

28 January 2021

Director
Law Enforcement and Crime
NSW Department of Communities and Justice
GPO Box 31
Sydney, NSW 2001

By email: policy@justice.nsw.gov.au

Dear Director,

**Submission to the Exposure Draft of the Crimes Legislation
(Offences Against Pregnant Women) Bill 2020**

1. Women's Legal Service NSW (**WLS NSW**) thanks the NSW Government for the opportunity to provide a submission in response to the Exposure Draft of the Crimes Legislation (Offences Against Pregnant Women) Bill 2020 (the **Bill**).
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.

Overview

3. WLS NSW has assisted many women experiencing domestic or family violence either during a pregnancy or because of a pregnancy. We have also been involved in a number of cases where women have experienced the destruction of a foetus after physical assaults by current or previous partners in circumstances where there was a clear intention by the offender to cause the termination of the pregnancy.
4. WLS NSW acknowledges the devastating impact of a lost pregnancy, particularly in the later stages of gestation and we are very concerned by violence perpetrated against people who are pregnant. However, as we have consistently stated over many years, we oppose any attempts to give legal personhood to a foetus. Harm to or destruction of a foetus is always an injury to the person who is pregnant.
5. We do not support any of the proposed amendments in the Bill.



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6. The “born alive rule” is an entrenched legal doctrine.¹ Whilst the Bill does not expressly legislate for legal personhood of a foetus, it proposes a range of amendments which would operate as if there are two victims if a criminal offence results in the destruction of a foetus. The Bill is also premised on an assumption that greater value is to be ascribed to the destruction of a foetus over any other possible injury encompassed under “grievous bodily harm”.

Terminology

7. We suggest adopting language in line with the *Abortion Law Reform Act 2019*, which refers to a person who is pregnant rather than a pregnant woman. Similar amendments are required in the definition of “grievous bodily harm” in section 4(1) of the *Crimes Act 1900* (**the Act**).

Schedule 1 Amendment of *Crimes Act 1900* - Sections 9 and 10 Circumstance of aggravation

8. We do not support the destruction of a foetus being characterised as a circumstance of aggravation attracting an additional 3 years imprisonment whether or not the person who is pregnant survives or loses their life.
9. The destruction of a foetus as a result of an offence is already deemed in the Act to be grievous bodily harm, as per section 4, which states “[g]rievous bodily harm includes...the destruction (other than in the course of a medical procedure or a termination of a pregnancy in accordance with the *Abortion Law Reform Act 2019*) of the foetus of a pregnant woman, whether or not the woman suffers any other harm”.
10. Acts or omissions causing the destruction of a foetus can currently be prosecuted as grievous bodily harm offences injuring the person who is pregnant. For example, the Act has a maximum penalty for intentionally causing grievous bodily harm of 25 years (section 33) and a 10 year maximum penalty for recklessly causing grievous bodily harm (section 35).
11. Factors such as knowledge of the fact of a pregnancy at the time the offence is committed, and the stage of foetal development can be taken into account when assessing the seriousness of the offence and in sentencing.
12. A blanket 3 year additional period of imprisonment across a wide range of relevant offences with varying statutory maximums also risks imposing inequitable punishments.
13. Additionally, we are concerned that there is potential for a person who is pregnant who commits an offence, such as consumption of prohibited drugs that results in the destruction of their foetus, to be subject to the circumstance of aggravation. Equally we fear that there may be amendments to the Bill during debate or subsequent legislative amendments that seek to prioritise the foetus over the rights of the person who is pregnant.
14. There may also be circumstances where miscarriage or stillbirth exposes a surviving person who was pregnant to unwanted, distressing and invasive scrutiny as police and prosecutors assess if there is a relevant offence. This could be very traumatic if the pregnancy was the result of rape or if there is uncertainty about paternity. It could also expose the survivor to further harm, for example in contexts of domestic and family violence or where the fact of the pregnancy was not known to family or community members.

¹ *R v Iby* (2005) 63 NSWLR 278.

Schedule 2 Amendment of *Crimes (Sentencing Procedures) Act 1999* - Section 28 Contents of victim impact statements

15. We do not support the proposed reform to victim impact statements to allow a family victim to prepare a victim impact statement regarding the loss of a foetus whether or not the person who was pregnant died.
16. If a person who is pregnant loses their foetus due to an offence, they may already give a victim impact statement in relation to the harm and loss they have suffered, which can include particulars of the impact on their immediate family. Family victims can also currently provide a victim impact statement, for example, when a person who was pregnant has died and the foetus was destroyed. We fear unintended consequences if family victims were permitted to provide victim impact statements beyond existing provisions. For example, the proposed amendments may mean that a family victim decides to only talk about the impact of the loss of the foetus without reference to the surviving person who was pregnant. We do not believe that this is appropriate as it implies legal personhood of the foetus even if this is not explicitly stated and it is likely to be further traumatising for the person.
17. If the destruction of a foetus occurs as a result of a domestic or family violence related assault, it could also be very distressing if members of the offender's family were permitted to provide a statement, which may be possible given the scope of the definition of "member of the primary victim's immediate family" in section 26 *Crimes (Sentencing Procedures) Act 1999*.

Schedule 3 Amendment of *Criminal Procedure Act 1986* - Section 16 Certain defects do not affect indictment

18. We do not support the inclusion of the name of the foetus of a person who is pregnant on the indictment and believe that this would be prejudicial as it implies that there are two victims.

Schedule 4 Amendment of *Motor Accidents Injuries Act 2017*- Section 3.4 Statutory benefits for funeral expenses

19. We are not opposed to the provision of funeral funding in circumstances where a foetus is destroyed as a result of a motor vehicle offence. However, we do not support the proposed amendment which equates the destruction of a foetus with the death of a person.

Community Education

20. We believe there is a lack of understanding within the general community that the destruction of a foetus as an injury to a person who is pregnant is already characterised as grievous bodily harm and considered as an aggravating factor in sentencing.
21. There is also a lack of understanding about the risks of serious, unintended harm to women's rights if conceptualisations of legal personhood of a foetus are incorporated into legislation.
22. We commend the Premier and the Attorney General for their commitment to consult experts on this issue and recommend that they respond through supporting increased education about the existing law on this issue.

23. In conclusion, consistent with the Campbell Review², we strongly believe the current law is sufficient. We do not support any of the proposed amendments in the Bill.

We would welcome the opportunity to discuss this submission further.

If you would like to discuss any aspect of this submission, please contact Carolyn Jones, Senior Solicitor or Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,

Women's Legal Service NSW

Gabrielle Craig
Assistant Principal Solicitor

² M Campbell, *Review of Laws Surrounding Criminal Incidents Involving the Death of an Unborn Child*, October 2010.