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Criminalising Harm to a Fetus

Legislation to protect a fetus from harm is contentious because it can lead to conflicting legal rights of the mother and the fetus. Below are two examples from the USA and NSW.

Criminalising Substance Abuse during Pregnancy in the USA

It is more than 40 years since the first criminal charges were brought against a woman in the USA for using drugs during pregnancy. While pregnant women remain subject to the same laws as anyone else, an additional set of legislation targets pregnant women, particularly those who are marginalized and those who use drugs, based on a belief that they have caused or risked harm to their fetus. Often known as “fetal assault”, “chemical endangerment” or “personhood” laws, these measures have been used to arrest and prosecute women who experience pregnancy complications and conditions such as drug dependence. A patchwork of evolving laws and practices impact women across the United States of America.

One of the unwanted effects of this legislation is that pregnant women are discouraged from seeking medical treatment that could prevent harm to their fetus for fear of prosecution or stigma.

The Fetus is not a Legal Person in NSW

In NSW a fetus is not currently a person in the legal sense. ‘Zoe’s Law’ is a bill in the NSW parliament which would make it a crime to cause serious harm or death to a fetus. The bill has been before the NSW parliament in some form since 2013. It was first championed by Christian Democratic Party leader Fred Nile after Brodie Donegan lost her unborn daughter Zoe at 32 weeks of pregnancy when she was hit by a car on Christmas Day in 2009.

The driver was charged with driving under the influence of drugs and causing grievous bodily harm, but the family wanted charges of murder or manslaughter brought over the loss of Zoe. However, under NSW law Zoe was not classed as a baby because she had not taken her first breath.

The bill is strongly opposed by pro-choice women’s groups who see legal personhood for a fetus as a precedent that could be used as a starting point to roll back abortion rights.