



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC/JWrg:2102982

29 January 2021

Ms Anita Chen-Hatton
A/Director
Law Enforcement and Crime
Department of Communities and Justice
GPO Box 31
Sydney NSW 2001

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

Dear Ms Chen-Hatton,

Exposure draft of the Crimes Legislation (Offences Against Pregnant Women) Bill 2020

Thank you for the opportunity to comment on the exposure draft of the Crimes Legislation (Offences Against Pregnant Women) Bill 2020 (the Bill).

We understand that the NSW Government has committed to reform the law to better recognise the harm caused by criminal acts of third parties that result in the loss of an unborn child.

The Law Society's position on the law in relation to the death of or harm to an unborn child

It is the Law Society's long held view that the criminal law currently provides properly for circumstances where criminal incidents involve the death of or harm to an unborn child. The Law Society's position is that there is no need to reform current offences, or create a new offence, and that doing so would create uncertainty in relation to causation and intent, and give rise to evidentiary issues.

The Law Society notes that the comprehensive review of this area of the law undertaken by the Hon Michael Campbell QC in 2010 (*Review of Laws Surrounding Criminal Incidents Involving the Death of an Unborn Child*) concluded that the existing provisions in the *Crimes Act 1900* (NSW) responded appropriately to criminal incidents involving the death of an unborn child and no change was recommended. The Review further concluded that NSW should not introduce any new offences for cases involving the death of an unborn child.

The Law Society agrees with the conclusions of the Campbell Review. We remain of the view that the Court of Criminal Appeal in *R v King* [2003] NSWCCA 399 satisfactorily determined the physical connection between mother and foetus. In the context of aggravated forms of offences of assault in s33 of the *Crimes Act 1900*, the Court held that the foetus is part of the mother.

Since 2005 the destruction of a foetus has been considered grievous bodily harm to the mother under the *Crimes Act 1900*, which recognises the seriousness of acts that cause the loss of an unborn child.

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The Law Society considers that the law in NSW, as set out in the decision of *R v King*, enables the criminal justice system to adequately deal with the criminality involved where an offender intentionally, recklessly, through criminal negligence or through dangerous driving harms a pregnant woman thereby harming or destroying a foetus.

The Bill

While the Bill does not create a new offence, it does amend the *Crimes Act 1900* to provide for a circumstance of aggravation for relevant offences committed against a pregnant woman that cause the loss of an unborn child (proposed new s9). The amendment will increase the maximum penalty for the relevant offence by an additional three years imprisonment. The Government's Media Release refers to the need for reform to "appropriately punish offenders".¹ However, we are unaware of any evidence that existing offences or sentences have been inadequate. We therefore see no compelling need to change the law, and do not support this amendment.

We also note that some current aggravating factors listed under s21A(2) of the *Crimes (Sentencing Procedure) Act 1999*, may be relevant when sentencing a person for a criminal act that resulted in grievous bodily harm to a woman by way of the loss of her unborn child (whether or not she suffered any further harm). For example, s21A(2)(g) provides as an aggravating factor that the injury, emotional harm, loss or damage caused by the offence was substantial.

We consider that proposed new s9 of the *Crimes Act 1900*, as presently drafted, is too broad and will lead to arbitrary and unjust outcomes. We have a number of concerns with the drafting approach.

First, the lack of any fault element in relation to the factor of aggravation is inconsistent with fundamental legal principles that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have, such that they can fairly be said to have chosen the behaviour and its consequences. By creating a strict liability element in relation to the effect of an offender's act on the unborn foetus, an offender who knows and intends to cause the death of a foetus is exposed to the same penalty as an offender who does not know, and could not reasonably be expected to know, that the primary victim (the mother) was pregnant. If the Bill is to proceed including this provision, we suggest a defence be included that applies where the defendant proves, on the balance of probabilities, that the defendant did not know, and could not reasonably have known, that the woman was pregnant.

Second, proposed new s9(3) of the *Crimes Act 1900* would aggravate any offence in the *Crimes Act 1900* by increasing the maximum penalty across the board by three years, regardless of the nature of the substantive offence, and its current penalty. Where the death of a foetus arises from the throwing of a rock at a passing car, for example (an offence punishable by up to five years imprisonment under s49A), an accused would be exposed to a maximum term of imprisonment that is almost double that attaching to the simple offence. A similarly disproportionate penalty would apply to a defendant charged with causing grievous bodily harm to a person by unlawful or negligent act or omission under s54 of the *Crimes Act 1900*, where that person happened to be a pregnant woman. The penalty for the simple offence of grievous bodily harm to a person by unlawful or negligent act or omission is two years, but would be more than doubled if the present Bill were enacted in circumstances where the victim was a pregnant woman, and the offender had no knowledge, intention or negligence as to the outcome, and the negligent act resulted in the loss of the foetus.

¹Premier's Media Release, 'Recognising pregnancies lost to criminal acts', 10 November 2020.

Where the loss of a foetus arises from an act of deliberately causing grievous bodily harm to a pregnant woman, (an offence carrying a maximum penalty of 25 years under s33(1)(b)), the accused may be charged with an aggravated offence carrying 28 years imprisonment, a far lesser proportionate increase than in the above scenarios where, arguably, the moral culpability of the offender is far less. Imposing maximum penalties in this blanket fashion is likely to lead to unjust and arbitrary outcomes, where the punishment does not fit the crime.

Third, we consider that the proposed circumstance of aggravation relating to offences against pregnant women should be limited to relevant offences involving either deliberate or serious harm to the primary victim, rather than every offence in the *Crimes Act 1900*. This approach would reflect that of s48A of the *Crimes Act 1900* (ACT), where the circumstance of aggravation applies only to manslaughter, intentionally inflicting grievous bodily harm, recklessly inflicting grievous bodily harm, wounding, inflicting actual bodily harm, assault occasioning actual bodily harm, culpable driving of a motor vehicle causing death and culpable driving of a motor vehicle causing grievous bodily harm. This approach seeks to balance the community objectives of recognising the harm caused by the loss of a foetus with the community objective in addressing such harm with criminal penalties that are fair and proportionate. The Second Reading Speech for this provision is instructive in this regard (attached). We would welcome the opportunity to be consulted on the list of offences that would fall within the category of involving either deliberate or serious harm. In our view, offences involving “serious harm” would be appropriately limited to offences alleging grievous bodily harm to or death of the primary victim. This would be consistent with the policy behind the 2005 amendment to the definition of “grievous bodily harm” in s4 of the *Crimes Act 1900* (NSW).

The Law Society supports the proposed amendments to the *Crimes (Sentencing Procedure) Act 1999*, which will broaden the circumstances in which a Victim Impact Statement can be provided. This is an appropriate approach to better recognise the harm caused by the loss of an unborn child as a result of the criminal act of a third party.

We further support proposed amendments to the *Criminal Procedure Act 1986* to provide that an indictment may include the name of the foetus of a pregnant woman in certain circumstances, and the amendments to the *Motor Accident Injuries Act 2017* to expand eligibility to claim funeral costs where an unborn child is lost as a result of a motor accident.

The Law Society contact for this matter is Rachel Geare, Senior Policy Lawyer, who can be reached on (02) 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,



Juliana Warner
President