

Termination of Pregnancy (Live Births) Amendment Bill 2024

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Dear Committee members

RE: SUBMISSION
Termination of Pregnancy (Live Births) Amendment Bill 2024

Thank you for the opportunity to make a submission to the parliamentary inquiry into the *Termination of Pregnancy (Live Births) Amendment Bill 2024*.

By way of background, I am a Professor of Law at the University of Adelaide. My research focuses on addressing vulnerability in all its forms, with a particular focus on human rights, labour law and migration law. I hold a Doctor of Philosophy in Law from the University of Oxford where I studied as a Rhodes Scholar. In 2021 I was appointed by the Minister for Immigration to the Ministerial Advisory Council on Skilled Migration and in 2019 I was appointed as the Australian representative to an expert working group of the International Labour Organization on temporary labour migration. In 2022 I was promoted to Professor of Law (effective 1 January 2023), awarded a 40 under 40 Award by SA InDaily and appointed by the Federal Minister for Home Affairs as one of three expert reviewers to examine the Australian migration program.

Please find attached my submission.

Yours sincerely
Professor Joanna Howe

SUBMISSION

Termination of Pregnancy (Live Births) Amendment Bill 2024

Professor Joanna Howe*

Introduction

Although the intention of an abortion is to end the life of an in-utero child, there are occasions when a baby is born alive. Signs of life in a baby which may be present following a failed abortion include the presence of a heartbeat, limb movement, pulsation, breathing and crying. This submission examines what we know about babies born alive following an abortion in Australia and offers an evidence base for supporting the passage of the *Termination of Pregnancy (Live Births) Amendment Bill 2024* into law. The basis for this argument is on the grounds of birth equality: the need to ensure equal treatment for all babies born alive in Queensland, irrespective of the circumstances of their birth.

Data on live births following abortion

As data reporting requirements on abortion varies between states and territories, there is only limited publicly released information about when babies are born alive following an abortion. From this information and from media reports we know of the following babies born alive and left to die:

- 27 in Western Australia¹
- 328 in Queensland²
- 396 in Victoria³
- 54 in South Australia⁴
- 1 in NSW⁵
- 1 in the Northern Territory⁶

These numbers are significantly less than the overall number of babies born alive following a failed abortion, given that only Queensland and Victoria publicly release fulsome data on babies born alive following an abortion. In the other jurisdictions, we only have an incomplete and anecdotal picture of the extent of babies born alive and left to die following an abortion.

* Professor of Law, the University of Adelaide. Consistent with all scholarly research, all views are the author's alone and not that of her employer. At the time of writing the author is a Professor of Law at the University of Adelaide. Dr Howe is also a former Rhodes Scholar and has a research focus on addressing vulnerability in all its forms, with a particular focus on human rights, labour law and migration law. Dr Howe holds a Doctor of Philosophy in Law from the University of Oxford. In 2021 Dr Howe was appointed by the Minister for Immigration to the Ministerial Advisory Council on Skilled Migration and in 2019 she was appointed as the Australian representative to an expert working group of the International Labour Organization on temporary labour migration. In 2022 Dr Howe was promoted to Professor of Law (effective 1 January 2023), awarded a 40 under 40 Award by SA InDaily and appointed by the Federal Minister for Home Affairs as one of three expert reviewers to examine the Australian migration program.

¹ This statistic is from July 1999 until December 2016. See further: Nathan Hondros, "They Were Left to Die": Call for Inquiry into Case of 27 Premature Babies Born Alive in WA, *WA Today* (online, 12 June 2018) <<https://www.watoday.com.au/national/western-australia/they-were-left-to-die-call-for-inquiry-into-case-of-27-premature-babies-born-alive-in-wa-20180611-p4zku.html>>.

² Queensland Health, Queensland Government, Perinatal Annual Reports for 2010–2020, Table 10.13 in each report ("Main condition in fetus/neonate by type of perinatal death").

³ Consultative Council on Obstetric and Paediatric Mortality and Morbidity, Victoria's Mothers and Babies Victoria's Maternal, Perinatal, Child and Adolescent Mortality Annual Reports for 2010–2020.

⁴ This statistic is from 2007 until 2007. Letter, "Re: Liveborn Terminations" from Dr Christine Dennis, A/Executive Director, Operations Division, SA Health (copy on file with author).

⁵ Inquest into the death of Jessica Jane [2000] NTMC 37 (10 April 2000) [28] (Greg Cavanagh) <https://justice.nt.gov.au/__data/assets/pdf_file/0017/206702/baby-j.pdf> See Appendix A.

⁶ Inquest into the death of Jessica Jane [2000] NTMC 37 (10 April 2000).

Table 1: Live births following abortion by gestation weeks, Queensland:⁷

Year	Gestation weeks			Total
	<20 weeks	20 to 28 weeks	>28 weeks	
2018	11	17	0	28
2019	5	42	0	47
2020	7	34	1	42
2021	10	30	1	41
2022	13	35	1	49

Abortion procedures that can result in a live birth

There is some uncertainty about how babies are born alive following a medical intervention which is intended to kill them. There are different abortion procedures. Some can result in a live birth.

One example of how this occurs is when a baby is born alive following the induction of labour without feticide.⁸ Feticide is where specific interventions occur to ensure the death of the in-utero baby prior to being delivered fully intact vaginally through labour. In this procedure:

Feticide is performed by ultrasound specialists who have skills in accessing the fetal circulation to instill intracardiac potassium chloride (KCl) or intrafunic lignocaine, resulting in cessation of fetal cardiac activity prior to the commencement of the termination procedure.⁹

According to one study, ‘[u]ntended live birth after abortion can be emotionally difficult for many (although not all) women and poses difficulties for health professionals, both in terms of process and emotion’.¹⁰ In 2018, a study reported in the *Journal of Obstetrics and Gynaecology* reviewed 241 late-term abortions without feticide on babies between 20-24 weeks gestation and found that more than half the babies were born alive, with a median time of survival of 32 minutes and one baby surviving for over four hours (267 minutes).¹¹

Evidence of live births following abortion in Australia

Although there is very little information about what happens to babies who are born alive following an abortion, a Northern Territory Coroner’s report into the death of baby Jessica Jane provides insight into what occurs.

In this case, Jessica Jane was born alive and placed on a metal kidney dish in an empty room for approximately 80 minutes until she died. According to Nurse Williams who delivered her, Jessica Jane, although premature, was apparently healthy, had no apparent abnormalities and her vital signs were relatively good. Nurse Williams weighed the baby and she was 515 grams. She called the doctor who had authorised the abortion to inform him of the live birth and that the baby’s Apgar scores¹² were strong. According to the Coroner, the doctor’s only response was to say ‘so?’

⁷ Question On Notice, No. 69. Asked on 14 February 2024 by Mr R Katter to the Minister for Health < <https://documents.parliament.qld.gov.au/tableOffice/questionsAnswers/2024/69-2024.pdf>>.

⁸ Inquest into the death of Jessica Jane [2000] NTMC 37 (10 April 2000) [16].

⁹ Lauren Megaw and Jan Dickinson, ‘Feticide and Late Termination of Pregnancy’ (2018) 20(2) *O&G Magazine*.

¹⁰ Lauren Megaw and Jan Dickinson, ‘Feticide and Late Termination of Pregnancy’ (2018) 20(2) *O&G Magazine*.

¹¹ Stephanie Springer et al, ‘Fetal Survival in Second-Trimester Termination of Pregnancy without Feticide’ (2018) 131(3) *Obstetrics & Gynecology* 575.

¹² ‘Apgar scores are clinical indicators of a baby’s condition shortly after birth. The score is based on 5 characteristics of the baby: skin colour, pulse, breathing, muscle tone and reflex irritability’, see Australian Institute of Health and Welfare,

and then he abruptly hung up the phone on her. He gave no instructions to give the baby medical care, and the baby was left to die where she lay. She checked on Jessica Jane every 10-15 minutes and observed crying and movement. According to the Coroner's report 'after about an hour her heartbeat and breathing slowed until death at 0405 hours'. Nurse Williams informed the Coroner, 'I desperately wanted to do more, but felt my hands were tied'.¹³

Extract from the NT Coroner's judgment of the inquest into the death of Jessica Jane

"The evidence established that the deceased was fully born in a living state. In the 80 minutes of her life she had a separate and independent existence to her mother. ... the purpose of the induction procedure (which was to abort the delivery of a live baby) should not be allowed to diminish her status as a human being. Her life was unexpected and her death was inevitable. However, the first half of this description could be applied to many of us, and the second half to all of us. The deceased having been born alive deserved all the dignity, respect and value that our society places on human life.

In my view, the fact that her birth was unexpected and not the desired outcome of the medical procedure, should not result in her, and babies like her, being perceived as anything less than a complete human being. Similarly, the fact that her death was inevitable should also not have the same result. The old, the infirm, the sick, the terminally ill are all entitled to proper medical and palliative care and attention. In my view, newly born unwanted and premature babies should have the same rights. The fact that her death was inevitable should not affect her entitlement to such care and attention.

In the Coroner's judgment, reference is made to another case of a baby born alive following an abortion and left to die in Sydney. Given the similarity between this case and media reports during the same time period of a baby born alive and left to die in Westmead Hospital, it seems likely that this reference is in relation to an unnamed baby who was aborted and zipped into a medical bag whilst still breathing at Westmead Hospital following an abortion.¹⁴ The NSW Deputy State Coroner Janet Stevenson in that case criticised Westmead hospital staff for failing to care for the baby, stating:

There is a serious issue which arose as to the way in which the deceased was treated after signs of life were detected. Not the least of these being the non-acceptance by medical staff that they had a duty to treat the situation in a manner different than they did... There appears to have been a total abrogation of responsibility, let alone common humanity, on the part of those who should have borne the burden of dealing with the child.¹⁵

In this case, the NSW Deputy State Coroner clearly identifies the legal status of a baby born alive following an abortion. She states:

'Australia's Mothers and Babies' (Web page, 14 December 2022) <<https://www.aihw.gov.au/reports/mothers-babies/australias-mothers-babies/contents/baby-outcomes/apgar-score-at-5-minutes>>.

¹³ Inquest into the death of Jessica Jane [2000] NTMC 37, [12] (10 April 2000).

¹⁴ Andrew Bolt, 'Ethicists Argue Case for Post-Birth Abortion, Too', *Perth Now* (online, 5 March 2012) <<https://www.perthnow.com.au/opinion/ethicists-argue-case-for-post-birth-abortion-too-ng-d30c192faf006f73dcbfd9f85ec404e>>.

¹⁵ Inquest into the death of Jessica Jane [2000] NTMC 37, [29] (10 April 2000).

The law clearly regards a foetus once born and showing signs of life as a person. It is also worth remembering that due to the changing nature of medical research, what today is classified as a ‘non-viable foetus’ is not necessarily so tomorrow.¹⁶

The NSW Deputy State Coroner Janet Stevenson in the Westmead hospital case stated that she had been made aware that ‘many terminated foetus[es] live after they are expelled from the mother’.¹⁷

A third known case of a pre-viable baby born alive following an abortion and being left to die without care is that of baby Xanthe.¹⁸ Unexpectedly born alive at 19 weeks after an abortion at the Royal Brisbane and Women’s Hospital in 2020, Xanthe was left to die alone in an empty hospital room for seven minutes without being held or provided with any other forms of comfort care.

In summary, in addition to the statistical data, the cases of Jessica Jane, the unnamed Westmead baby and Xanthe, provides additional evidence that in Australia babies are born alive and left to die without medical care following an abortion.

Arguments in favour of the Bill

The primary reason for the *Termination of Pregnancy (Live Births) Amendment Bill 2024* is that it will codify the current Termination of Pregnancy Guideline in Queensland in relation to live births following an abortion and ensure that this cannot be changed without new legislation. A secondary reason for this Bill is that it brings Queensland in line with recent best practice reform in South Australia and New South Wales which provide for equal treatment to all children born alive in those jurisdictions irrespective of the circumstances of their birth.¹⁹

Prior to October 2024, the Queensland Termination of Pregnancy Guidelines made it clear that there was to be no provision of medical care (either palliative care or life-saving treatment) to a baby who survived an abortion. These Guidelines stated:

If a live birth occurs:

- Support the women’s wishes and preferences
- Handle baby gently and carefully and wrap to provide warmth
- Offer opportunities to engage in care provision (e.g. cuddling/holding) as desired
- Do not provide life-sustaining treatment (e.g. gastric tubes, IV lines, oxygen therapy)
- Provide sensitive emotional support and reassurance to parents throughout the process and afterwards
- Document date and time end of life occurs.²⁰

In October 2024 these Guidelines were changed to state:

¹⁶ Inquest into the death of unnamed baby of XX (Name withheld), Inquest before Coroner sitting alone (16 April 1999) Deputy State Coroner Janet Stevens (copy on file with the author). See Appendix B.

¹⁷ Inquest into the death of Jessica Jane [2000] NTMC 37, [28] (10 April 2000).

¹⁸ Jackie Sinnerton, “Hospital failures pushed my wife over the edge”, *The Sunday Mail*, 6 August 2023. See Appendix C.

¹⁹ *Abortion Law Reform Act 2019* (NSW) s 11(3); *Termination of Pregnancy Act 2021* (SA) s 7(3).

²⁰ Queensland Government, Queensland Clinical Guidelines: Termination of Pregnancy (2019) 24.

5.4.3 Born with signs of life Live birth following a termination of pregnancy is an uncommon outcome. If a baby is born with signs of life, provide care appropriate to the individual clinical circumstances and in accordance with best practice guidelines.²¹

The response by the Health Minister to a Question Asked on Notice clarifies that “best practice guidelines” refers to the Queensland Clinical Guideline *Termination of Pregnancy*.²²

The Guideline states that in instances where “a baby is born with signs of life and survival is determined to be unlikely,” the guidelines state that “active treatment” is not recommended.

The Guideline suggests a range of other best practices including the establishment of “local procedures for the management of live birth”, including offering counselling and other services to parents, handling the baby gently and wrapping to provide warmth and offering parents to engage in care provision such as cuddling/holding. If parents do not wish to be involved in palliation, the Guideline states that healthcare providers “may provide comfort support strategies”.²³

It is important to provide legislative protection for babies born alive after an abortion through codifying the Guideline’s requirement of “care appropriate to the individual clinical circumstances”. This means it cannot be amended without parliamentary scrutiny and legislative change.

Legal definitions of personhood under Queensland law

A baby born alive after an abortion is a legal person under the *Public Health Act 2005*. Section 214 of this Act states:

"baby born alive" means a baby whose heart has beaten after delivery of the baby is completed.

"delivery" means the expulsion or extraction of a baby from its mother.

Therefore, under Queensland law, a baby born alive after an abortion is a subject of the law and thus entitled to legal protection of their human rights and equal treatment under the law. The proposed Bill merely codifies this entitlement in the context of Queensland abortion law.

²¹ Queensland Government, Queensland Clinical Guidelines: Termination of Pregnancy (2019) (Amended in October 2023) New section 5.4.3 “Born with signs of life inserted”
<https://www.health.qld.gov.au/__data/assets/pdf_file/0032/735296/s-top.pdf 24.>

²² Ibid.

²³ Ibid.