

10 February 2020

Ms Anita Chen-Hatton
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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).

Legal Aid NSW refers to its earlier submission to the Discussion Paper – *Reform to recognize the loss of an unborn child as a result of a criminal act* dated October 2019. In that submission, we suggested that current NSW offences are sufficient to address the loss of an unborn child and that any further law reform in this area should be:

- evidence based and targeted at addressing clearly identified concerns
- consider the broader long-term impact of any new or amended offences on the criminal law
- consistent with the principles of the *Abortion Law Reform Act 2019 (NSW)* and not criminalise women or medical professionals engaged in abortions
- not criminalise prospective mothers
- avoid establishing different and confusing laws about when a child attains legal personhood.

Consistent with that position, we do not support the approach in the draft Bill that would significantly increase criminal penalties in the *Crimes Act 1900 (NSW)* across the board in respect of conduct where the offender has no knowledge, and could not reasonably be expected to have known, of the consequences of their actions. Such approach would be at odds with the principle that criminal liability should be imposed

only on those who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and its consequences. There should, where possible, be a close correlation between moral culpability and legal responsibility.

Against that background, we are concerned that proposed new sections 9 and 10 of the *Crimes Act 1900* (NSW) (in Schedule 1 of the Bill) are unjustifiably broad and may lead to unjust and unintended sentencing outcomes. The proposed amendments would provide a circumstance of aggravation for “relevant offences” committed against a pregnant woman which causes the loss of an unborn child. The maximum penalty of the relevant offence will be increased by an additional three years imprisonment where the circumstance of aggravation is established. The definition of relevant offences in proposed section 26 is very broad:

offence against a pregnant woman means an offence—
(a) committed against a primary victim who was pregnant at the time the offence was committed, and
(b) as a direct result of which the foetus was destroyed, whether or not the primary victim died.

Exposure to a significantly higher maximum penalty would be established, regardless of:

- the mens rea of the offender in relation to his/her conduct affecting the primary victim
- the degree and nature of harm suffered by the primary victim
- the intention or knowledge of the defendant as to the pregnancy of the primary victim.

We suggest that the circumstance of aggravation would preferably be limited to circumstances where the defendant knows, or should reasonably have known, that the woman was pregnant at the time of commission of the offence.

If that position is not supported, then we submit that the definition of “*offence against a pregnant woman*” should be limited to those offences in the *Crimes Act 1900* (NSW) involving either deliberate or serious harm to the pregnant woman and where the destruction of a foetus is a reasonably foreseeable outcome of the offender’s inherently dangerous conduct. To avoid doubt, the relevant offences could be prescribed to reflect those offences which already recognise the loss of a foetus as an aggravation of harm to the pregnant woman, namely:-

- Intent to cause grievous bodily harm (s33)
- Recklessly cause grievous bodily harm (s35(1))

- Recklessly cause grievous bodily harm (s35(2))
- Dangerous driving occasioning bodily harm (s52A)
- Dangerous navigation occasioning grievous bodily harm (s52B)
- Cause grievous bodily harm 2 years (s54)

Complex issues involving intent and causation require a detailed consideration of which offences should be covered by the new circumstance of aggravation, rather than a blanket approach taken in the current Bill. Under a more tailored approach, the circumstance of aggravation would not apply to offences (such as property related offences, for example) where the causal nexus between the conduct and the resulting loss of a foetus is tenuous. This would also avoid other unintended consequences, such as compounding existing problems with the drug supply causing death offence in section 25C of the *Crimes Act* highlighted by the Special Commission of Inquiry into the Drug 'Ice'.¹ The loss of a foetus as a result of offences that are not prescribed would continue to be taken into account as an aggravating factor which increases the objective seriousness of the offence under section 21A(2)(g) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

This more balanced approach would also reflect section 48A of the *Crimes Act 1900* (ACT) which provides for aggravated forms of certain offences where the offences was committed against a pregnant woman and the commission of the offence caused:

- a) the loss of, or serious harm, to the pregnancy, or
- b) the death of, or serious harm, to a child born alive as a result of the pregnancy.

The relevant offences are prescribed (in section 48A(1)). The offence is not aggravated if 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 (subsection 48A(3)).

To further avoid disproportionate and arbitrary sentencing outcomes, the increased maximum penalty of the relevant offence where the circumstance of aggravation is established should also be prescribed in relation to individual offences. We do not support the present approach which would more than double the maximum penalty for the offence of negligently causing grievous bodily harm, for example, particularly as there is no requirement to establish intentional harm to the primary victim.

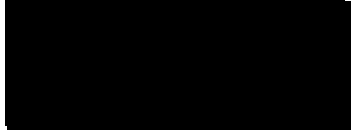
Thank you again for the opportunity to provide this feedback on the Bill. If you have any questions about our feedback, the responsible officer within Legal Aid NSW is

¹ See paragraphs 11.517ff of Volume 2 of its Report: <https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/The-Drug-ice-1546/04-Report-Volume-2.pdf>

Harriet Ketley, Senior Legal Project Officer, Crime, who can be contacted on 



Yours sincerely



Brendan Thomas
Chief Executive Officer