



A suitable legislative framework for termination of pregnancy in South Australia

Fact Sheet 9 – Late Term Terminations

Currently in South Australia the term ‘late term abortion’ or ‘late term termination’ refers to any abortion procedure which occurs after 22 weeks gestation.

Late term abortions are generally considered differently to medical and surgical abortions which occur prior to 22 weeks of gestation due to the increased risks involved in the procedure and due to the increasing viability of the foetus. Late term abortions can only occur by way of a surgical or medical procedure performed by a medical practitioner.

Late term abortions raise particular sensitivities but in practice are rare.¹ Specifically, the proportion of terminations performed at 20 weeks gestation or later was 2.8%. Of the 120 pregnancy terminations performed at 20 weeks gestation or later, 48.3% were for the mental health of the woman, 43.3% were for congenital anomalies, and 8.3% were for specified medical conditions of the woman.

The existence, and significance of some foetal abnormalities only becomes apparent at later gestation.² It is significant that some serious foetal anomalies are only likely to be detected in the later stages of pregnancy, with the timing of diagnosis influencing a women’s decision to terminate a pregnancy.³ Certain screening tests may only occur at 19 or 20 weeks of gestation, with further investigations often being required to form a confident clinical picture of the nature of the anomaly. As such, about 30% of terminations for foetal anomaly are performed after 20 weeks of gestation.⁴

¹ The VLRC, for example, noted: ‘Later terminations are comparatively rare. Almost all (approximately 99%) of the terminations in [Victorian] public hospitals and licensed private health facilities are performed before 20 weeks gestation’: Victorian Law Reform Commission, *Law of Abortion*, Report No 15 (March 2008) 38 [2.10]-[2.11]. The QLRC similarly found: ‘Later terminations are comparatively rare. Almost all (approximately 99%) of the terminations in public hospitals and licensed private health facilities are performed before 20 weeks gestation. Of the 10 421 patient admissions for terminations in 2016 in Queensland public hospitals and licensed private health facilities, 140 (1.34%) occurred at 20 weeks gestation or more. 169 Of those 140 terminations, 64 occurred at 20–21 weeks gestation and 76 occurred at 22 weeks gestation or more’: Queensland Law Reform Commission, *Review of Termination of Pregnancy Laws*, Report 76 (June 2018) 36 [2.110]-[2.111].

² Victorian Law Reform Commission, *Law of Abortion*, Report No 15 (March 2008) 43-44 [3.78]-[3.79]. ‘Major structural malformations such as spina bifida, major cardiac or neurological malformations and major limb defects are usually not diagnosable before the 18–20 week scan. Nor is hydrocephalus (“water on the brain”) which is one of the most common birth defects. Many structural malformations are associated with a substantial risk of genetic disorder, which parents will want diagnostic testing to verify before considering abortion. Some conditions, like cytomegalovirus (CMV) infection and mild ventriculomegaly, result in serious disability in only a small percentage of cases, eg 10% for CMV, and a ‘normal’ or only mildly disabled child in most cases. Serious long-term disability will not be apparent until approximately 32 weeks’: at 43, n 109.

³ The VLRC quoted 2005 data showing here was a total of 309 abortions post 20 weeks in Victoria, 129 of which were for foetal abnormality. Of these, 105 occurred between 20 and 22 weeks gestation, 23 between 23 and 27 weeks gestation, and one post 28 weeks. See Victorian Law Reform Commission, *Law of Abortion*, Report No 15 (March 2008) 44 [3.85].

⁴ See Queensland Law Reform Commission, *Review of Termination of Pregnancy Laws*, Report 76 (June 2018) 47 [178]; referring to Evidence to the Parliamentary Committee, 28 October 2016, 27 (Prof M Permezel, President, RANZCOG). Screening and diagnostic testing for fetal anomalies may be carried out at various stages of pregnancy, including ultrasound and blood test screening at 11–13 weeks, sampling and testing of the amniotic fluid at 15 weeks and ultrasound screening for structural anomalies at 18–22 weeks. Results of some tests may take approximately one week to be returned. Where a major structural anomaly is detected, additional testing and counselling may be required before diagnosis and advice about prognosis can be

Although late term abortions are the rarest form of termination, it is often the most sensitive, due to the medical implications and the potential viability of the foetus and as such, in several Australian jurisdictions (See Fact Sheet 6 – Termination and the Law in Australia), it is subject to different laws and regulations.⁵

Whilst the Australian Capital Territory allows full-term abortions on request and there are no specific gestational limits,⁶ other jurisdictions such as Victoria (24 weeks) and Queensland (22 weeks), provide for different legal criteria for abortion (in addition to any clinical and professional practices) after a certain period of gestation.

In South Australia, the current law contains specific provisions which deal with abortions involving a ‘child capable of being born alive’ which relates only to certain late term procedures. In the circumstance where a child is capable of being born alive (which under the present law is presumed to be 28 weeks but in clinical practice is in effect 24 weeks) it is unlawful to perform a termination unless the termination was performed in good faith to save the mother’s life.⁷ This is a complex provision.⁸ Part of the complexity of this section is that medical technology has advanced since 1969 and the presumption of when a child is capable of being born alive has changed.

QUESTIONS TO CONSIDER

SALRI is interested in your views on the issues surrounding late term abortions. Some matters you might consider are:

- Should there be any requirements in relation to offering counselling for the woman?
- Do you have any suggestions for incidental law changes to present law and/or practice in South Australia in relation to abortion?

Please note: SALRI does not, and cannot, provide legal advice to individuals. If you are in need of legal advice we encourage you to speak to a lawyer and/or contact a community legal service.

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given; each case must be considered individually with the help of a multi- disciplinary team, including maternal fetal medicine specialists, before the parents can reach an informed decision about how to proceed: Information provided by RANZCOG Queensland, 30 November 2017.

⁵ See generally Victorian Law Reform Commission, *Law of Abortion*, Report No 15 (March 2008) 36-41 [3.36]-3.63], 78-80 [5.63]-[5.81]; Queensland Law Reform Commission, *Review of Termination of Pregnancy Laws*, Report 76 (June 2018) 94-97 [3.186]-[3.194].

⁶ However, it is important to note that any such procedure is still subject to clinical and professional practice and any medical laws. See Fact Sheet 4.

⁷ See generally Victorian Law Reform Commission, *Law of Abortion*, Report No 15 (March 2008) 95-109.

⁸ *Ibid* s 82A(7), (8). See also Victorian Law Reform Commission, *Law of Abortion*, Report No 15 (March 2008) 22 [2.42].