



Crimes Amendment (Zoe's Law) Bill 2013

Crimes Amendment (Zoe's Law) Bill 2013

Extract from NSW Legislative Council Hansard and Papers Thursday 21 February 2013.

Second Reading

Reverend the Hon. FRED NILE [10.12 a.m.]: I move:

That this bill be now read a second time.

I thank members for their co-operation to allow me to give my second reading speech to the Crimes Amendment (Zoe's Law) Bill 2013. The House has developed the policy of enabling members to give a second reading speech on a bill which may be opposed by other members of the House. Although members have allowed the bill to be introduced and read a second time, I accept that it does not mean the bill has the automatic support of all members. I believe that members should have the right to deliver a second reading speech on a bill. The objects of the Crimes Amendment (Zoe's Law) Bill 2013 are to amend the Crimes Act 1900 to:

- (a) establish a separate offence for conduct causing serious harm to, or destruction of a child in utero and,
- (b) to extend the offence of dangerous driving causing death or grievous bodily harm to dangerous driving causing the destruction of, or serious harm to a child in utero.

The Opposition spokesperson has been reported in the media as saying that the Opposition does not understand the necessity for this bill. I hope my second reading speech will show the absolute necessity for this bill. That is the reason the name "Zoe" is in the title of this bill: an incident involving the baby Zoe shows why this bill is absolutely necessary. In 2011 and 2002 two public incidents drew attention to the deficiency of the law with regard to protections extended towards women during pregnancy. I emphasise that this bill provides an exemption for "medical procedures", which is the terminology used for a termination of a pregnancy or for an abortion. This bill specifically states that it has nothing to do with an abortion or a termination of a pregnancy.

The Hon. Helen Westwood: Give women a go.

Reverend the Hon. FRED NILE: The bill states that: it is the fact.

The Hon. Cate Faehrmann: And it does that in the United States as well.

Reverend the Hon. FRED NILE: That is the point I am making.

The Hon. Matthew Mason-Cox: Point of order: I ask that members of the Opposition be asked to cease interjecting so that we can hear Reverend the Hon. Fred Nile in silence.

DEPUTY-PRESIDENT (The Hon. Paul Green): Order! Members will give respect to Reverend the Hon. Fred Nile. I appreciate that it is a sensitive topic but the member will be heard in silence.

Reverend the Hon. FRED NILE: In 2001-02 two public incidents drew attention to the deficiency of law with regard to the protections extended toward women during pregnancy. In November 2001 Ms Renee Shields suffered a road rage incident that led to the death of her unborn child, Byron. In August 2002 Ms Kylie Flick suffered a miscarriage after she was beaten and stood on by her 112 kilogram boyfriend, Mr Phillip Nathan King. In both cases the law failed to directly address the injustice and grief suffered by these women as there was no existing offence for the destruction of a child in utero. In response to community pressure the then New South Wales Attorney General John Hatzistergos commissioned the Hon. Mervyn Finlay, QC to conduct an inquiry into the matter.

In April 2003 the Finlay report recommended "that New South Wales legislate to introduce the offence of killing an unborn child relating to a criminal act causing a child, capable of being born alive, to die before it has an existence independent of the mother". The report mirrored the request of the woman concerned. However, in December 2003 the Court of Criminal Appeal ruled that:

The close physical connection between a pregnant woman and her unborn child means that the loss of that child can constitute grievous bodily harm to the pregnant woman, even in the absence of other injury to her.

The former New South Wales Government then decided against the adoption of Finlay's recommendation, that is, to introduce a new offence, preferring instead to codify the court's ruling and provide for the remedial restitution of justice through the existing provisions of "grievous bodily harm" found within the Crimes Act 1900.

The Crimes Amendment (Grievous Bodily Harm) Bill 2008, otherwise known as Byron's law, merely added the following clause to the existing definition of "grievous bodily harm":

4. (1 a) 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,

The bill was passed in the Legislative Assembly on 22 March 2005 and in the Legislative Council on 4 May 2005 but not without incident. Significant concerns were raised in the Legislative Council with regard to the scope and eventual implementation of the legislation. Amendments were moved by the Christian Democratic Party and strongly supported by the Coalition, but these were ultimately defeated 17 to 22 after the Government—a Labor Government—refused to allow its members a conscience vote. Subsequent events were to highlight the acute failure of Byron's Law.

On Christmas Day 2009 Ms Brodie Donegan, who was eight months pregnant at the time, decided to go for a short walk to stretch her legs. She had only managed to walk several metres when she was run down by a drug-affected driver. The impact killed Ms Donegan's unborn daughter, Zoe, and inflicted significant injuries to Ms Donegan herself, including a shattered pelvis and injuries to her lower spine, hip and right foot. Pursuant to the Crimes Act 1900, the driver was charged with inflicting grievous bodily harm but as Ms Donegan had sustained injury herself the death of her child in utero was rendered legally irrelevant. The failure of the law to specifically acknowledge Ms Donegan's loss demonstrated that the concerns of eight years prior had not been adequately addressed. That is why I am introducing this bill.

Several women were to suffer in like circumstances. Mrs Susan Harris had persevered with in vitro fertilisation for three years before finally falling pregnant with her son Lars. On 20 January 2010 a reckless driver crossed the road and hit the vehicle in which she was travelling. The impact caused the death of her child in utero but the driver only received a suspended sentence and loss of licence for six months. This raises the question: What is the value of a human life? When I first became concerned about this issue one of my supporters, who was very close to giving birth to her child, was driving her car when it was hit from the rear by a bus. She was thrown forward onto the steering wheel. She did not sustain any substantive injury—no broken bones and so on—but the impact with the steering wheel caused the death of her unborn child. In my innocence I asked, "What happened about the death of your child?" She replied, "Nothing happened." I could not believe that a baby almost ready to be born had died yet nothing happened, and that has been on my conscience since I entered this Parliament.

The Crimes Amendment (Zoe's Law) Bill 2013 seeks to provide an appropriate response. The bill is geared to meet the anguish of women who are concerned and want something done; it is not being driven by men. The constant complaint made by those who suffer the loss, the death, of a child in utero as a result of a malicious or otherwise reckless act of another is that the law fails to provide for the remedial restitution of justice due to a failure to adequately acknowledge the loss directly. After nine years, two inquiries and an amendment to the Crimes Act this situation remains unchanged. We now have the opportunity to rectify what amounts to a serious gap in our legislation and an injustice.

Often when I endeavour to do something some in the media try to turn it into an abortion debate. This bill specifically excludes terminations of pregnancies, abortions. The bill seeks to provide an appropriate and just legal response to the destruction of a child in utero other than in the course of a medical procedure or with the consent of the mother. It achieves this by adopting a recommendation of the Finlay report and introduces a new stand-alone offence within the Crimes Act 1900. For more than two years I have been corresponding with the current Attorney General, and Minister for Justice, and prior to that with Attorneys General in the Labor Government. Mr Smith has made various suggestions over the years as to the wording of the bill and I have sought to meet every suggestion or request he has made. The bill is now in a form capable of support by the Government and, I hope, the Opposition.

The bill also seeks to provide equal protection for all pregnant women. With the passage of the Crimes Amendment (Grievous Bodily Harm) Bill in 2005 the current Crimes Act only covers cases involving a foetus, thereby ignoring the plight of any woman who happens to be less than 63 days into her pregnancy. This precludes expectant mothers who may have only recently heard the heartbeat of their child—usually around 35 days; or viewed them on an ultrasound—usually around 42 to 56 days—at the first medical check-up. Further, as demonstrated by the case of *R v King*, there is a strong correlation between pregnancy and domestic violence. This is particularly acute in the first 100 days of pregnancy. Many members of this House, particularly female members, have spoken frequently about the issue of domestic violence and their concerns. The bill is related to that issue.

In 1994 the *Medical Journal of Australia* published a paper stating that one in 10 Australian women had experienced domestic violence during pregnancy. This should be of great concern to all members of this House. In 2008 the *Australian Journal of Primary Health* reported that domestic violence during pregnancy occurred with one in every five women and that 40 per cent of those women were more likely to suffer a miscarriage as a result. The bill seeks to provide equal protections for all pregnant women by removing discrimination against women who do not fulfil the selective criteria currently defined within the Crimes Act 1900—the current law.

The bill seeks to provide clarity in the application of law. With the current protections to pregnant women being limited to a specific day, there is a great deal of needless ambiguity and uncertainty with regard to the application of the law as exact times of conception are impossible to prove. The bill seeks to add clarity and certainty by removing the arbitrary limitations currently in force and broadening the scope of protection to include all stages of pregnancy. This allows medical experts and the judiciary better flexibility to make determinations based on their specific expertise and any future advance in science and technology. The bill does not tie a judge's hands—a judge will make his or her judgement having heard the evidence—but it gives a judge the flexibility of considering the life of the baby in the womb during the period of pregnancy.

The bill also seeks to ensure that any act committed against a pregnant woman other than in the course of a medical procedure or with the consent of the mother that results in the death or disability of a child after birth will likewise constitute an offence. Schedule 1, item [2], proposed section 41AA (4) makes use of the term "child in utero" as a naming convention to cover all stages of pregnancy:

41AA (4) In this section:

child in utero means the prenatal offspring of a woman.

This term was found to be the most appropriate in relation to this legislation. The term "child" in a pre-birth context is nothing new; it is currently used within the Crimes Act 1900 and the criminal codes of all Australian States and Territories, with the exception of South Australia and Victoria. Further, both the Hon. Mervyn Finlay, QC, and the Hon. Michael Campbell, QC, acknowledged the term's utility and regularly made use of it within their reports. The term "child in utero" is also found in several foreign jurisdictions. Members are aware that there have been media reports about this bill, including one in the *Sydney Morning Herald* and one in the *Sun-Herald*. Unfortunately, the *Sun-Herald*, for its own purposes, tried to make the bill about abortion—that was a red herring—and took it in another direction. As I said, that was not the intention, and it is clearly not the legal intention as stated in the bill.

I have named the proposed legislation "Zoe's Law" in honour of the unborn child of Brodie Donegan, a Central Coast woman who was eight months pregnant on Christmas Day in 2009 when a driver on drugs ran over her. A media article reported Ms Donegan as saying that I had not discussed the bill with her. After the tragedy that she experienced I felt that I had no right to interfere in her privacy. I am very happy to talk to her and discuss the bill at length with her. However, I thought it was improper, as a member of Parliament, to impose myself on her, which is why I did not do so. As I said, Zoe was stillborn as a result of injuries suffered by her mother but the driver was not charged with Zoe's death because the law did not recognise her as a person. The article in the *Sun-Herald* stated:

"I think it's about the victims feeling that someone has taken responsibility for the baby losing its life," Ms Donegan said ... "It's important for the victims to feel like their baby mattered and counted."

I say amen to that. The article further stated:

The existing law defines harm against a foetus as an aggravated assault against the mother. But the new law would create a distinct criminal offence over harm to an unborn child other than in medical procedures, such as abortion.

The article further stated:

"I find it hard to reconcile that if a baby has not yet taken a breath, then a situation like mine is considered grievous bodily harm to the mother, but if one breath is taken then it is manslaughter of a child," Ms Donegan said.

The *Sydney Morning Herald* had a follow-up article about the bill which was more accurate. It repeated the information that the bill:

... has been named in honour of the unborn child of Brodie Donegan, a central coast woman who was eight months pregnant on Christmas Day in 2009 when a driver on drugs ran over her.

While the existing law defines harm against a foetus as an aggravated assault against the mother, Zoe's Law would create a separate offence.

Mr Nile said it would give the unborn child legal protection but would not affect existing abortion laws.

I am pleased—this may not be a surprise to members of the House—finally to have received an excellent supporting statement on the bill from the Archdiocese of Sydney; it has only just been forwarded to me. The statement was issued through the Archdiocese of Sydney Catholic Communications Department and is headed "Call for Zoe's Law Welcomed". It states:

The Archdiocese of Sydney's Life Marriage and Family Centre has welcomed calls for Zoe's Law to be passed by NSW Parliament which would enable manslaughter charges to be brought against a driver involved in a motor accident who causes the death of an unborn child.

The legislation proposed in a private members bill brought by Christian Democratic MLC Fred Nile has been named Zoe's Law in honour of the unborn child who was killed when a female driver high on drugs ran into a 32-weeks pregnant Central Coast mother, Brodie Donegan, on Christmas Day, 2009.

The 31 year old mother of toddler Ashlee from Ourimbah, NSW suffered fractures to her pelvis, spine, leg and foot. But for her and her partner, Nick, far worse than her injuries was the loss of her unborn baby.

The little girl Brodie and Nick named Zoe was stillborn. Delivered by caesarean she had died as a result of the injuries her mother suffered in the accident. Grief stricken, the young parents held their baby Zoe in their arms unable to believe she would have no future and that their much-loved, much-wanted child had not survived the crash.

For Brodie and Nick though there was even worse to come when they learned not only that the driver had been on drugs at the time of the accident but that because their unborn child never took a breath she was not regarded legally as a person. Instead under existing law her death could only be counted as yet another of her mother's multiple injuries.

Under today's laws, the driver whose recklessness had taken baby Zoe's life could not be charged with her death. Instead the only charges that could be brought were aggravated assault or grievous bodily harm to Zoe's mother. But Zoe as an individual and a person in her own right with a life and a future that had been cut short had no legal recognition.

From December 2009 when they lost Zoe, mother Brodie and father Nick have fought to change the law.

Unbeknown to them, Fred Nile picked up the case and in this particular bill wants to try to ensure that in future when an unborn baby is killed as the result of a car accident or domestic violence or similar cause, but not as a result of a legally approved medical procedure such as a termination, the person or people responsible can be charged with causing the death and be brought to justice.

"It's about the victim feeling someone has taken responsibility for the baby losing its life. It's important for victims to feel their baby mattered and counted," Brodie said at the weekend on hearing about the private member's bill that if passed will become known as Zoe's Law.

I have indicated to Ms Donegan that I am happy to talk to her at any time. The statement continued:

"It is heartbreaking and deeply unjust our laws still do not properly recognise the life and value of the unborn child," says Mary Joseph, Project Office with the Life Marriage and Family Centre, and hopes the bill will be passed into law.

"The Convention on the Rights of the Child to which Australia is a signatory says the state must provide children with 'appropriate legal protection before as well as after birth'," Mary says. "But Baby Zoe was not recognised as a victim of manslaughter in this case because she was still inside her mother's womb and had not taken a breath. Zoe was a living person, a unique and irreplaceable baby girl with a wonderful future ahead of her, to love and be loved."

As I said, the parents nursed baby Zoe after she was delivered by caesarean. The statement continued:

[Mary Joseph] points out how much and how deeply Zoe had been loved by her parents and how her loss continues to be mourned by the entire family including her elder sister, Ashlee who was a toddler when Zoe lost her life and by brother Lachlan, who was born two years later.

"Zoe's family deserves justice. Zoe's life was precious, as the life of every child is precious. And whether a child is loved or wanted by his or her family or not, our laws should protect all unborn children equally," Mary Joseph says and hopes that Zoe's Law will become NSW Law and that the legislation will not only secure justice for Zoe but for all other unborn children.

"We also hope the debate about Zoe's Law in Parliament will mark a turning point in our attitude to unborn children so we can more deeply recognise and respect the beautiful and unique expression of humanity represented in each of these children and the life they have to share," Mary says.

A spokeswoman for NSW Attorney General, Greg Smith, says once the private bill brought by Mr Nile comes before Cabinet, the government will determine its position.

I have not been given a guarantee that the Government will vote for the bill but I hope that, after two years of negotiations, the legislation has the goodwill of the Attorney General and the Coalition Government. Although Labor Opposition members have been negative about this bill, even in relation to a second reading debate, I trust that they will seriously consider this bill without any emotional response and deal factually with it. It is my hope that they will come to see that they can support it as an Opposition in this House and that it is not in any way against Labor Party policy; I would say that it upholds Labor Party policy.

I hope that, in due course, all members will give this bill their serious consideration when the time comes—and it will not be dealt with urgently; it will not be dealt with next week. I hope and pray that the Cabinet will support the bill. I will wait for the Attorney General to advise me after it has gone through Cabinet. When I am advised, then I will inform the House that I am ready to bring on the bill for debate. There will be no ambush and suddenly the bill is being debated. All members will be fully informed when that will happen. I will let members know as soon as I know. I commend the bill to all members of the House.