Jayden’s Law and the history of miscarriage

*Catherine Kevin*

Earlier this year in South Australia, the bill referred to as Jayden’s Law, proposing a change to the definition of a stillbirth in the Births, Deaths and Marriages Act was prepared by Robert Brokenshire, the Family First Member of the state Legislative Council. The amendment proposed would mean that parents who suffer a miscarriage between 12 and 20 weeks would be able to choose to have the event recognised by the state as a stillbirth with the presentation of a birth certificate. This would expand the definition of stillbirth on eight weeks. The narrative of the Bill’s genesis began with the pregnancy loss of Tarlia Bartsch. This event occurred in Port Augusta in 2011, 19 weeks into Bartsch’s pregnancy. When a heartbeat could not be found her labour was induced and she delivered a boy. Bartsch and her partner named him Jayden. As ABC Television’s *7.30 Report* described it, this event ‘touched a raw nerve’.1 When Bartsch wrote on Facebook of her anger at not qualifying for a birth certificate for her son, she received a torrent of support, some of it from women who described their own miscarriages and deliveries of stillborn babies. According to media accounts, the next step she took was to send an email to every South Australian MP requesting attention on this issue. Family First took up the cause and named it Jayden’s Law. The *Adelaide Advertiser* began telling this story just three weeks after Bartsch experienced her ordeal.2

In the last decade or so a number of pregnancy-loss events have caught the attention of the Australian media. In September 2007 a miscarriage that occurred in the emergency waiting-room bathroom of the Royal North Shore Hospital in Sydney led to an inquiry into
the Emergency Department there\(^3\) and the publication of numerous testimonies of miscarriage in NSW broadsheets and tabloids alike.\(^4\) This occurred two years after the legislature in that state was prompted by cases of miscarriage caused by third party violence to amend the Crimes Act in order to provide scope for recognising these losses.

The media interest in miscarriage in this period has had parallels in the increasing availability of support networks for grieving women (and families) who have experienced miscarriage. On close examination, the symbolic landscape that has been drawn on both in autobiographical accounts of miscarriage and in the official support networks, shares territory with that of the anti-abortion movement. One example of this is the dominance of the language of death and babies in the personal testimonies of loss. Another is the use of the image of tiny pre-born feet, which is a mainstay of the anti-abortion movement, and has been adopted by miscarriage support organisations both here and in the United States. This intersecting of miscarriage and abortion discourses is in part due to the absence of cultural scripts available to women for expressing the contours of the distinct loss that can be felt in the event of miscarriage. While anti-abortion campaigners have practised the art of describing the value of the unborn and disseminating this message since abortion law reform movements became prominent in the 1960s, the event of many miscarriages was, until fairly recently, indiscernible or at least difficult to confirm, and where it had been experienced as significant had not been openly discussed.\(^5\) The effect of these historical conditions has been the absence of a discourse that readily expresses the particular nature of the grief that miscarriage can produce.

As already mentioned, the South Australian legislature is not the only place where attempts to address this absence have been made. However the political and social values that have informed and
energised these attempts are significantly different. In New South Wales Labor Minister Bob Debus commissioned an enquiry into the possible amendment of the Crimes Act to allow scope for addressing miscarriages caused by third party violence. The report of this enquiry recommended a new offence of ‘child destruction’ or ‘killing of the unborn child’, which cast the foetus as an individual crime victim, separate from the pregnant or previously-pregnant woman. In order adopt this recommendation, the parliament would be required to dispense with the ‘Born Alive’ rule, which only invests individual legal personhood in a child once it is ‘born alive’, and not before. The report’s recommendation received support from anti-abortion groups, especially the NSW Right to Life Association. However instead of adopting this course of action it was the judgment in the case of Kylie Flick whose pregnancy miscarried as a result of an assault that determined the legislative change contained in the NSW Crimes Amendment (Grievous Bodily Harm) Act 2005. In this decision, the loss of pregnancy resulting from violent assault constituted grievous bodily harm to the pregnant woman. In deciding to regard the foetus as part of the pregnant woman’s person, the Court was influenced by the ‘connected tissue’ argument which serves to reject any model of separate entities.

Legal scholar Rebecca Stringer, compares this approach with that adopted by the US Federal legislature in 2004, known as the Unborn Victims of Violence Act. While this confers legal personhood upon the foetus, ‘the connected tissue configuration pursues the different move of extending the meaning of ‘person’ to encompass ‘pregnant woman’: a subject whose physical and legal personage includes ‘human tissue connected to and inside ‘her body’. This conceptualisation of the pregnant woman takes account of her pregnant embodiment while maintaining her legal integrity. It averts a course of legal development that might have left women vulnerable
to more than just further restriction of access to abortion services. The alternative, following a Separate Entities Model, could also have conferred on the foetus the kind of legal status that has seen well over 200 women across 30 states in the US prosecuted for behaviours in pregnancy that were deemed dangerous to the foetus. Importantly, in relation to abortion as it is currently practised in Australia, in adopting this model in the Crimes Amendment (Grievous Bodily Harm) Act in March 2005, the NSW legislature explicitly exempted persons performing medical procedures from the definition of grievous bodily harm.

This exemption was particularly necessary given that abortion law is stipulated within the Criminal Code in New South Wales. This is the case in the majority of Australian states and territories, despite the legal reforms that rendered abortion much more accessible between 1968 and 1986. In the last decade the Australian Capital Territory and Victoria have become the only jurisdictions where abortion has been removed from the Criminal Code. Although surveys have long suggested that the majority of Australians do not wish to reduce access to abortion, it is perhaps equally true that many are unaware that the practice is contained within most state Criminal Codes, leaving women’s lawful access to abortion more vulnerable to erosion.

In South Australia, Jayden’s Law awaits further discussion. When the Bill was first tabled in parliament, the South Australian Feminist Collective responded with a public forum and protest expressing concerns about the implications of Jayden’s Law for access to abortion. In an interview with Annabelle Homer on local ABC radio Brokenshire responded to these concerns by stating that:

This, unlike most pieces of legislation, has no politics whatsoever in it, this is purely about having a heart and a mind. … Acknowledging
life at 12 weeks with respect to a birth certificate definitely won’t have any impact on what the current abortion laws are, I can categorically state that, I mean that’s for another debate.  

During this interview Brokenshire explained the delay in further debate on this issue by professing to a commitment to attend to these concerns through adjustments to the detail of the Bill. However, it is difficult to believe that the Family First member has not imagined how points of difference might be argued in this ‘other debate’. Although he has recently stressed the term ‘choice’ in his plan for parents to have access to birth certificates, adopting a rhetorical tone usually associated with the very position opposing his Bill, the Family First Party’s ‘Life Policy’ is constituted by objections to abortion and euthanasia. Family First has never been shy about articulating these positions and indeed during the interview with Homer Brokenshire reiterated his personal opposition to abortion, which is in line with this policy. The connected tissue model for interpreting the pregnant body is an alternative to the separate entities model and in the New South Wales case it works to protect abortion rights. Family First’s Life Policy suggests a much stronger affinity with the separate entities model. It will therefore be interesting to see how the tweaking of the Bill might address the issue of feminist concerns about protecting access to abortion while remaining true to a core policy position for the Party. It will be fascinating to see how Brokenshire navigates a path through this quandary.
About the Author

Catherine Kevin teaches history at Flinders University. She is the editor of two collections: *Feminism and the Body: interdisciplinary perspectives* (2009) and *Branding Cities: cosmopolitanism, parochialism and social change* (2009). Catherine has published on the histories of the pregnant body, maternal loss and reproductive politics and more recently on representations of the Stolen Generations in Australian film.


