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

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12 May 2024, revised 13 May 2024.

**SUBMISSION OF TOBIAS KENNETT TO THE INQUIRY INTO THE TERMINATION OF PREGNANCY (LIVE BIRTHS) AMENDMENT BILL 2024**

I apologise to the Committee's Secretary for the number of times this submission has been re-submitted with minor changes. It appears I am a poor proofer of my own work.

**1. *Preliminary***

The insertion of proposed s 9A makes it clear that a medical practitioner has a duty to provide care and treatment to a child who is born alive, not subject to a life-limiting condition and is viable.[1] In light of the discussion in the Explanatory Notes and past inquiries in other jurisdictions,[2] it is unclear whether proposed s 9A would be imposing a new duty or simply restating the existing duty of medical practitioners in what is a grey-area. Whether it reflects the existing law is irrelevant to the question of what the law should be.

**2. *Comment***

The Explanatory Note states that:

> "First, if a live birth occurs following a termination and the baby has no life-limiting condition and is on the threshold of viability (ie. after 22 weeks and 6 days) or older, it should be clearly stipulated that life-sustaining medical care should be provided to the child irrespective of parents' wishes."[3]

I think the Committee should consider the effect of a s 9A to the extent it relates to children born alive with viability. The Commission should consider whether medical practitioner should be allowed to consider the mother's and family's interests when deciding what care to provide to a born alive but potentially viable child. The Committee should also seek to clarify in the Bill the disciplinary effect of failing to attempt to keep child born alive who would appear viable.

*Decision making*

Stating the obvious, termination of pregnancy is a complex issue. The decision of whether to attempt to keep alive a child born alive with viability is a very complex decision.

This was highlighted during the Senate's Community Affairs Legislation Committee inquiry into the Human Rights (Child Born Alive Protection) Bill 2022. The Bill included similar provisions to this Bill. One submitter relevantly submitted that:[4]

> "If this Bill were successful, it would mean that palliative care is not provided post birth. Instead of being able to hold the fetus/baby, or undertake other grief and loss rituals, the woman, pregnant person and any other family members present would need to wait while the fetus/baby is taken away.

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[1] Explanatory Notes, *Termination of Pregnancy (Live Births) Amendment Bill 2024*, 3.
[2] See also Senate Community Affairs Legislation Committee, Parliament of Australia, *Human Rights (Children Born Alive Protection) Bill 2022* (Report, August 2023) 9-11[2.19]-[2.25].
[3] At 3.
[4] Human Rights (Children Born Alive Protection) Bill 2022 s 9.

> This Bill would mandate health workers to undertake steps to 'resuscitate' which would override any attempt at compassionate care, including palliative care plans."[5]

From a human rights perspective, it involves many considerations.[6] A child born has a right to life, and a right to healthcare. However, its mother and the family also have a right to healthcare. These rights directly conflict, as highlighted in the quote above. To attempt to save a born alive but potentially viable child takes away from mother and family centred care, including being able to hold the fetus/baby and receive support. Also, given that many people seeking a termination are vulnerable (sexual violence, domestic violence, exploitation), there will often be complex mental healthcare implications associated with a child surviving.

Further, one must naturally ask what will be of a child born alive's life if its mother (and family) did not wish and do not wish for it to be alive, and take a role in its care? The mother also has as part of several human rights the right to bodily autonomy, and the family as the fundamental group unit of society is entitled to be protected by society and the State. Should some level of respect for a mother's (and family unit's) decision to terminate a pregnancy and not bring a new family member into existence?

There is also the practical question of how likely it is that a child that is potentially viable will survive. How does the chance of survival balance against the harm caused to the mother and family by providing it treatment? And, what suffering on the child itself will any treatment inflict, which may ultimately be futile?

*Recommendation 1 – having regard to mother' s and family's interests*

Given the complexity of the human rights at play when deciding what care to provide to a child born alive but potentially viable, I submit that an express provision allowing medical practitioners to have regard to a mother's (and family's) interests is appropriate.

Depending on the Committee's view, this provision could be broad or narrow. I would submit that a broad drafting should be used, to ensure maximum flexibility:

> (3A) However, when deciding what medical care and treatment to provide to a person born as a result of a termination, a registered health practitioner may have regard to the interests of the child's parents.

I expect the Committee will not like this broad drafting. The provision could be narrowed to only concern the actual effect caused (ie distress, mental harm), thereby allowing a medical practitioner to only consider the effect on the mother and family, and not board moral questions about the quality of the child's future in the care of the State, respecting bodily autonomy and familiar decision making. For example:

> (3A) However, when deciding what medical care and treatment to provide to a person born as a result of a termination, a registered health practitioner may have regard to the effect the medical care and treatment would have on the child's parents.

[5] Senate Community Affairs Legislation Committee, Parliament of Australia, *Human Rights (Children Born Alive Protection) Bill 2022* (Report, August 2023) 11 [2.26], quoting Australian Women's Health Network, Submission No 18, 6.

[6] For the purposes of this discussion, I will only focus on human rights in the *Human Rights Act 2019*.

*Recommendation 2 – preventing disciplinary or other action*

Given the complexity of decision making, I also submit that a medical practitioner should not be liable for disciplinary or other action for failing to comply with s 9A to the extent it relates to children born alive with viability. That is because what treatment and care should be provided is an immensely complex question incapable of ever being standardised. It would be unjust that disciplinary or other proceedings could be taken against a medical practitioner for deciding to prioritise the interests of either the child or the mother and family.

Section 9A is being inserted into pt 2. Section 9 is entitled "compliance with this *part* relevant to professional conduct or perofrmance". The intention behind s 9 is obvious; it was obviously intended to make compliance with pt 2, which sets out the substantive rules relating to terminations, relevant in a matter under an Act about a registered health practitioner's professional conduct of performance. However, the text of s 9 only makes whether or not a person has complied with ss 5-8 of the Act relevant. Thus, it appears that s 9 will not automatically make 9A relevant to disciplinary and other matters. Further, the Bill is not amending s 9 to insert eg a new sub-s (1)(d) relating to 9A.

I would submit that s 9A is relevant to disciplinary and other matters by itself, without a need to be incorporated into s 9. This is because s 9A refers to the existing duty of a medical practitioner through the use of langauge like "nothing in this act prevents" and "it is declared that the duty owed". Whether a medical practitioner has complied with their duty (and therefore s 9A) is obvious relevant to any disciplinary and other action.

Thus, to give effect to the desire to ensure medical practitioners are protected from disciplinary and other action when they make decisions, a provision will need to be inserted. I would suggest this be an amendment of the *Health Practitioner Regulation National Law Act 2009* pt 4 to insert a new modification provision. Regard will need to be had to the various different avenues (eg panels, tribunals) in which disciplinary and other proceedings can occur. Perhaps the amendment would be of the effect that, in relation to conduct in breach of the *Termination of Pregnancy Act 2018*, the conduct which is substantially below the standard reasonably expected of a health practitioner of an equivalent level of training or experience.

I have not considered the interaction of this proposed provision with the rest of the Health Practitioner Regulation National Law. The Committee should consider both the constitutional and practical effects of the proposed provision.

**3. *Comment on Human Rights Statement of Compatibility***

I believe the Human Rights Statement of Compatibility produced by the Member for Traeger needs to be revisited. As I have outlined above, there is a direct conflict between a child born alive's and its mother's and families' right to healthcare where treatment for the purpose of keeping it alive is provided. Therefore, this Bill must involve some limitation of some person's human rights, despite the Human Rights Statement of Compatibility saying the bill does not "restrict any individual's civil or political rights" and does not "contravene any human right listed under Part 2, Division 2 and 3 Human Rights Act 2019."