

Termination of Pregnancy (Live Births) Amendment Bill 2024

Explanatory Notes

Short Title

Termination of Pregnancy (Live Births) Amendment Bill 2024

Policy Objectives and Reasons for the Bill

The policy objective of the *Termination of Pregnancy (Live Births) Amendment Bill 2024* is to enshrine in legislation the protections for babies born as a result of a termination of pregnancy procedure. The bill removes any doubt that babies born in these circumstances are entitled to the same degree of medical care and attention as a baby born in any other way.

Queensland law allows medical practitioners to perform termination of pregnancy on a woman throughout pregnancy. Unlike similar laws in South Australia and New South Wales, the Queensland *Termination of Pregnancy Act* is silent on what happens when a child is born alive as a result of a termination of pregnancy procedure.

While instances are rare, Queensland babies do survive late term abortions, and are born alive.

According to government figures, between 2010 and 2015, 204 babies were born alive after a termination procedure aged 20 weeks or more.¹

More recent research suggests the number of babies born alive in these circumstances in Queensland is growing, and the 2010 to 2020 figure stands at 328 babies born alive following a termination procedure in Queensland.²

Babies can be born alive following an abortion both pre- and post-viability. Importantly, the threshold of viability continues to shift earlier in pregnancy because of medical advances in how best to care for extremely premature infants. A 2023 study of 29 babies born at 22 weeks found that with active intervention at birth these babies had a survival rate of 82.8%.³ An earlier study, which is cited in South Australia's Perinatal Practice Guideline for extremely premature babies found that "the rate of survival to hospital discharge was 82.7% for infants born at 25 weeks gestation and admitted to intensive care, 68.2% at 24 weeks and 54.5% at 22/23 weeks gestation."⁴

The most recent figures on Queensland babies born alive after an abortion are listed below.⁵

¹ <https://documents.parliament.qld.gov.au/tableoffice/questionsanswers/2016/779-2016.pdf>

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 Motojima, Y., Nishimura, E., Kabe, K. et al. Management and outcomes of periviable neonates born at 22 weeks of gestation: a single-centre experience in Japan. *J Perinatol* (2023).

⁴ Chow S, Creighton, P, Chambers G and Lui K. 2019. Report of the Australian and New Zealand Neonatal Network - 2017. Sydney: ANZNN. Available from URL: <http://www.preru.unsw.edu.au/PRERUWeb.nsf/page/ANZNN+reports>; See also: SA Department for Health and Wellbeing, Perinatal Care At The Threshold of Viability, South Australian Perinatal Practice Guideline.

⁵ <https://documents.parliament.qld.gov.au/tableOffice/questionsAnswers/2023/1496-2023.pdf>

Termination of pregnancy resulting in live births by gestation weeks for admitted patients, Queensland:

Calendar Year	Gestaation 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

A known case of a pre-viable baby born alive and left to die in Queensland is that of Xanthe.⁶ Unexpectedly born alive at 19 weeks after an abortion at the Royal Brisbane and Women’s Hospital, Xanthe was left to die alone for seven minutes without being held.⁷

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).⁸

Presently, Queensland Health’s “Termination of Pregnancy” Clinical Guideline provide some general guidance as to how medical practitioners are to treat a baby born alive following a late term abortion. The guidelines state the following:

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.⁹

The Guideline states that when a baby is “born with signs of life,” practitioners are to “provide care appropriate to the individual clinical circumstances and in accordance with best practice guidelines.”

The response by Health Minister to a Question Asked on Notice clarifies that “best practice guidelines” refers to the Queensland Clinical Guideline *Termination of Pregnancy*.¹⁰

This Guideline stipulates 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 opportunities to engage in care provision such as cuddling/holding. If parents do not wish to be involved in palliative care provision, the Guidelines stipulate that healthcare providers “may provide comfort support strategies”.¹¹

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

⁷ *Ibid.*

⁸ Stephanie Springer et al, ‘Fetal Survival in Second-Trimester Termination of Pregnancy without Feticide’ (2018) 131(3) *Obstetrics & Gynaecology* 575.

⁹ https://www.health.qld.gov.au/__data/assets/pdf_file/0029/735293/g-top.pdf

¹⁰ <https://documents.parliament.qld.gov.au/tableOffice/questionsAnswers/2023/1496-2023.pdf>

¹¹ Queensland Clinical Guideline *Termination of Pregnancy*, Table 23.

While the present iteration of the Guideline is an improvement on the previous version which stipulated that “if a live birth occurs...do not provide life-sustaining treatment”, there remain ambiguities which require addressing.

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.

Second, if a live birth occurs following a termination and survival is deemed unlikely, it should be clearly stipulated that if parents do not wish to provide comfort care to the baby, there is a legal obligation on healthcare providers to do so until the baby is no longer alive.

Further it is important to note, the Guideline is merely that. Indeed, the disclaimer on the inside cover of the document states that the Guideline is “provided for information purposes only.” The information contained in the document is:

... not a substitute for clinical judgement, knowledge and expertise, or medical advice. Variation from the guideline, taking into account individual circumstances, may be appropriate.

That is to say, while the present Guideline provides for the care of a baby born following a termination procedure, it does not contain, nor is it necessarily informed by, the force of law. There is no particular reason why a practitioner would take heed of the guidelines or be subject to scrutiny for not following them.

Indeed, the Guideline may arbitrarily be subject to change. In point of fact, the present Guideline with respect to babies born alive came into effect in October 2023. Prior to that date, the clinical guidelines, with respect to any babies born with signs of life, recommended “not [to] provide life-sustaining treatment (e.g. gastric tubes, IV lines, oxygen therapy).”

The potential changeability of the Guideline calls for the need for the legislature to step in to enshrine in law that the duty of a practitioner toward a baby born as a result of termination is no different to the duty owed to any other baby born in circumstances other than a termination.

The amendment brings the Queensland law into line with South Australia and New South Wales.¹² The *Termination of Pregnancy (Live Births) Amendment Bill 2024* removes any doubt that a baby alive as a result of a termination of pregnancy procedure has the same right as any baby born in normal circumstances. This reflects the importance of equal treatment for all babies born in Queensland.

Achievement of Policy Objectives

The bill will achieve its objective by amending the *Termination of Pregnancy Act*.

A new section 8B is inserted into the *Termination of Pregnancy Act*.

S 8B (1) identifies the section applies when a termination causes a baby to be born.

¹² Abortion Law Reform Act 2019 (NSW) section 11(3) stipulates “To avoid doubt, the duty owed by a registered health practitioner to provide medical care and treatment to a person born as a result of a termination is no different than the duty owed to provide medical care and treatment to a person born other than as a result of a termination.” This section is replicated in the *Termination of Pregnancy Act 2021 (SA)* in section 7(3).

S 8B (2) states that any duty a participant in a person's birth to provide appropriate care to a baby born as a result of a termination is no different than any duty they would have to a baby born in any other way.

S 8B (3) clarifies that the "appropriate care" means medical care and treatment that is (a) clinically safe and (b) appropriate to the baby's medical condition, while "participant in person's birth" clarifies that the subjects to whom this section applies are the same as those outlined *Termination of Pregnancy Act*; that is to say, the registered health practitioner who performed the termination, and any other practitioners, including students, present at the time of birth.

Alternative ways of achieving policy objectives

As the purpose of the bill is to enshrine in legislation

Estimated cost for government implementation

As this Bill would enshrine in legislation current practice as provided for in the Queensland Health's Maternity and Neonatal Clinical Guidelines, there is no anticipated additional cost to the state of implementing this bill.

Consistency with fundamental legislative principles

The Bill is consistent with the fundamental legislative principles as defined in Section 4 of the Legislative Standards Act 1992.

Consultation

The legislation is the result of a growing movement to enshrine in law the recognition of the basic human rights of babies born as a result of a termination of pregnancy. Consultation has been undertaken with stakeholders across the spectrum, including legal experts on human rights and members of the medical fraternity.

Consistency with legislation of other jurisdictions

The legislation is consistent with legislation relating to live births following termination in South Australia and New South Wales.