

CRIMES AMENDMENT (ZOE'S LAW) BILL 2017

Second Reading

Reverend the Hon. FRED NILE (12:43): I move:

That this bill be now read a second time.

The objects of the Crimes Amendment (Zoe's Law) Bill 2017 seek to amend the Crimes Act 1900:

- (a) to establish a separate offence for conduct causing serious harm to or the 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 bill has been nicknamed "Zoe's law" but it could easily have been named for Byron, Margaret or Lars. The first baby brought to my attention as having died in utero was named Margaret, and that would have been my naming preference. I met Caroline Fraser when she was pregnant. The next time I saw her she was not pregnant and I asked, "How is your baby going?" She replied, "The baby is dead." She explained that a bus had hit her car from behind with great impact while she was driving and pushed her onto the steering wheel, which crushed the baby causing it to die. I said, "What happened?" And she said, "Nothing. They said the baby is not a person as it had not breathed". I said, "I do not understand how a baby can die and nothing happens".

That incident prompted my investigation into this area of law. I believe there is a gap in the law. Zoe's was another tragic death that I will speak about later in this second reading speech. There has been confusion about this bill previously as it was thought to be an anti-abortion bill. The bill makes it clear that there is an exemption for medical procedures, which is the terminology used for termination of a pregnancy or aborting of a foetus. This bill states specifically that it has nothing to do with termination of a pregnancy. I encourage members not raise that issue as a reason for opposing the bill. It is a red herring. The bill states clearly that there is an exemption for medical procedures.

In 2001-02 two incidents drew attention to the deficiency in the law with regard to the protections extended to women during pregnancy. In November 2001 Ms Renee Shields was involved in 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, Phillip Nathan King. In both cases, the law failed to address directly the injustice and the grief suffered by those women as there was no existing offence for destruction of a child in utero. In response to community pressure, the then 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 women concerned. That is the basis of the bill before the House. The New South Wales Government decided against adopting Mr Finlay's recommendation to introduce a new offence, preferring to codify the court's ruling and provide for the remedial restitution of justice through the existing provision of "grievous bodily harm" found within the Crimes Act 1900. The Crimes Amendment (Grievous Bodily Harm) Bill 2008, known as "Byron's law", added the following clause to the existing definition of grievous bodily harm. The clause states:

4.(1a) 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.

On 22 March 2005 the bill passed through the Legislative Assembly. On 4 May 2005 the Legislative Council passed the bill, 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, which were supported by the Coalition, but they failed to gain sufficient votes to take effect. On Christmas Day 2009 Ms Brodie Donegan, then eight months pregnant, decided to go for a short walk to stretch her legs. She had walked only a few metres before she was run down by a drug-affected driver. The

impact killed Ms Donegan's unborn daughter, Zoe, and inflicted significant injuries upon Ms Donegan, who suffered 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, as Ms Donegan had sustained injury, but 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 concerns I had raised previously had not been adequately addressed. That is why I have introduced 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 received only 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, Mrs Caroline Fraser, whom I referred to earlier, was very close to giving birth to her child. While she was driving, her car 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 of 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 a baby almost ready to be born had died yet nothing had happened. That has been on my conscience since I entered Parliament, and it is why I have persevered with this legislation.

The Crimes Amendment (Zoe's Law) Bill 2017 seeks to provide an appropriate response to fill that gap. This bill is geared to address the anguish of women who are concerned and want something done; it is not being driven by men. If my first wife, Elaine Nile, were still alive and a member of this House, she would have carriage of this legislation. That is not possible, so I have to take carriage of it. I know it is an issue that concerns women; 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 12 years and many injuries, 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 on this issue it turns into a debate on abortion. The bill clearly exempts any medical procedures, including abortion. The bill achieves a solution by adopting a recommendation of the Finlay report and introduces a new standalone offence within the Crimes Act 1900. For many years I have been corresponding with various Attorneys General and Ministers for Justice, in both Labor and Liberal governments, to try to rectify what I believe is a gap in legislation.

The bill seeks to provide adequate protection for all pregnant women. With the passage of the Crimes Amendment (Grievous Bodily Harm) Bill in 2005, the current Crimes Act covers only 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 at the first medical check-up, which is usually around 35 days, or viewed their child on an ultrasound, which is usually around 42 to 56 days. 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. There has already been a debate on domestic violence in the House today. Domestic violence is another reason that I believe this legislation is so important.

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 was experienced by 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 protection 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 the law. With the current protections to pregnant women being limited to a specific day, there is a great deal of needless ambiguity and uncertainty in 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 evidence, and any future advances in science and technology. The bill does not tie a judge's hands—a judge will make his or her judgment having heard the evidence—but it gives a judge the flexibility to consider 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. It says:

(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 in their reports. The term "child in utero" is also found in several jurisdictions overseas.

I have named the 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. The driver was not charged with Zoe's death because the law did not recognise her as a person. The *Sydney Morning Herald* wrote an article about that. To save time, I will not read the article now. I am pleased to have received an excellent supporting statement on the bill from the Archdiocese of Sydney, which was prepared and issued by project officer Mary Joseph. I will quote from the statement, and note that the words are from a woman, not a man. They are not my words. The article 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 document goes on to say that I have carriage of the bill. It further says:

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.

Obviously they campaigned independently of me. The article continues:

"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.

They were pleased. The Catholic Church statement also states:

"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."

I believe it is time for the Parliament to address this issue, which I have left in abeyance for a couple of years to give the Parliament time to give further consideration to this legislation. I hope that when the bill comes back

into the House for debate all members will have had time to seriously consider and decide upon it according to their conscience and that it will not be rushed through the House. All members will be advised when the bill is brought back into the House. I commend the bill to the House.