

## Position Statement | Crimes Legislation Amendment (Loss of Foetus) Bill 2021

### Background

Family Planning NSW, Women's Health NSW, the Women's Electoral Lobby and other stakeholders played a central role in the decriminalisation of abortion in NSW. We have jointly considered the Crimes Legislation Amendment (Loss of a Foetus) Bill 2021.

It is our strongly agreed position that it is essential that any amendments made to existing legislation do not threaten the *Abortion Law Reform Act 2019*.

As organisations, we are not legal specialists but seek to ensure that legislation:

- supports a woman's right to freely make choices about her healthcare and future
- supports a woman's right to make decisions regarding their pregnancy options
- supports clinicians to provide healthcare to all people, free from the risk of persecution

We will strongly oppose the introduction of any legislation that has the potential to infringe on existing laws in relation to abortion within NSW and their impact on women or healthcare workers.

### The issues

*The Crimes Legislation Amendment (Loss of Foetus) Bill 2021* is more commonly known as *Reform to recognise the loss of an unborn child due to crime* and in the media and hereafter in this document *Zoe's Law*.

Zoe's Law has taken various forms and been a matter of debate in NSW for more than a decade. Previous iterations of Zoe's Law sought to create a separate criminal offence for the death of a foetus, raising issues around abortion provision and granting legal personhood to a foetus.

Family Planning NSW, the Women's Electoral Lobby, Women's Health NSW, community legal centres and legal societies worked closely in the past to voice our strong opposition about previous iterations of the Bill.

### Existing legislation

It is important to reiterate that there is other existing legislation to prosecute those whose criminal actions result in the death of a foetus.

In 2005, the definition of Grievous Bodily Harm in the *Crime Act 1900* was amended 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 offence carries a maximum prison sentence of 25 years.

In 2010, the Hon. Michael Campbell QC reviewed the law surrounding criminal incidents involving the death of an unborn child and found that there was no need to change the current law.



However, the 2021 Bill in its draft form offers some concessions from earlier iterations of Zoe's Law, most specifically that it does not create a separate criminal offence for the death of a foetus. Rather, it will make the death of a foetus an 'aggravating factor' to criminal acts therefore increasing penalties. It is our early view that this concession considers a woman's right to access healthcare.

It will always be a priority for us that Bills like this do not impact a woman's right to choose or a health professionals' role in providing essential care.

#### Funeral arrangements

There are also provisions in the Bill which speak to the grief of losing a foetus including financial provisions for funeral arrangements in some cases. While not problematic in and of itself, this move is out of step with concessions afforded with other victims of criminal acts.

#### Victim Impact Statements

The proposed Bill expands the eligibility of family members to make a Victim Impact Statement in court. This poses concerning issues in some circumstances and consideration should be given to whether anyone other than the pregnant person is suitable to make such a statement. Significant sensitivities will exist where a pregnant person has lost a foetus through circumstances such as domestic violence.

#### Impact on abortion legislation

We cautiously welcome concessions in the existing draft Bill which exclude abortion and clearly look to only apply penalties where the death of a foetus is the result of a criminal act after 20 weeks and 400gm gestation.

The threshold of 20 weeks is reassuring and important to maintain as the lowest gestation limit in relation to the legislation. It aligns with Births Death and Marriages. It would have been ideal, however, if the weeks were aligned with the *Abortion Reform Act 2019* which allows abortion to 22 weeks.

Unlike previous versions of Zoe's Law, the 2021 iteration is understood to be a Liberal/National party position and members of these parties will not create further amendments. This will not preclude amendments in the Upper House particularly through conservative Independents.

#### **Concerns of note**

- The Bill points to prosecuting third parties involved in a criminal act which causes the death of a foetus. We would like explicit protections to ensure pregnant people committing unlawful acts cannot be prosecuted for the death of their foetus under any circumstances.
- Language throughout should be "pregnant person" not "woman" to be in line with other recent legislation.
- The proposed Bill expands the eligibility of family members to make a Victim Impact Statement in court. This poses issues particularly in circumstances such as domestic violence. Consideration should be given to if the pregnant person should have the right to choose or veto who may make such statements.

#### **Intolerable amendments would include:**

- Personhood of a foetus
- Prosecution of a person for causing the death of their own foetus, accidentally, criminally, intentionally, or unintentionally
- Prosecution of health workers for causing the death of a foetus

and on behalf of:

Denele Crozier (Womens' Health NSW)  
Mary O'Sullivan (NSW Women's Electoral Lobby)  
Julie Hamblin (Lawyer)