

## Termination of Pregnancy (Live Births) Amendment Bill 2024

**Submission No:** 111  
**Submitted by:** Brian Amies  
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## *Termination of Pregnancy (Live Births) Amendment Bill 2024*

### **Introduction**

I am writing to express my strong support for the *Termination of Pregnancy (Live Births) Amendment Bill 2024* currently being examined by the Health, Environment and Agriculture Committee.

I believe that this Bill provides the law that the Common Law, Queensland statute *Criminal Code Act 1899* and the New South Wales statute *Crimes Act 1900* No 40 provide and medical research substantiates.

The Queensland Government has avoided its responsibilities to the people of Queensland since the passing of its first *Termination of Pregnancy Act 2018*.

This statute was, at that time, accompanied by the Queensland Clinical Guidelines, Termination of pregnancy.

Within this guideline was the topic “5.4.3 Other fetal considerations” which included Table 22 Fetal considerations.

In this table was stated:

- “• If a live birth occurs:”
  - “Do not provide life sustaining treatment ...
  - Document date and time end of life occurs”

The Queensland Government has reacted to public disquiet, with this unacceptable position, by changing the wording of the document to camouflage its intent.

The *Termination of Pregnancy (Live Births) Amendment Bill 2024* will address this dishonesty.

Queensland Clinical Guideline: Termination of pregnancy

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### **5.4.3 Other fetal considerations**

Table 22. Fetal considerations

Aspect	Consideration
Live birth	<ul style="list-style-type: none"><li>• Provide individualised and holistic care to women according to circumstances</li><li>• If appropriate, discuss the potential for live birth with the woman<ul style="list-style-type: none"><li>○ Refer to Definition of terms</li></ul></li><li>• Establish local procedures for the management of live birth</li><li>• Offer counselling and support services to women, partners and healthcare professionals involved with care of a live born fetus</li><li>• If a live birth occurs<sup>46</sup>:<ul style="list-style-type: none"><li>○ Handle baby gently and carefully and wrap to provide warmth</li><li>○ Offer opportunities and support the family's wishes to engage in care provision (e.g. cuddling/holding)</li><li>○ Do not provide life sustaining treatment (e.g. gastric tubes, IV lines, oxygen therapy)</li><li>○ Provide sensitive emotional support and reassurance to parents throughout the process and afterwards</li><li>○ Document date and time end of life occurs</li></ul></li></ul>

## Australian Common Law

One explanation of the common law Born Alive Rule, of which many High Court cases discuss aspects, is that of Spigelman CJ, Grove J and Bell J in *R v David John IBY* [2005] NSWCCA 178 at 63 “*The born alive rule is, as I have indicated above, a product of primitive medical knowledge and technology and of the high rate of infant mortality characteristic of a long past era. There is a strong case for abandoning the born alive rule completely, ...*”

While this Born Alive Rule concurs with the *Public Health Act 2005* s. 214. Definitions for pt 1 which provides that ***baby born alive*** means a baby whose heart has beaten after delivery of the baby is completed, *Iby* provides that this rule should be abandoned in recognition that life begins before birth.

Kirby J. held in *Harriton v Stephens* (2006) that

66. An *established duty category exists*: Originally, the common law accepted a principle that, because legal personality arises at birth, duties cannot be owed to a person before that person is born [138]. However, it is now established that health care providers owe a duty to an unborn child to take reasonable care to avoid conduct which might foreseeably cause pre-natal injury. Such a duty has been held to exist even before conception [139]. Once the child is born, the damage accrues in law and the child is able to maintain an action for damages.

[138] See, eg, *Watt v Rama* [1972] VR 353.

[139] *X and Y (By Her Tutor X) v Pal* (1991) 23 NSWLR 26.

Nevertheless, if the Common Law of Australia recognises life before birth, how much more is life present for a baby born alive.

Further, Crennan J. held in *Harriton v Stephens* (2006) that

### The value of life

258. There is nothing in the majority's rejection of the “blessing” argument in *Cattanach v Melchior*<sup>[424]</sup> or in their disinclination to bar a wrongful birth claim because of the law's recognition of broad underlying values of the importance of life<sup>[425]</sup>, which prevents the additional observation in this case that it is odious and repugnant to devalue the life of a disabled person by suggesting that such a person would have been better off not to have been born into a life with disabilities.

[424] (2003) 215 CLR 1 at 36 [79] per McHugh and Gummow JJ, 54-60 [141]-[153] per Kirby J; see also at 72-74 [195]-[198] per Hayne J.

[425] (2003) 215 CLR 1 at 35-36 [77]-[78] per McHugh and Gummow JJ, 55-56 [142]-[145] per Kirby J, 108-109 [301] per Callinan J.

## Queensland Statute

The Queensland *Criminal Code Act 1899* provides that it is currently not a crime for a person to directly, or indirectly, by any means whatever, cause the death of a child born alive because it is currently authorised or justified or excused by law.

*Criminal Code Act 1899*  
Current as at 1 February 2024

291 Killing of a human being unlawful

It is unlawful to kill any person unless such killing is authorised or justified or excused by law.

292 When a child becomes a human being

A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not, and whether the navel-string is severed or not.

293 Definition of killing

Except as hereinafter set forth, any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person.

294 Death by acts done at childbirth

When a child dies in consequence of an act done or omitted to be done by any person before or during its birth, the person who did or omitted to do such act is deemed to have killed the child.

## **New South Wales Statute**

Pursuant to the New South Wales *Crimes Act 1900* No 40 s. 20 provides that the definition of murder of a child occurs from the time of his or her being born alive.

s. 18 of this statute defines murder and manslaughter. It includes the intentional act or omission of the accused which causes the death.

NSW legislation

### ***Crimes Act 1900 No 40***

Current version for 3 April 2024

#### **20 Child murder—when child deemed born alive**

On the trial of a person for the murder of a child, such child shall be held to have been born alive if it has breathed, and has been wholly born into the world whether it has had an independent circulation or not.

## **Research**

The *Termination of Pregnancy Act 2018* provides

s. 6(2) In considering whether a termination should be performed on a woman, a medical practitioner must consider—

(b) the woman's current and future physical, psychological and social circumstances

The "Queensland Clinical Guideline: Termination of pregnancy" in *5.1.1 Psychological sequelae* at *Evidence summary* considers in Table 17, Psychological healthcare, that psychological complications arising from an "unplanned pregnancy" as being imprecise.

It states:

"• Adverse psychological sequelae may be no more likely following termination than following continuation of the pregnancy<sup>34</sup>"

"34. Royal College of Obstetricians and Gynaecologists. The care of women requesting induced abortion. Evidence-based clinical guideline number 7. [Internet]. 2011 [cited 2022 February 11]. Available from: <https://www.rcog.org.uk>."

This reference 34, The Care of Women Requesting Induced Abortion, is at

Reference: [https://www.rcog.org.uk/media/nwcjrf0o/abortion-guideline\\_web\\_1.pdf](https://www.rcog.org.uk/media/nwcjrf0o/abortion-guideline_web_1.pdf)

"Psychological sequelae

5.13 Women with an unintended pregnancy should be informed that the evidence suggests that they are no more or less likely to suffer adverse psychological sequelae whether they have an abortion or continue with the pregnancy and have the baby.

5.14 Women with an unintended pregnancy and a past history of mental health problems should be advised that they may experience further problems whether they choose to have an abortion or to continue with the pregnancy."

This authority for the Queensland Guideline regarding psychological sequelae, being reference 34, does not readily show any "Evidence based" substantiation.

### 5.1.1 Psychological sequelae

Table 17. Psychological healthcare

Aspect	Considerations
<b>Evidence summary</b>	<ul style="list-style-type: none"> <li>• There are significant limitations in the evidence examining the relationships between unplanned pregnancy, termination, birth and mental health<sup>33</sup></li> <li>• Emotional responses following termination are complex and may change over time</li> <li>• Risk factors for post-termination psychological problems may include:               <ul style="list-style-type: none"> <li>○ Previous or concurrent psychiatric illness</li> <li>○ Coercion</li> <li>○ Increasing length of gestation</li> <li>○ Ambivalence and lack of social support</li> <li>○ Poor relationships with others or religious affiliation</li> </ul> </li> <li>• Adverse psychological sequelae may be no more likely following termination than following continuation of the pregnancy<sup>34</sup></li> <li>• For the majority of mental health outcomes, there is no statistically significant association between termination of pregnancy and mental health problems<sup>21, 33, 35</sup></li> <li>• An unwanted pregnancy may lead to an increased risk of mental health problems, or other factors may lead to both an increased risk of unplanned pregnancy and increased risk of mental health problems<sup>33-35</sup></li> <li>• When a woman has an unwanted pregnancy, rates of mental health problems will be largely unaffected whether she has a termination or goes on to give birth</li> <li>• Women with a past history of mental health problems may be at increased risk of further mental health issues after an unplanned pregnancy<sup>33, 34</sup></li> </ul>
<b>Recommendation</b>	<ul style="list-style-type: none"> <li>• Consider the need for non-judgemental support and care for all women, and partners, who request a termination               <ul style="list-style-type: none"> <li>○ Discuss with women the importance of seeking support if they experience mental distress/anxiety/health issues or suicidal ideations, particularly if there is a reported history of mental health issues</li> <li>○ Involve members of the multidisciplinary team as appropriate</li> </ul> </li> <li>• Offer the woman a referral to mental health services, where indicated<sup>36</sup></li> </ul>

However, Australian and international research literature on abortion and mental health is sharply divided between studies finding psychological risks following abortion to be significant and persistent and those finding them to be negligibly small and transient.

The controversy is exacerbated by the parallel controversy over research design.

Despite the controversies, for which many studies and reviews have been published, it remains true that there are a significant number of women who do have significant mental health issues that are caused, triggered, aggravated, or complicated by their abortion experience and these issues can even be drivers for having an induced abortion.

A woman's psychological circumstances can no longer be considered simply as "imprecise" even when considering the destruction of their child who has been born alive.

Conclusion:

s. 6(2) of the *Termination of Pregnancy Act 2018* requires amending, as regards "psychological ... circumstances" being held as "may be no more likely". This amendment could be in reference to a child born alive as an inclusion in the *Termination of Pregnancy (Live Births) Amendment Bill 2024*.