



DISCUSSION

Our bodies, our choices: Australian law on foetal personhood



Helena Anolak*

Federation University, Australia

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ABSTRACT

The debate revolving around foetal vs maternal rights has been philosophised for years. It has captured attention internationally with the European Court of Human Rights struggling for over five decades to define personhood, and is still yet to reach a definite formulation. A proposed Law Crimes Amendment Bill (Zoe's Law, 2) is currently fuelling public debate about women's reproductive choices in New South Wales, Australia. The proposed legal bill attempts to redefine a 'person' or 'human being' by placing a marker on when 'personhood begins' namely at 20 weeks or weighing a minimum of 400 g. Similar laws recognising personhood at foetal viability have come into force in the United States of America that clearly show the broader consequences of this kind of legislation as American women now face county-by-county, state-by-state anti-choice legislative activism. Midwives work closely with women and their families giving them the authority to formulate opinions on issues of maternal–foetal conflict. If a law such as this is allowed to pass a number of legal and ethical issues will arise for Australian midwives that could potentially have far reaching implications for them and for the women and families that they provide women centred care for.

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1. Introduction

Advances in antenatal medical technology mean that foetuses, which previously were 'invisible' by being concealed and unreachable within their mothers' body, are now observable, visible, palpable and operable in utero.¹ This said, the maternal–foetal relationship remains a unique one. Medical advancements mean that the pregnant woman and the foetus have become two patients with access to one through the other. This generates a dual relationship that bridges the divide to include the foetus in specialist medical practices and discourse.

The debate revolving around foetal vs maternal rights and foetal viability in general has been philosophised for years. It has captured attention internationally with the European Court of Human Rights (ECHR), who for over five decades have struggled to define personhood, is still yet to reach a definite formulation. In the writing up of The Universal Declaration of Human Rights 1948 there were several debated proposals for the provision of explicit protection for the foetus however non of the proposals made it into the final document with the final draft stating 'everyone had a right

to life'.² Article 4 of the American Convention on Human Rights (ACHR) provides that the right to life must be protected 'in general, from the moment of conception'.³ On this basis legal developments in the United States of America (USA) have been trending towards protecting the foetus at viability or at an early gestation.

The increased protection of the foetus under law is vividly evidenced in the recent legal bill proposed in New South Wales (NSW) Australia.^{4,5} The Law Crimes Amendment Bill 2013, No. 2 (Zoe's Law). Briefly, the law recognises an unborn child in criminal law. 'Zoe's Law 2' was passed with a significant majority in the Lower House of the NSW Parliament on 21 November 2013. If it becomes law, it will be the first law in Australia to give legal rights to a foetus over 20 weeks or weighing a minimum of 400 g.¹ The Bill is currently in the NSW Upper House where the vote could be closer.⁶ Zoe's Law is named after Brodie Donegan's unborn child. Brodie was 36 weeks pregnant when she was involved in a car accident on the Central Coast. As a result of that accident she lost her baby. The driver was charged with grievous bodily harm for the injuries she caused Brodie. She could not be charged with an offence for harming Zoe as the law did not recognise an unborn child as separate from the mother.⁶ If Zoe's Law Bill 2013 (No. 2) is passed a number of legal and ethical issues will arise for professional Midwives. This would potentially have far reaching implications for both women and Midwives.

* Correspondence to: Faculty of Health, School of Nursing, Midwifery and Healthcare, Baille Street, Horsham, Victoria 3400, Australia. Tel.: +61 03 5327 6930. E-mail address: h.anolak@federation.edu.au

This article will review the medico legal background of this issue, analyse the issue from a moral and social perspective and examine the implications that a law such as Zoe's Law would have for Midwifery practice in Australia. It explores the complex spectrums that this proposed law presents. Legal implications feed into ethical and moral one hand but on the other affect Midwifery responsibilities and interventions. In simple terms the bill complicates a relatively well-settled synergy of the different actors and professional codes of conduct.

2. The legal status of the foetus vs personhood?

Under Common Law, the foetus under current Australian law appears to have little protection as it is not a legal 'person' or 'human being' until it completely exits its mother's by being born alive.⁷ This is a position that reflects the influence of English Common Law and most of the other Common Law jurisdictions.⁸ The essence of existing legal jurisprudence is thus that a foetus in legal terms, is a 'person in waiting'.^{4,5} The Law Crimes Amendment (Zoe's Law) Bill 2013 (No. 2) essentially seeks to redefine a 'person' or 'human being' by placing a marker of when 'personhood' begins. In this regard it puts 20 weeks into pregnancy as endowing the foetus with full legal rights of personhood. Twenty weeks has been selected on account of the fact that legally at that gestation a foetus that dies is recognised by Births, Deaths and Marriages legislation necessitating a funeral. The personhood of the foetus is buttressed by the fact that parents of the deceased child can potentially qualify for the Australian baby bonus.⁹ For foetus's younger than 20 weeks or smaller than 400 g the current law would continue to apply.

Personhood when bestowed socio-legally on an individual carries with it privileges, protection and rights.¹⁰ This it would be said carries with it the traditional responsibilities and liabilities often fused into the political and legal concept of citizenship.¹¹ The argument against recognising rights before birth has competing legal, medical, ethical and moral foundations. A diversity of opinions – scientific, medical and legal – worldwide remains in contestation regarding at which point in human development an organism is considered 'an infant'.¹² The essence of personhood is the quality or condition of being an individual person and is generally used as a means to determine moral status of an individual therefore enabling an autonomous interaction with the law.¹⁰ The difficulty in definitively stating when personhood begins does not come from our inability to ascertain a set of physiological facts, but is primarily the result of our inability to define what personhood is.¹³

The reality is such that if Zoe's Law is passed, it would mean that if someone caused the destruction or harm to a foetus greater than 20 weeks old they would be charged with grievous bodily harm to the foetus essentially rendering them liable to a double homicide or manslaughter charge, instead of being charged in the current system with grievous bodily harm to only the pregnant woman.¹⁴

3. Analysis of issues from a moral and social perspective

Advances in medical technology and surgical techniques have caused or contributed to a cultural development that identifies fetuses in the popular minds as independent of their mothers.¹⁵ Ultrasound technology presents a visualisation of the foetus's individual appearance and hence concrete evidence to us that a foetus really exists.^{7,16} This construction of foetal existence into personhood is continued outside the antenatal clinic as a copy of the ultrasound image is shown to family and friends displayed on fridge doors and even turned into baby shower invitations.¹⁶ In essence ultrasound technology enables parents to enlist others into the social construction of their baby and give it the public and social identity required for the attainment of personhood.¹⁵ This

intimate relationship between the image and the putative parents acquires great significance in the context of pregnancy loss on account of the 'realness' of the baby. It is partly on this emotive basis that Brodie campaigned for her Zoe's Law.

4. Implications for Midwifery practice in Australia

Much has been written about the importance of women centred care in the practice of midwifery.^{17–19} Women centred care can be defined as the delivery of care that is tailored to women's needs, preferences and values drawing on these key principles to ensure that women's values guide all clinical decisions.²⁰ These ideals support and strengthen the philosophy statement of the International Confederation of Midwives and has aided in the formulation of several key Australian policy documents and standards related to current midwifery care and the development of Australian maternity services.^{18,21} Midwifery scope of practice is such that demands equal partnership in care for the woman, access to or the disclosure of information and dual relationships and boundaries approached always with the benefit for the woman and her child in mind.²² Midwives see themselves as a profession whose duty is to ensure the well-being of pregnant women by supporting women's right to self-determination, with respect to reproductive health, choice, control, continuity of care and advocating for absolute right to maternal autonomy and woman centred care.^{22,23} Sexual and reproductive rights are essential human rights. A legislative change such as Zoe's Law Crimes Amendment (Zoe's Law) Bill 2013 (No. 2) that allows foetal personhood rights has potential consequences to the rights of women and on midwives themselves.^{6,24} The new law complicates the role of Midwives who are tasked with the dual duties of care in law which means both a duty of care to the pregnant woman and one to the foetus she is carrying.⁵ In this situation, midwives are faced with a conflict between the woman's right to self-determination on one hand and the right to life of the child on the other. This conflict causes a high level of emotional stress and, subsequently, professional identity problems.²⁴

4.1. Maternal autonomy: competing priorities? The tussle of medics and lawyers

Legal personhood doesn't make sense for a baby in utero. The physical reality of pregnancy means that the baby is the opposite of autonomous - it depends completely on the mother and is completely contained within her body until birth. While inside the mother, a baby is covered by her legal personhood. Birth is the moment of separation when the baby is no longer contained within the mother and her legal personhood. (Hannah Robert²⁵)

For anyone to suggest that decisions are out of a women's hands, whether insistent on continued pregnancies or to terminate a pregnancy against their will, seems deeply misogynistic. It goes beyond pain and physical injuries – it violates the mother's decision over her own body.²⁵ Legal experts believe personhood laws would give fetuses rights equal to those of the women who created or are carrying them, potentially subjecting health professionals who perform or aid in abortions vulnerable to criminal charges.²⁶

The concept of a person's autonomy is one of choice. A person's right to autonomy is their right to choose how to live their own life.²⁷ If the foetus holds personhood rights, this could encourage legislation against maternal activities that might damage the foetus, such as excessive alcohol, or drug consumption.^{25–27} Indeed, in the USA, women who have damaged their babies through cocaine addiction have received lengthy prison sentences (12 years in one recent case²⁸). Again, some have suggested resort to the courts and even confinement to control maternal behaviour.

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