¹ See *Cumulative number of anti-choice measures enacted since 1995*, NARAL: Pro-Choice America <http://www.prochoiceamerica.org/government-and-you/state-governments/cumulative-number-of.html> (accessed 19 Sep 2013).



any NSW law is a clear first step towards the passage of anti-reproductive rights legislation here.

Effectiveness of the exceptions in section 8A(4)

6. It is to be assumed that the purpose of the exceptions in section 8A(4) is to provide immunity for the lawful actions taken by the pregnant woman or lawful actions carried out with her consent. Our concern is with what could happen in respect of unlawful actions.
7. To illustrate, the courts have held that abortion is unlawful in NSW unless a doctor believes it is necessary to prevent serious danger to the woman's life, or to her physical and mental health, which can include consideration of economic and social factors.² Attempts to procure an abortion for any other reason are unlawful in NSW.³ If a foetus of 20 weeks or 400 grams is defined to be a 'living person' a court may be asked to decide if the termination of a pregnancy at that stage is lawful given it will result in the destruction of a separate foetal person.
8. With all due respect to the intention of the proponents of this Bill, they cannot guarantee that all future officers of the courts in NSW will accept that pregnant women can consent to the destruction of a 'living person' they are carrying. Once an abortion is determined to have been unlawful the new s 8A offences may be enlivened for use against the woman and / or any medical and health professionals involved in the medical procedure or treatment.

Misrepresentation of offence

9. While the section heading should not influence interpretation, we are concerned that the section 8A heading is misleading and suggests uncertainty about the intended reach of the provisions by referencing 'harm to' a foetus and not just 'destruction of' a foetus, as currently provided for in the definition of grievous bodily harm in the *Crimes Act 1900*.

Applicable offences

10. We are also concerned that the choice of applicable offences for section 8A appears arbitrary. Not all grievous bodily harm offences in the *Crimes Act* have been included and no explanation has been provided for the exclusion of a range of available offences that relate to the infliction of grievous bodily harm, such as s 35A *Causing dog to inflict grievous bodily harm or actual bodily harm*. Additionally some of the applicable offences do not refer to the infliction of grievous bodily harm, such as s 51A *Predatory driving*.
11. A more significant concern is the inclusion of s 54 *Causing grievous bodily harm*, which creates an offence for 'any unlawful or negligent act or omission' causing grievous bodily harm. This has the potential to cover a wide range of offences, including the abortion provisions.⁴
12. Such apparent inconsistencies highlight the need for caution and strongly support the position that the Bill is an ineffective response to the stated impetus.

² See *R v Wald* (1971) 3 DCR (NSW) 25 and *CES and Another v. Superclinics (Australia) Pty Ltd and Others* (1995) 38 NSWLR 47.

³ See sections 82 to 84 of the *Crimes Act 1900*.

⁴ See note 2 above.

Additional amendments proposed by Mark Speakman MP

13. We note that a number of MPs have sought our views in relation to further amendments to the Bill, which have been put forward by Mark Speakman MP.
14. It is our position that the proposed s 8A(5) does nothing to alleviate concerns in relation to the effectiveness of the exceptions for anyone who may be involved in consensual actions with pregnant women, including the pregnant woman. As noted above, abortion is a criminal offence in NSW and the lawfulness of any particular abortion is always open to adjudication by the courts. Similarly, other consensual yet unlawful actions by pregnant women, such as self-administration of prohibited drugs, remain open to scrutiny on a case by case basis.
15. We are also of the opinion that while the proposed section 8A(6) may state that the Bill is not intended to create any differences between sentencing outcomes under the current legislation and those available under the statutory scheme proposed by the Bill, it is not possible or appropriate to attempt to prevent the discretion of the court to sentence as warranted on the facts in an individual case.
16. As a civil society we must do everything we can to preserve and uphold the rights of the people within our society. This Bill aims to redefine who is a person, albeit within a specific context. However once the goalposts of personhood are altered how can this not ultimately result in a conflict of rights, especially if submissions are made that the actions of a pregnant woman may be harmful to the foetal person.
17. We encourage you to consider the genuine risk that this Bill poses to the human rights of women in NSW and urge you to oppose the Bill.

If you would like to discuss this further, please contact Carolyn Jones, Senior Solicitor on 8745 6900.

Yours faithfully,
Women's Legal Services NSW

Janet Loughman
Principal Solicitor

CC: All members of NSW Parliament