

**CRIMES AMENDMENT (ZOE'S LAW) BILL (NO. 2) 2013**

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**Bill introduced on motion by Mr Chris Spence, read a first time and printed.****Second Reading****Mr CHRIS SPENCE** (The Entrance) [10.05 a.m.]: I move:

That this bill be now read a second time.

I am pleased to bring before the House the Crimes Amendment (Zoe's Law) Bill (No. 2) 2013. The object of the bill is to amend the Crimes Act 1900 to recognise the existence of the foetus of a pregnant woman that is of at least 20 weeks gestation so that proceedings for certain offences relating to grievous bodily harm may be brought against an offender who causes the unlawful destruction of or harm to any such foetus as proceedings for grievous bodily harm to the foetus rather than proceedings for grievous bodily harm to the pregnant woman. Further, it is important to note that section 8A (4) specifies that these offences do not apply or have any relation to anything done in the course of a medical procedure, including medical treatment or anything done by or with the consent of the pregnant woman that causes harm to or the destruction of a foetus. The bill does not, nor does it intend to, have any impact on doctors, nurses or other health practitioners or anyone in the medical fraternity who is involved with or provides assistance to any medical procedures or treatments. The bill does not, nor does it intend to, have any bearing on a woman's right to choose.

The bill does, however, acknowledge and protect a woman's right to choose to carry her pregnancy to full term and acknowledges her loss in the same scope as the requirements under Births, Deaths and Marriages when that right is suddenly taken away by a serious criminal offence. Under the Births, Deaths and Marriages Registration Act 1995, a stillborn foetus at 20 weeks gestation is required to be registered as a birth in New South Wales. The definition of "unborn child" for the purposes of this bill is identical to the definition of "still birth" in the Act. The Births, Deaths and Marriages Act 1995 allow parents of a stillborn to name their stillborn baby. It requires the stillborn baby to be buried or cremated and a perinatal medical certificate to be registered with Births, Deaths and Marriages, the stillborn certificate and a birth certificate is issued. On this basis the bill is very distinct in referring to a foetus that is 20 weeks gestation or more in order to correlate with existing legislation. I draw attention to schedule 1 [2] to the bill, which states:

For the purposes of the proposed section, an unborn child that is taken to be a living person for the purposes of applicable offences, is defined as a foetus of at least 20 weeks gestation or, if that cannot be reliably established, a foetus that weighs at least 400 grams (proposed section 8A (1) and (2)).

For the specific purpose of this section only, the defined unborn child is taken to be a living person in order for the applicable offences to actually apply. The applicable grievous bodily harm charges in the Crimes Act are directed against a person. As a foetus is not recognised as a person, let alone living, in any part of the law at present without taking a breath, it is necessary to allow by law an unborn child to be considered as a living person for the purpose of the applicable offences only. It does not translate across the Crimes Act in its entirety. It is restricted and specific to the applicable offences as listed in the bill as being grievous bodily harm, not murder or manslaughter. This bill does not propose any new offences; rather, it works within the framework of select existing grievous bodily harm offences. The proposed insertion of section 8A simply seeks to clarify interpretation and application for the purpose of specific applicable offences.

I take this opportunity to welcome Brodie Donegan and her partner Nick, who are seated in the Speakers gallery, to the New South Wales Parliament. This bill is before the House today due to the efforts of Brodie Donegan. I thank her for sharing her story and I commend her tenacity to use her experience as a catalyst for change in respect of the recognition of stillbirths caused by criminal acts or negligence. I will place on the record the story of Brodie Donegan. Her story—and I will refer to it as much as possible in her words—truly exemplifies the heart and intention of this bill. Since 2011, I have had many conversations with Brodie, and whilst putting the bill together I worked closely with her and Nick to encapsulate the legislative changes she has campaigned for since the incident that changed their lives.

On Christmas Day 2009, Brodie decided to go for a short walk from her home in Ourimbah on the Central Coast to stretch her legs before driving to Newcastle to spend the remainder of the day with family. She was at that stage 32 weeks pregnant with baby Zoe. At 10:30 a.m. Brodie crossed the road and stepped away from the kerb, vaguely hearing a car in the background. Brodie recalls:

The next thing I remember is hearing voices and people asking me if I was okay. I instantly thought I must have fainted but then I started to feel the pain. I couldn't feel my right leg. The only visual I recall is Nick leaning over me and everyone saying not to move me. I remember asking people about my baby.

It took three hours to extract Brodie from the accident as she was wrapped in tree branches under the front end of the van that hit her. Brodie continues to recall:

My next memory ... is at Royal North Shore Hospital where they were trying to locate my daughter's heartbeat, which they found rather quickly. I was hopeful that my daughter still having a heartbeat was good news and it might end up okay. I begged doctors to take her out immediately but they said they needed to stabilise me and work out my injuries. After two hours they couldn't find a heartbeat. I begged and cried, the doctors conferred and decided to give me an emergency caesarean. I remember yelling to Nick as I was wheeled into theatre that he had to call our daughter Zoe because that meant "life". I wanted her to live so badly ...

I was given a general anaesthetic and knocked out for the operation. I woke returning to the recovery ward and I asked everyone I saw if my daughter Zoe survived. They all told me they didn't know. Eventually, after what felt like a lifetime later, Nick was sent in to break it to me. That they'd tried to resuscitate her but they'd been unsuccessful. That she hadn't been able to hold on. By that time I had figured if it was going to be good news everyone would be telling me. I felt like I already knew. Nick and I were heartbroken. I remember the maternity social worker coming in and asking me if I wanted to see her, which of course I did.

Zoe was wheeled in and Nick handed her to me. She was still warm and she looked and felt and smelt like any other newborn, she just was not breathing. It was so surreal. I wanted to turn back time. I remember looking at her face and seeing the mark on her lip from the resuscitation attempts and noticed one of

her eyes partly open. She was absolutely gorgeous and so soft and I just wanted her to wake up so badly. I was completely distraught.

The social worker came up again to give me information on losing a baby and asked if we wanted to see Zoe again. We did, and by the time she was brought up, my mother and stepfather had arrived with my eldest daughter Ashlee. I hadn't seen Ashlee since I left the house to go on that walk, nearly 12 hours before. She was so scared of me, and of all the tubes attached to me. She would not go near me and this upset me greatly. I'd just lost one daughter and I desperately wanted my other daughter close to me, but with my hair still matted with blood from the lacerations from going through the windscreen, the bruises, swelling and grazes all over my body, and the fact I could not sit up, could not move and had a metal belt around my hips was all just too frightening for her.

We then had to try to explain to Ashlee what had happened to Zoe. Ashlee touched Zoe and wanted to know why she had a sore on her lip. It was heartbreaking to see them together in such completely different circumstances to how I'd imagined they would meet. In the midst of all this, the Police arrived to take Zoe to the Coroner. I was in shock. I had only had this baby a few hours before, and despite the hospital telling me I could see her as often as I wanted, here were the Police trying to take her.

After an intervention by a doctor, Brodie was granted further time with her baby Zoe. Brodie underwent further surgeries to insert a 10 centimetre screw into her shattered pelvis and to reattach the muscle in her thigh which had been torn from her bone and was bleeding into her leg. She also suffered a broken foot, as well as numerous lacerations and soft tissue damage. The physical injuries sustained to Brodie were nothing in comparison to the loss of her baby Zoe, who just 24 hours before the accident had been given a glowing report at her antenatal check-up.

A few days after her accident, Brodie gave her statement to police. At that time she was told that as Zoe had not taken a breath there would be no charge against the loss of her life, and that Zoe would not be regarded as there was no specific intent to harm her. She was advised that it was likely the driver would only receive a fine and a good behaviour bond. Brodie found this difficult to comprehend, saying it was as though the daughter she had held and said goodbye to just did not count.

In hospital Brodie began to realise the hard work she would have to go through to recover from her injuries, but she was determined. She set her sights on being able to walk the City2Surf in August 2010, and was going to fundraise for the hospital in Zoe's name. To date Brodie and Nick have fundraised close to \$50,000 for Royal North Shore Hospital, Miracle Babies and Bears of Hope—a truly wonderful achievement and a testament to their great determination to remember Zoe and make her count. The funeral for Zoe was held almost four weeks after the accident, when Brodie was recovered enough to attend. At the funeral Nick and Brodie both spoke. Brodie recalls:

We had lost our little girl. She would never get to do the things our two year old daughter Ashlee had done or will do. We'd never see her take her first steps, smile, go to school or grow up. All our hopes and dreams for Zoe were lost and she'd lost all of us ... We still couldn't reconcile that we were having a funeral for the death of a baby that the law wasn't charging for.

In the ensuing months, and notwithstanding a long battle, the driver was charged with

grievous bodily harm to Brodie and sentenced to two years and three months; however, she was released at the conclusion of her nine month non-parole period. Baby Zoe was simply listed amongst Brodie's injuries. Brodie's opinion about what happened is:

Nick and I believe that from a victim's perspective there should be a separate charge for the loss of the baby. We believe the offender should be charged with the loss they caused. We believe this should only be used in certain cases, in relation to serious crimes and it should not impact on a woman's right to choose, nor should it jeopardise medical professionals.

We think this bill (Zoe's Law No 2) does that. It fills the gap we perceive to be there.

Births Deaths and Marriages say you need to have a funeral for a baby born over 20 weeks. We received a stillbirth/death certificate. We named our daughter. We received the baby bonus paid as the bereavement bonus, as happens after you lose a baby over 20 weeks. I received six weeks paid parental leave from Newcastle University as is also customary if you lose a baby over 20 weeks.

There is all this existing legislation recognising the existence of Zoe, yet when it came for the driver to be charged with what happened, she was charged with Dangerous Driving causing Grievous Bodily Harm to me—Zoe was listed with my injuries. To me, she was more important than my injuries ... the loss of her was harder to recover from than my injuries. She may have breathed and possibly survived if I'd been extracted from the scene earlier, or had been operated on earlier.

To us, those hours which possibly made the difference between a separate charge or to be listed as one of my injuries is where the gap lies. And we think it should be filled ... that any baby lost in any horrific or violent way due to someone committing a criminal act should count ... should be included ... and should be recognised.

That is Brodie Donegan's story. That is how this bill came to be named Zoe's Law.

I turn now to the detail of the bill. Under the current Crimes Act 1900, section 4 defines grievous bodily harm to include:

... 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.

This bill expands on the section 4 (1) definition of grievous bodily harm to further define the application of the offence in relation to the destruction of or harm to the foetus of a pregnant woman. Specifically, this bill retains the current provision that the destruction of or harm to a foetus under 20 weeks' gestation is grievous bodily harm to the pregnant woman, again being whether or not the woman suffers any other harm. However, for the destruction of or harm to a foetus that is of at least 20 weeks gestation, a separate grievous bodily harm charge may be brought as an offence to the foetus itself. For the purposes of this bill and to distinguish from a foetus that is under 20 weeks gestation, this is defined in the term "unborn child", which means the foetus of a pregnant woman that is of at least 20 weeks gestation or, if gestation

cannot be reliably established to be more or less than 20 weeks, has a body mass of at least 400 grams.

It is only within the specific applicable offences within grievous bodily harm that this recognition will occur—namely, section 33 (1), intentionally causing grievous bodily harm; section 33A (1), discharging firearm, with the intent to cause grievous bodily harm; section 35, recklessly causing grievous bodily harm; section 46, intentionally or recklessly causing grievous bodily harm by gunpowder; section 51A, predatory driving; section 52A (3), dangerous driving occasioning grievous bodily harm or section 52A (4), aggravated dangerous driving occasioning grievous bodily harm; section 52B (3), dangerous navigation causing grievous bodily harm or section 52B (4), aggravated dangerous navigation causing grievous bodily harm; section 54, causing grievous bodily harm by an unlawful or negligent act or omission; section 95, robbery or stealing from the person in circumstances of aggravation; and section 110, breaking and entering a dwelling and the infliction of grievous bodily harm therein.

It was with great deliberation that this bill creates a very specific developmental threshold upon which these offences may be brought against a foetus of at least 20 weeks gestation or with a body mass of at least 400 grams. Under the New South Wales Births, Deaths and Marriages Act 1995 a foetus that is at this stage of development stillborn is required to be registered by the parents in the normal way. A doctor is required to complete a perinatal certificate specifying the cause of death. The stillborn baby must be either buried or cremated. If parents so choose, the stillborn can be blessed or baptised with a baptismal certificate issued. In registering the stillbirth with the New South Wales Registry of Births, Deaths and Marriages, the parents are able to name their child or, if they choose not to, the birth certificate simply names the child "Baby".

Also to be considered, stillbirths at this stage of development qualify the mother to be able to claim the Commonwealth baby bonus, which is noted as a "bereavement bonus". The mother is also able to take paid parental leave where provided through her employment. While these requirements through the New South Wales Births, Deaths and Marriages Act are considered to be administrative requirements, they are strongly recognised as assistance to parents in the bereavement process to acknowledge and come to terms with their loss. By extension, the ability for grievous bodily harm proceedings to be brought against an offender who caused the destruction of or harm to an unborn child of 20 weeks gestation or more in criminal or negligent circumstances as a result of this bill will be a significant recognition for grieving parents, and one that I know Brodie Donegan much longed for in 2009.

It has been put to me that the Births, Deaths and Marriages Act deals with the grieving process. I put it to members that in nearly 99 per cent of all cases it merely assists a parent in grieving the loss of their child. Not being capable of carrying a child myself by virtue of being male, I cannot imagine the grief and the sense of loss that a stillborn child could bring, but being a father I can certainly imagine the loss I would feel had my own daughter not been born alive. To suggest that the Births, Deaths and Marriages Act has dealt with the grieving process denies the fact that in situations like Brodie Donegan's, the grieving process for her was denied the moment the Director of Public Prosecutions could not charge the driver of the motor vehicle that directly caused the loss of her pregnancy.

Brodie Donegan was denied the right for her to choose to go full term in her pregnancy. She was denied the right to face the person responsible and see that person face the charges that

she should have faced for the direct consequences of her criminal actions. The driver of that vehicle should never have got behind the wheel. The driver of that vehicle should never have been on the road on Christmas Day 2009. Yet she was, and the catastrophic and tragic circumstances surrounding what followed were not dealt with, they were not considered to be over for the parents of Zoe in the weeks that followed just by what was presented to them through the Births, Deaths and Marriages Act; the grieving did not end.

The closure for Brodie Donegan should have been when—15 months later—she testified in court against the driver. Yet it was not. It was not closure listening to the driver face a charge simply listing Zoe as an injury. That is not the closure that grieving parents would seek. That is not the closure that is deserving of the criminal action that ended the pregnancy of Brodie Donegan. Many will argue that this bill will be seen as being the first step in encroaching upon the rights of women to choose; that it will be seen as the first step in recognising an unborn child as a living entity. That is not what this bill is about. In fact, for the record Brodie Donegan herself is a self-confessed supporter of pro-choice. She has made it clear that this bill should not encroach upon a woman's right to choose.

The reasoning behind the use of the words "unborn child" as being a living person for the purposes of this bill was because of the difficulties in trying to acknowledge that the existing grievous bodily harm charge could be brought against an offender, recognising the foetus as being separate to the mother. Each act of grievous bodily harm currently in the Crimes Act is listed as being "to a person". Rather than duplicate every grievous bodily harm listed and change them to include a foetus of 20 weeks gestation or greater, and because a foetus is not deemed to be a living entity until such time as it takes a breath, for the purposes of this section, and this section only, the foetus will be referred to as an "unborn child" considered to be a "person" so that each of the grievous bodily harm charges noted can be applied. As I said this earlier in this speech, it does not apply outside of this section. It is not a first step—it is not to be used as a first step. Indeed, sections 52A (1) and (2) and 52B (1) and (2) were removed because these sections dealt with dangerous driving or dangerous navigation causing death.

It is a fact that in order for death to be considered in a criminal charge, the victim must first have been born. In this bill, the charge is not death as the foetus has not yet been born. Therefore, it is appropriate that grievous bodily harm be the only charge applicable in this instance. The passing of this bill, does not allow, in any way, shape or form, for the charges of murder or manslaughter. We as legislators have a responsibility to introduce legislation and enact laws for the people for whom we represent. From time to time we will introduce laws that not everybody agrees with but at every stage we must consider what a reasonable person we represent would want. Brodie Donegan is a constituent of mine and this bill is overwhelmingly supported by the constituency that I represent. It is with my greatest respect and empathy that I present this bill to the House on behalf of Brodie Donegan and in honour of Zoe.

**Debate adjourned on motion by Mr Paul Lynch and set down as an order of the day for a future day.**