



The problem with personhood

The stated object of foetal personhood bills is to recognise harm to or destruction of some fetuses as a separate offence to any harm caused to a pregnant woman.¹ If the Bill passes it will be the first time in Australia that legislation defines a foetus as a person.

Such a law establishes a conflict of rights between the foetus and the pregnant woman. The appeal of legal consistency is strong and if a foetus is defined as a person for certain purposes it is not difficult to imagine other scenarios where a foetus could be argued to be a person as well.

It endangers women's access to abortion and other reproductive health care, but also potentially subjects them to punitive surveillance and over-ruling of their medical decisions at any time during pregnancy.

"Personhood" laws passed in the US criminalise abortion with no exception, and also ban many forms of contraception, in vitro fertilisation, and health care for pregnant women.

"Personhood" laws also increase an already dangerous trend of criminalising pregnancy, by mandating that women who terminate a pregnancy be arrested, prosecuted, and even imprisoned because of the supposed injury done to a separate "person" - namely, the foetus.

So-called foetal homicide laws are already being used in many states to arrest and prosecute women who miscarry pregnancies or are otherwise seen as "harming" the foetus.²

Our laws already recognise the destruction of a foetus

The current criminal law in NSW provides that the destruction of a foetus, other than in the course of a medical procedure, is grievous bodily harm to the woman, even

if the woman is not injured, and carries a maximum prison sentence of 25 years.³

This issue has been extensively considered in NSW

In the *Review of laws surrounding criminal incidents involving the death of an unborn child*⁴ the Honourable Michael Campbell QC found that the current law in NSW allows for an appropriate response to such incidents and that no amendments were required.

In 2013 and 2014, the NSW Parliament also considered foetal personhood laws, which were ultimately not passed.

Changes to the criminal law may not be the best way to acknowledge the tragic loss of a foetus.

The wider implications of such Bills are troubling to all those who oppose it and should be of concern to all women.⁵ Such Bills have been opposed by women who lost fetuses in the manner that such Bills seek to criminalise.⁶

Foetal personhood overseas

In other jurisdictions, such as the United States, the legislative recognition of a foetus as a separate victim has led to a range of restrictive and punitive consequences for pregnant women and for people providing them with medical and other services.

For example:

Bei Bei Shuai attempted suicide by ingesting rat poison and miscarried. She was charged with murder and foeticide. In a plea deal, she was convicted of a lesser crime (criminal recklessness).

Purvi Patel attempted self-abortion with pills ordered on the internet and was convicted of murder. Women were told by lawmakers during the passing of these laws (after a pregnant woman was shot in the

stomach in a gun violence incident) that they would not affect pregnant women. In Patel's appeal, her lawyers argued that the feticide law was being improperly applied since it was meant to prosecute people who kill a foetus during an act of violence against a woman, not to punish a woman for an illegal abortion. The state denied her appeal.⁷

Alabama legislators in 2014 changed the judicial permission process to allow a judge, at his or her discretion, to appoint a guardian ad litem "for the interests of the unborn child." The law also requires that local district attorneys are notified of the hearing and can question the minor and call witnesses.⁸

The husband of a pregnant Texas woman, Marlise Munoz - who had been brain dead for seven weeks - had to go to court to

force a hospital to take her off a respirator, ventilator and other machines. The hospital said that doctors were simply trying to obey a Texas law that states that "you cannot withhold or withdraw life-sustaining treatment for a pregnant patient." Munoz's husband responded by saying that "Marlise cannot possibly be a pregnant patient - Marlise is dead." Furthermore, he argued that her wishes - relayed, he said, in conversations but not in writing that she not be on "life-sustaining" measures when she is brain dead - shouldn't be treated differently than a man or other woman simply because of her pregnancy.⁹

Foetal personhood is a fraught area of law, with disturbing international cases suggesting caution and careful review is the appropriate response, and that the weight of evidence is currently against introducing such laws.

Endnotes

- 1 Jones C, 'Foetal Personhood for NSW?', *Alternative Law Journal*, 2013, 38(4), <https://www.altlj.org/news-and-views/downunderallover/duao-vol-38-4/625-foetal-personhood-law-for-nsw>
- 2 Re.Wire Legislative Tracker: Foetal Personhood Laws, <https://rewire.news/legislative-tracker/law-topic/personhood/>
- 3 Jones C, 'Foetal Personhood for NSW?', *Alternative Law Journal*, 2013, 38(4), <https://www.altlj.org/news-and-views/downunderallover/duao-vol-38-4/625-foetal-personhood-law-for-nsw>
- 4 The Honourable Michael Campbell QC (2010) *Review of Laws Surrounding Criminal Incidents Involving the Death of an Unborn Child*, https://www.justice.nsw.gov.au/justicepolicy/Documents/final_campbell_report.pdf
- 5 Henry C, Embracing foetal personhood in NSW, Precedent 122 May/June 2014, <http://classic.austlii.edu.au/au/journals/PrecedentAULA/2014/17.pdf>
- 6 Rober H, 'Why losing my daughter means I don't support Zoe's law', *The Conversation*, 18 November 2013, <https://theconversation.com/why-losing-my-daughter-means-i-dont-support-zoes-law-19985>
- 7 Barker T, 'The New Reality: Women Charged For Murder After Self-Inducing Abortions', *Broadly*, 25 January 2016, https://broadly.vice.com/en_us/article/ypa8z7/the-new-reality-women-charged-for-murder-after-self-inducing-abortions
- 8 Chandler K, 'Alabama abortion law lets judges appoint lawyers for fetuses', *MSNBC*, 28 March 2015, <http://www.msnbc.com/msnbc/alabama-abortion-law-lets-judges-appoint-lawyers-fetuses>
- 9 Botehlo G, Morris J, 'Husband: Pregnant, brain-dead wife wouldn't want to be on life support', *CNN*, 15 January 2015, <https://edition.cnn.com/2014/01/15/justice/pregnant-life-support-texas/index.html>