



BRIEFING NOTE

Date: 31 October 2018

Re: *Crimes Amendment (Zoe's Law) Bill 2017*

Background

On 12 October 2017, the *Crimes Amendment (Zoe's Law) Bill 2017*, a Private Member's Bill, was introduced by Rev. The Hon. Fred Nile MLC. The New South Wales Bar Association ("Association") has had the benefit of viewing the Bill which is available here: <https://www.parliament.nsw.gov.au/bill/files/2936/First%20Print.pdf>.

The Bar Association's position on Zoe's Law

The Association was first consulted on Zoe's Law in 2013 when it was introduced as a Private Member's Bill by Chris Spence MP. The Association at the time opposed that Bill for two reasons:

1. The definition of 'unborn child'; and
2. The broader implications of the Bill.

A further explanation of these reasons is set out below. These same arguments continue to be relevant to the current debate surrounding the *Crimes Amendment (Zoe's Law) Bill 2017*.

Definition of 'unborn child'

In its 2013 submission the Association wrote the following with respect to the definition of 'unborn child' contained in the earlier version of the Bill:

"The 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."

While the 2017 Bill replaces 'unborn child' with 'child in utero', our submission on the definition of 'unborn child' remains relevant.

Broader implications of the Bill

The NSW Bar Association had concerns about the broader implications of the 2013 Bill which remain relevant to the discussion of the current Bill. In its 2013 submission opposing the Bill, the Association stated the following:

“...[T]he 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.”

This argument remains relevant to the *Crimes Amendment (Zoe’s Law) Bill 2017* where ‘child in utero’ is to be treated as a ‘person’. The previous Chris Spence MP version of the Bill defined “unborn child” for the purposes of that Bill as a foetus of at least 20 weeks gestation.

The Rev Nile’s version of the Bill goes further and proposed section 41AA (4) of the current defines “child in utero” to cover all stages of pregnancy.

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 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 ‘child in utero’ will be treated as a ‘person’. ‘Grievous bodily harm’ to that ‘child in utero’ (defined to include ‘destruction’ of the ‘child in utero’) 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. The proposed amendments in Rev Nile’s Bill would set a dangerous precedent with possible wide-ranging implications for the law of this State.

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.

Recommendation

The Association does not support the *Crimes Amendment (Zoe's Law) Bill 2017*, on the basis previously outlined in 2013, that is:

1. The definition of 'unborn child' which with respect to the 2017 Bill, is 'child in utero'; and
2. The broader implications of the Bill.

Contact

If you or your staff have any further questions please contact the Association's Deputy Executive Director, Mr Alastair McConnachie on 9232 4055 or by email at amconnachie@nswbar.asn.au.