

2005

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

CRIMES (OFFENCES AGAINST PREGNANT WOMEN)

AMENDMENT BILL 2005

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.

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. This aspect is discussed in detail in relation to Clause 18 of the Bill.

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

Clauses

Clause 1 Name of Act

This clause sets out the name of the proposed Act as the *Crimes (Offences Against Pregnant Women) Amendment Act 2005*.

Clause 2 Commencement

This clause provides that the Act will commence the day after its notification on the Legislation Register.

Clause 3 Legislation amended – sch 1

This clause states that the Act amends the *Crimes Act 1900*.

Clause 4 Manslaughter New Section 15 (3)

This clause inserts a new subsection (3) into section 15 – Manslaughter. Subclause (3) provides for an aggravated offence of manslaughter with a maximum penalty of imprisonment for 26 years.

The clause should be read with clause 18 which inserts a new section 48A – Aggravated offences – offences against pregnant women. Proposed section 48A makes provision in relation to aggravated offences against section 15 and sets out the factors of aggravation for the offence. Subclause 18 (5) also provides that the *Criminal Code 2002*, Chapter 2 – General principles of criminal responsibility – does not apply to the section 15 offence of manslaughter.

**Clause 5 Intentionally inflicting grievous bodily harm
Section 19**

Clause 5 is a technical amendment that is necessary for drafting purposes. The clause amends section 19 to enable the existing section to be subsection (1) of the provision.

Clause 6 New section 19 (2)

This clause inserts a new subsection (2) into section 19 – Intentionally inflicting grievous bodily harm. Subclause (2) provides for an aggravated offence of intentionally inflicting grievous bodily harm with a maximum penalty of imprisonment for 20 years.

The clause should be read with clause 18 which inserts a new section 48A – Aggravated offences – offences against pregnant women. Proposed section 48A makes provision in relation to aggravated offences against section 19 and sets out the factors of aggravation for the offence. Subclause 18 (5) also provides that the *Criminal Code 2002*, Chapter 2 – General principles of criminal responsibility – does not apply to the section 19 offence of intentionally inflicting grievous bodily harm.

**Clause 7 Recklessly inflicting grievous bodily harm
Section 20**

Clause 7 is a technical amendment that is necessary for drafting purposes. The clause amends section 20 to enable the existing section to be subsection (1) of the provision.

Clause 8 New section 20 (2)

This clause inserts a new subsection (2) into section 20 – Recklessly inflicting grievous bodily harm. Subclause (2) provides for an aggravated offence of recklessly inflicting grievous bodily harm with a maximum penalty of imprisonment for 13 years.

The clause should be read with clause 18 which inserts a new section 48A – Aggravated offences – offences against pregnant women. Proposed section 48A makes provision in relation to aggravated offences against section 20 and sets out the factors of aggravation for the offence. Subclause 18 (5) also provides that the *Criminal Code 2002*, Chapter 2 – General principles of criminal responsibility – does not apply to the section 20 offence of recklessly inflicting grievous bodily harm.

**Clause 9 Wounding
Section 21**

Clause 9 is a technical amendment that is necessary for drafting purposes. The clause amends section 21 to enable the existing section to be subsection (1) of the provision.

Clause 10 New section 21 (2)

This clause inserts a new subsection (2) into section 21 – Wounding. Subclause (2) provides for an aggravated offence of wounding with a maximum penalty of imprisonment for seven years.

The clause should be read with clause 18 which inserts a new section 48A – Aggravated offences – offences against pregnant women. Proposed section 48A makes provision in relation to aggravated offences against section 21 and sets out the factors of aggravation for the offence. Subclause 18 (5) also provides that the *Criminal Code 2002*, Chapter 2 – General principles of criminal responsibility – does not apply to the section 21 offence of wounding.

**Clause 11 Inflicting actual bodily harm
Section 23**

Clause 11 is a technical amendment that is necessary for drafting purposes. The clause amends section 23 to enable the existing section to be subsection (1) of the provision.

Clause 12 New section 23 (2)

This clause inserts a new subsection (2) into section 23 – Inflicting actual bodily harm. Subclause (2) provides for an aggravated offence of inflicting actual bodily harm with a maximum penalty of imprisonment for seven years.

The clause should be read with clause 18 which inserts a new section 48A – Aggravated offences – offences against pregnant women. Proposed section 48A makes provision in relation to aggravated offences against section 23 and sets out the factors of aggravation for the offence. Subclause 18 (5) also provides that the *Criminal Code 2002*, Chapter 2 – General principles of criminal responsibility – does not apply to the section 23 offence of inflicting actual bodily harm.

**Clause 13 Assault occasioning actual bodily harm
Section 24**

Clause 13 is a technical amendment that is necessary for drafting purposes. The clause amends section 24 to enable the existing section to be subsection (1) of the provision.

Clause 14 New section 24 (2)

This clause inserts a new subsection (2) into section 24 – Assault occasioning actual bodily harm. Subclause (2) provides for an aggravated offence of assault occasioning actual bodily harm with a maximum penalty of imprisonment for seven years.

The clause should be read with clause 18 which inserts a new section 48A – Aggravated offences – offences against pregnant women. Proposed section 48A makes provision in relation to aggravated offences against section 24 and sets out the factors of aggravation for the offence. Subclause 18 (5) also provides that the *Criminal Code 2002*, Chapter 2 – General principles of criminal responsibility – does not apply to the section 24 offence of assault occasioning actual bodily harm.

**Clause 15 Culpable driving of motor vehicle
New Section 29 (2A)**

This clause inserts a new subsection (2A) into section 29 – Culpable driving of motor vehicle. Subclause (2A) provides for an aggravated offence of culpable driving of motor vehicle causing death with a maximum penalty of imprisonment for nine years.

The clause should be read with clause 18 which inserts a new section 48A – Aggravated offences – offences against pregnant women. Proposed section 48A makes provision in relation to aggravated offences against section 29 (2) and sets out the factors of aggravation for the offence. Subclause 18 (5) also provides that the *Criminal Code 2002*, Chapter 2 – General principles of criminal responsibility – does not apply to the section 29 (2) offence of culpable driving of motor vehicle causing death.

Clause 16 New Section 29 (3A)

This clause inserts a new subsection (3A) into section 29 – Culpable driving of motor vehicle. Subclause (3A) provides for an aggravated offence of culpable driving of motor vehicle causing grievous bodily harm with a maximum penalty of imprisonment for five years.

The clause should be read with clause 18 which inserts a new section 48A – Aggravated offences – offences against pregnant women. Proposed section 48A makes provision in relation to aggravated offences against section 29 (3) and sets out the factors of aggravation for the offence. Subclause 18 (5) also provides that the *Criminal Code 2002*, Chapter 2 – General principles of criminal responsibility – does not apply to the section 29 (3) offence of culpable driving of motor vehicle causing grievous bodily harm.

Clause 17 Section 29

This clause provides for the renumbering of section 29 when the Crimes Act is republished under the *Legislation Act 2001*.

Clause 18 New sections 48A and 48B

This clause inserts a new sections 48A and 48B.

New section 48A provides for aggravated offences for certain offences against pregnant women. The clause should be read with clauses 4, 6, 8, 10, 12, 14, 15 and 16. These clauses set out the maximum penalty that applies for the aggravated offence. The provision has been included to recognise that some acts of violence are worse than others and that violence towards pregnant women that result in harm to the pregnancy or subsequent child deserves separate and more severe treatment. The provision also reflects a community desire for appropriate sanctions for malicious acts against pregnant women.

Subclause (1) lists the provisions to which the section applies. Subclause (2) sets out the factors of aggravation for an offence listed in 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 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 further below. 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.

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

The effect of subclause 4 is that a person may be found guilty of an aggravated offence although the person does not know the victim was pregnant. This element may be considered to trespass unduly on personal rights and liberties and engage the right to be presumed innocent under section 21 of the *Human Rights Act 2004*. 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 engagement of rights is a justifiable limit on the right to be presumed innocent and is relevant, rational and proportionate to the objective served by the aggravated offence provisions.

The engagement of rights is relevant and rational because 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 2004* 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 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 woman 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.

The engagement of rights is also rational because in a high proportion of cases the protection of pregnant women would be rendered ineffective if there is a requirement for the defendant to know the woman was pregnant. For example, in the context of the

culpable driving offences the aggravated offence would be unworkable if the prosecution is required to prove fault in relation to whether a driver knew the occupant of a car or victim was pregnant. In a high proportion of culpable driving offences a defendant would not generally be aware of any details of the occupant in another vehicle. Further, the state of mind or intent of the defendant in relation to causing the death of or harm to a victim or even the existence of a victim is not relevant to the elements of the simple offence. This would also make an alternative option such as reversing the onus of proof ineffective. For these reasons the engagement of rights is proportionate.

In the context of the other offences, the aggravated version of the offence would not come into effect until the prosecution can prove all elements of the simple offence beyond reasonable doubt. In relation to causing grievous bodily harm offences, for example, there is still the requirement to prove that the defendant intended or was reckless about the fact that grievous bodily harm would result or the offence could not be made out.

Most significantly, the absence of a fault element is balanced by clause 19 which requires a court to have regard to the harm caused to the pregnancy and the state of mind of the victim in relation to the existence of the pregnancy and the harm caused to the pregnancy when determining the sentence to be imposed on the person. It is considered that a judge is in the best position to ascertain in all of the circumstances what penalty should be imposed having regard to what the defendant knew. If the defendant did not know that the victim was pregnant, this would be an important factor in reducing the level of penalty that might otherwise be imposed.

This balancing provision supports the proportionately of the engagement of the right to be presumed innocent and is further discussed in relation to clause 20. The provision has been carefully designed to counter the interference with the right to be presumed innocent and to ensure that this engagement of rights is not arbitrary, unfair or excessive.

Subclause 5 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 6 contains the definitions for the section:

cause loss, serious harm or death: This definition explains that for the aggravated offences the causal link is satisfied if the defendant’s conduct “substantially contributes” to the loss, serious harm or death. It is not necessary to show that the person’s conduct was the sole cause but simply that it was a substantial cause. This is a commonsense approach consistent with the approach Australian courts take with respect to homicide and inflicting personal injury.

harm and **serious harm** to a child: These definitions refer to the *Criminal Code 2002* dictionary definitions of harm and serious harm. The definitions in the Criminal Code are generic and relate to a person therefore it is sufficient to rely on them.

harm to a pregnancy: This definition is an inclusive definition and lists some of the common harms that could result to a pregnancy from acts of violence toward a pregnant woman. The list is not exhaustive.

serious harm to a pregnancy: This definition explains that serious harm to a pregnancy is any harm including the cumulative effect of more than one harm that is likely to cause the loss of the pregnancy or endangers, or is likely to endanger, the natural course of the pregnancy.

loss of a pregnancy: The term “loss of pregnancy” is defined to mean “a miscarriage” or where the mother continues to carry but has a stillbirth. The definition would cover the loss of a pregnancy at any stage but would not cover cases where the defendant’s conduct causes the woman to give birth prematurely to a live baby (this would be covered under ‘serious harm to pregnancy’).

New section 48B is procedural in nature and provides for alternative verdicts. The provision ensures that a prosecution for a simple offence does not fail because the aggravating factor is not proved. The provision also provides for a step down alternative penalty procedure. This ensures that where an aggravated factor is proved but the elements of a simple offence is not proved a prosecution does not fail for an alternative aggravated offence.

Clause 19 Section 49 heading

This clause substitutes the heading contained in section 49.

Clause 20 New section 342 (1) (w)

The task of a judge or magistrate sentencing an offender is to impose a sentence in a manner that applies sentencing principles and considerations to all cases equally. The sentencing court must balance the needs of the victim, the community and the offender; determine the factual basis upon which the sentence should be imposed; and consider the circumstances of the offence.

This clause inserts additional matters that a court must have regard to when determining a sentence for an offence when it is known to a court that a victim of the offence was a pregnant woman. The court shall have regard to the loss or harm to the pregnancy (see discussion of this term in clause 18) or to the child born alive as a result of the pregnancy, whether the person knew, or ought reasonably to have known, that the woman was pregnant, and whether the person intended to cause, or was reckless about

causing, loss of or harm to the pregnancy or to the child born alive as a result of the pregnancy.

This additional consideration is an important balance to subclause 18 (4). Subclause 18 (4) provides that it is not necessary to prove a fault element in relation to a factor of aggravation, effectively this enables a person to be found guilty of an aggravated offence although the person was not aware of the factor of aggravation. The person's knowledge and state of mind when committing the simple offence would be taken into account by a court on sentencing.

Being convicted of an aggravated offence does not mean that a court must impose the penalty for the aggravated offence. The aggravated offence penalty is a maximum penalty a court can impose. Where a statutory term of imprisonment is attached to an offence the term may be reduced by a court. For example, if the maximum penalty for a simple offence is ten years imprisonment, a court has the power to impose any term of imprisonment up to or including ten years imprisonment. Where the maximum penalty for the aggravated offence is 13 years, the court has the power to impose any term of imprisonment up to or including 13 years imprisonment.

However the clause is not limited to sentencing offenders convicted of the aggravated feature of pregnancy offences. It would also apply to the sentencing of offenders for any offence. When it is known to a court that a victim was a pregnant woman, a court may consider any harm caused to the pregnancy or child born alive as a result of the pregnancy, and the knowledge of the offender in relation to the pregnancy and the offenders' state of mind when determining a sentence for any offence, whether or not the offence has an aggravated offence, and when the offence has an aggravated offence, whether or not the aggravated factor was proven.

For example, in a matter where a person is convicted of assaulting a woman who is pregnant and it is established that the person knew the victim was pregnant and intended to cause serious harm to the pregnancy, but the aggravated factor was not proven because the commission of the offence did not actually cause any serious harm to the pregnancy, the court would have regard to the fact that the offender knew the woman was pregnant and intended to harm her pregnancy in determining a sentence for a simple offence.

Clause 21 Dictionary, new definition of actual bodily harm

This clause inserts a definition of actual bodily harm to include, for a pregnant woman – harm to the pregnancy. The purpose of this clause is to ensure that offences under the Act in relation to inflicting or occasioning actual bodily harm extends to harm to a pregnancy whether or not the woman suffers any other harm. The definition of actual bodily harm is an inclusive definition and is not exhaustive. It does not effect the remainder of the common law interpretation of what constitutes actual bodily harm.

This excludes harm to a pregnancy as a result of a medical procedure.

The clause does not omit or remake the existing offences in relation to inflicting or occasioning actual bodily harm. Under section 8 (1) (a) of the *Criminal Code 2002*, Chapter 2 – General principles of criminal responsibility – does not apply to these offences.

Clause 22 Dictionary, definition of grievous bodily harm

This clause expands the current definition of grievous bodily harm to include, for a pregnant woman – loss of or serious harm to the pregnancy other than in the course of a medical procedure. The purpose of this clause is to ensure that offences under the Act in relation to causing or inflicting grievous bodily harm extends to the loss of or serious harm to a pregnancy whether or not the woman suffers any other harm.

This excludes the loss of a pregnancy or serious harm to a pregnancy as a result of a medical procedure and would not affect the current law with respect to the lawful termination of pregnancies.

The clause does not omit or remake the existing offences in relation to causing or inflicting grievous bodily harm. Under section 8 (1) (a) of the *Criminal Code 2002*, Chapter 2 – General principles of criminal responsibility – does not apply to these offences.