

2006

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

CRIMES (OFFENCES AGAINST PREGNANT WOMEN)

AMENDMENT BILL 2005

SUPPLEMENTARY EXPLANATORY STATEMENT

Circulated with the authority of
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Overview

The Crimes (Offences Against Pregnant Women) Amendment Bill 2005 (the Bill) amends the *Crimes Act 1900* (the Crimes Act) to make a number of offences aggravated offences if an offence is committed against a pregnant woman and the commission of the offence causes the loss of, or serious harm to, the pregnancy or the death of, or serious harm to, a child born alive as a result of the pregnancy.

The Bill recognises that some acts of violence are worse than others and that violence towards a pregnant woman that results in harm to the pregnancy or subsequent child deserves separate and more severe treatment. The Bill also reflects a community desire for appropriate sanctions for malicious acts against pregnant women and also to afford special protections for pregnant women from acts of violence.

The effect of the aggravated offence would be to increase the maximum available penalty for the simple offence. The penalties for the aggravated offences have been set approximately 30 per cent higher than the penalties for the simple offences.

The Bill also amends the sentencing principles in the Crimes Act to ensure the court takes into account any harm caused to the pregnancy or to the child born alive as a result of the pregnancy, whether the offender knew, or ought reasonably to have known, the woman was pregnant, and whether the offender intended to cause, or was reckless about causing, harm to the pregnancy or the child born alive when determining the sentence to impose for an offence.

The Bill also amends the Crimes Act definitions of grievous bodily harm and actual bodily harm.

The amendment dealt with in this explanatory statement replaces subclauses 48A (2) to (5). The effect of the amendment is to include a “lack of knowledge” defence to allow an accused to avoid liability for an aggravated offence if he or she proves, on the balance of probabilities, that they did not know and could not reasonably be expected to know that the woman was pregnant.

Amendment details

Clause 18

Proposed new section 48A (2) to (5)

Page 6, line 13 –

The amendment replaces subclauses 48A (2) to (5).

New subclause 2 is identical to existing subclause 2 and sets out the factors of aggravation for an offence listed in existing subclause 1. To establish the aggravated offence it is necessary to prove one of the offences was committed against a woman who was pregnant at the time of the offence. The Act does not define pregnant woman or pregnancy. It is intended to take on its ordinary meaning and apply at any stage of a pregnancy beginning at conception and ceasing when a child is born alive. Section 10 of the *Crimes Act 1900* deals with when a child is born alive.

Once it is proved that the victim was pregnant at the time of the offence, to establish the aggravated offence, it is also necessary to prove that the commission of the offence caused either the loss of, or serious harm to, the pregnancy or the death of, or serious harm to, a child born alive as a result of the pregnancy. These terms are discussed in the ‘Revised Explanatory Statement’ for the Bill.

The aggravating factor that relates to a child born alive as a result of the pregnancy is necessary because some harm suffered in utero takes time to manifest in a child once it is born alive. However, these provisions do not displace the common law rule established in *Attorney-General’s Reference* (No.3 of 1994) [1998] AC 245 that injury to a fetus before birth, which results in harm to the child after it is born, can give rise to criminal responsibility for that injury. Notwithstanding this common law rule, in some cases where a child is subsequently born alive and has sustained injuries in utero that could give rise to a charge of an actual bodily harm, grievous bodily harm or manslaughter related offence, it may be difficult for the prosecution to prove the requisite intent required to make out a criminal offence against the child. In these circumstances it would be possible for the Director of Public Prosecutions to elect to pursue a charge for an aggravated offence that is referenced against the child’s mother.

New subclause 3 inserts a “lack of knowledge” defence to allow an accused to avoid liability for an aggravated offence if he or she proves, on the balance of probabilities, that they did not know and could not reasonably be expected to know that the woman was pregnant.

Without the amendment a person may be found guilty of an aggravated offence even though the person did not know and could not reasonably have known, that the victim was pregnant. It may be contrary to fundamental principles to saddle a person with criminal liability if he or she simply has no knowledge and no real warning about the central element of the aggravated offence; namely that the woman was pregnant. Such an absence of a requirement to prove fault for the aggravating factors is a limitation to the right to a presumption of innocence. The limitation may not satisfy the reasonable limits test in section 28 of the *Human Rights Act 2004*.

The defence will operate so a person will not be liable for any of the aggravated offences if he or she proves, on the balance of probabilities, that he or she did not know and could not reasonably have known that the woman was pregnant. This means that in traffic accident cases involving people not known to each other where the pregnant woman is injured in the other vehicle the defendant will generally be able to claim this defence. However, in most domestic violence situations this will be more difficult, particularly where the defendant is the woman’s partner.

Further, the deterrent value of the aggravated offences is considerably diminished in situations where the person does not know and has no way of knowing that he or she will be exposed to a greater penalty because the woman concerned is pregnant.

If a defendant establishes the proposed new defence he or she will still be liable for the non aggravated simple offence and the proposed new sentencing principles will ensure that when the court imposes a sentence for the simple offence it will have regard to any harm that was caused to the pregnancy. However the court will only be permitted to

sentence up to the maximum for the simple offence and not the maximum of the aggravated offence, which will not apply if the defence is established. The other features of the Bill that will ameliorate the no fault element provision will also remain. That is, to establish the aggravated offences the prosecution will still have to prove all the elements - including the fault elements - of the corresponding simple offence.

The proposed new sentencing criteria will continue to remain so that if the defendant intended to cause harm to the woman's pregnancy or was reckless about that the court can take those matters into account in determining the penalty to impose for the aggravated offence.

A lack of knowledge defence could still be argued to trespass unduly on personal rights and liberties and be a limitation on the right to be presumed innocent under section 21 of the Human Rights Act. This would be on the basis that the defendant is required to prove the defence, on the balance of probabilities, as opposed to the prosecution being required to prove an element of the offence (ie that the person knew, or ought to have known, the victim was pregnant) beyond all reasonable doubt.

The lack of knowledge defence is considered to satisfy the reasonable limits test in section 28. Section 28 of the Human Rights Act provides that human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society. It is considered that this limitation serves a legitimate objective, it is rationally connected to achieving that objective and it is the least restrictive means of achieving that objective.

There is a strong community interest in affording special protections for pregnant women from acts of violence and for appropriate sanctions for malicious acts against pregnant women. Section 9 (2) of the Human Rights Act explicitly states that the right to life applies from the time of birth. Until a child is born alive any harm caused to a pregnancy may only be referenced against a mother. This legal view is reconfirmed and clarified in relation to existing clauses 21 and 22.

The objective for the aggravated offences in the Bill is to afford greater protection to pregnant women and their pregnancies by allowing for higher penalties to be imposed where a relevant offence is committed against a pregnant women and the commission of the offence causes the loss of or serious harm to the pregnancy or child born alive as a result of the pregnancy. This objective meets the concerns held by the community.

There is a rational connection between the limitation on rights and the achievement of this objective. The Scrutiny of Bills Committee suggested including a lack of knowledge defence to achieve compliance with the Human Rights Act; in doing so the Committee prepared a thorough and detailed analysis of the issues involved in determining Human Rights compliance.

In considering the Bill in its original form - without the newly proposed defence - the Committee made the following important findings:

- That there is a strong community interest in affording special protections for pregnant women from acts of violence;

- In aiming to apply appropriate sanctions for acts of violence against pregnant women the proposed aggravated offences serve a legitimate objective; and
- The proposed offences are rationally connected to achieving that objective.

When the Committee balanced all the considerations involved the only real point of vulnerability it identified as a possible concern for non compliance was that the limitation to the right to the presumption of innocence may not have been sufficiently minimised, to balance that it suggested the inclusion of a lack of knowledge defence.

The defendant is only required to prove the defence to the “civil standard”, on the balance of probabilities, and not to the more onerous criminal standard of “beyond a reasonable doubt”, which the prosecution would have to prove. Ultimately this has a bearing on the effectiveness of the offences and when all the factors identified by the Committee are considered this is considered to be the fairest and most appropriate approach.

Subclause 4 is identical to existing subclause (3) and is procedural in nature. It provides that if the prosecution intends to prove an aggravated offence, the relevant factors of aggravation must be stated in the charge.

Subclause 5 provides that it is not necessary for the prosecution to prove that the defendant had a fault element in relation to any factor of aggravation, specifically that the offence was committed against a pregnant woman and that the commission of the offence caused the loss of, or serious harm to, the pregnancy; or the death of, or serious harm to, a child born alive as a result of the pregnancy.

However subclause 3 provides a defence to allow an accused to avoid liability for an aggravated offence if he or she proves, on the balance of probabilities, that they did not know and could not reasonably be expected to know that the woman was pregnant.

Subclause 5 also provides that the *Criminal Code 2002*, Chapter 2 – General principles of criminal responsibility – does not apply to an offence to which the section applies, namely:

- section 15 (Manslaughter)
- section 19 (Intentionally inflicting grievous bodily harm)
- section 20 (Recklessly inflicting grievous bodily harm)
- section 21 (Wounding)
- section 23 (Inflicting actual bodily harm)
- section 24 (Assault occasioning actual bodily harm)
- section 29 (2) (Culpable driving of motor vehicle causing death)
- section 29 (3) (Culpable driving of motor vehicle causing grievous bodily harm).

Chapter 2 of the Criminal Code also does not apply to the aggravated offences.

Subclause 5 removes any doubt about the application of the Criminal Code. The clause is necessary for the purpose of the aggravated offence as it could be argued that it is not a pre-2003 offence and therefore the Criminal Code would apply. The necessity for the clarification in relation to the simple offence is less evident. It has been included as a

cautionary measure to ensure that valuable court time is not needlessly wasted in arguments that the Criminal Code and not the common law applies because the Bill has in some way changed the simple offence.

By way of background, Chapter 2 of the Criminal Code codifies the general principles of criminal responsibility. It contains all of the general principles that apply to any ACT offence to which the Criminal Code applies. The Criminal Code adopts the usual analytical division of the elements of criminal offences into the physical elements and the fault elements. It makes clear that a law creating an offence can specify the fault element for physical elements of the offence. It also provides that the law can specify that there is no fault element for one or all of the physical elements of the offence (ie. strict or absolute liability). Where such matters are not specified in an offence, the Criminal Code provides for default fault elements which apply to particular physical elements of the offence. The effect of subclause 5 means that the default fault elements in the Criminal Code cannot not be read into the elements of the simple or aggravated offences.

Further, Division 2.3 sets out the generic defences permitted by the Criminal Code. This includes defences such as lack of capacity, mistake or ignorance of fact, claim of right, intervening conduct or event, duress, sudden or extraordinary emergency. The effect of subclause 5 means that a person charged with a simple or aggravated offence cannot invoke any of the defences permitted by Division 2.3. This does not amount to a limitation on human rights as these defences have common law or statutory counterparts, which may be relied on by the defendant.