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## SUBMISSION

### *Human Rights (Children Born Alive Protection) Bill 2023*

**Professor Joanna Howe\***

Dear Senate Committee members

Thank you for the opportunity to make a submission to the Senate inquiry on Universal Access to Reproductive Healthcare.

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 reviewers to examine the Australian migration program.

In this submission I make 7 recommendations and argue for the development of federal protection for babies born alive following an abortion. The basis for this argument is on the need to ensure equal treatment for all babies born alive in Australia, irrespective of the circumstances of their birth.

Please find attached my submission.

Yours sincerely  
Professor Joanna Howe

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\* Professor of Law, the University of Adelaide. All views are the author's alone and not that of her employer.

## SUBMISSION

### *Human Rights (Children Born Alive Protection) Bill 2023*

Professor Joanna Howe\*

#### Introduction

Although the intention of an abortion is to end the life of the foetus, 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, breathing and crying. This submission examines what we know about babies born alive following an abortion in Australia. In this submission I make 7 recommendations and argue for the development of federal protection for babies born alive following an abortion. The basis for this argument is on the need to ensure equal treatment for all babies born alive in Australia, irrespective of the circumstances of their birth.

#### How many babies are born alive following an abortion in Australia?

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 Australia<sup>1</sup>
- 328 in Queensland<sup>2</sup>
- 396 in Victoria<sup>3</sup>
- 54 in South Australia<sup>4</sup>
- 1 in NSW<sup>5</sup>
- 1 in the Northern Territory<sup>6</sup>

These numbers are significantly less 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 a failed

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\* Professor of Law, the University of Adelaide. 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 reviewers to examine the Australian migration program.

<sup>1</sup> 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>>.

<sup>2</sup> 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").

<sup>3</sup> 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.

<sup>4</sup> 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).

<sup>5</sup> 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](https://justice.nt.gov.au/__data/assets/pdf_file/0017/206702/baby-j.pdf)>

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

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.

Table 1: Babies born alive and left to die in Queensland and Victoria between 2010-2020<sup>7</sup>

|              | QUEENSLAND | VICTORIA |
|--------------|------------|----------|
| 2020         | 41         | 43       |
| 2019         | 48         | 34       |
| 2018         | 29         | 29       |
| 2017         | 35         | 28       |
| 2016         | 31         | 33       |
| 2015         | 32         | 31       |
| 2014         | 28         | 38       |
| 2013         | 22         | 43       |
| 2012         | 21         | 53       |
| 2011         | 20         | 40       |
| 2010         | 21         | 24       |
| <b>TOTAL</b> | 328        | 396      |

### How are babies born alive following an abortion?

There is some uncertainty about how babies are born alive following a medical intervention which is intended to kill them. One known example of how this occurs is when a baby is born alive following the induction of labour without feticide.<sup>8</sup> 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.<sup>9</sup>

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'.<sup>10</sup> In 2018, a study reported in the *Journal of Obstetrics and Gynecology* reviewed 241 late-term abortions without feticide on babies between 20-24 weeks gestation and found that more than half the

<sup>7</sup> In these reports babies born alive and left to die after a failed abortion are recorded as a 'neonatal death'. The information in this table is taken from the annual reports from Queensland and Victoria which are available online. See further: 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'); Consultative Council on Obstetric and Paediatric Mortality and Morbidity, Victoria's Mothers and Babies Victoria's Maternal, Perinatal, Child and Adolescent Mortality Annual Reports, 2010–2020, Table 2.22 in the 2020 report ('Perinatal deaths as a result of termination of pregnancy').

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

<sup>9</sup> Lauren Megaw and Jan Dickinson, 'Feticide and Late Termination of Pregnancy' (2018) 20(2) *O&G Magazine*.

<sup>10</sup> Lauren Megaw and Jan Dickinson, 'Feticide and Late Termination of Pregnancy' (2018) 20(2) *O&G Magazine*.

babies were born alive, with a median time of survival of 32 minutes and one baby surviving for over four hours (267 minutes).<sup>11</sup>

### Is it a ‘pro-life lie’ that babies are left to die following a failed abortion in Australia?

The abortion industry and pro-abortion media outlets assert that babies born alive and left to die following an abortion is a ‘myth’,<sup>12</sup> ‘nonsensical’,<sup>13</sup> and ‘medically unnecessary’.<sup>14</sup>

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 scores<sup>15</sup> were strong. According to the Coroner, the doctor’s only response was to say ‘so?’ 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’.<sup>16</sup>

#### 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.

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

<sup>12</sup> Tory Shepherd, “‘He’s Tabling a Bill about a Myth’: Calling Bullshit on George Christensen’s “Born Alive” Abortion Move’, *Crikey* (online, 5 May 2021) <<https://www.crikey.com.au/2021/05/05/george-christensen-abortion-bill/>>.

<sup>13</sup> Paul Karp, ‘George Christensen’s “Nonsensical” Abortion Proposal Could Penalise Doctors up to \$440,000’, *The Guardian* (online, 23 February 2021) <<https://www.theguardian.com/australia-news/2021/feb/23/george-christensens-nonsensical-abortion-proposal-could-penalise-doctors-up-to-44000>>.

<sup>14</sup> Sarah Ison, ‘Political Push to “Protect” Babies Born Alive after Abortion’, *The Australian* (online, 5 December 2022) <[https://www.theaustralian.com.au/the-oz/news/political-push-to-protect-babies-born-alive-after-abortion/news-story/a6fa6d5e922ae894793939d332557324?gclid=Cj0KCQIAgOefBhDgARIsAMhQXA7GfirfEs0JVkKWddfb3kKEv93vD7xcwhm4FNgvUTF2i\\_eVFbEuPJP0oaAmV-EALw\\_wcB](https://www.theaustralian.com.au/the-oz/news/political-push-to-protect-babies-born-alive-after-abortion/news-story/a6fa6d5e922ae894793939d332557324?gclid=Cj0KCQIAgOefBhDgARIsAMhQXA7GfirfEs0JVkKWddfb3kKEv93vD7xcwhm4FNgvUTF2i_eVFbEuPJP0oaAmV-EALw_wcB)>.

<sup>15</sup> ‘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, ‘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>>.

<sup>16</sup> Inquest into the death of Jessica Jane [2000] NTMC 37, [12] (10 April 2000).

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.<sup>17</sup> 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.<sup>18</sup>

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

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.<sup>19</sup>

In summary, there is some evidence that in Australia babies are born alive and left to die without medical care following a failed abortion. 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'.<sup>20</sup>

### **What role will a federal law have in protecting babies born alive following a failed abortion when abortion law is governed by the states and territories?**

There is a pressing need for a federal law to give equal protection to babies born alive following an abortion given that there is no consistent regulatory approach across states and territories in Australia.

In Queensland, for example, the Termination of Pregnancy Guidelines make it clear that there is to be no provision of medical care (either palliative care or life-saving treatment) to a baby who survives an abortion. These Guidelines currently state:

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.<sup>21</sup>

### **Examples of babies born alive following a failed abortion**

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<sup>17</sup> 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-d30c192faf006f73dcd9f85ec404e>>.

<sup>18</sup> Inquest into the death of Jessica Jane [2000] NTMC 37, [29] (10 April 2000).

<sup>19</sup> Inquest into the death of unnamed baby of XX (Name withheld), Inquest before Coroner sitting alone, Deputy State Coroner Janet Stevens (copy on file with the author).

<sup>20</sup> Inquest into the death of Jessica Jane [2000] NTMC 37, [28] (10 April 2000).

<sup>21</sup> Queensland Government, Queensland Clinical Guidelines: Termination of Pregnancy (2019) 24.

- **Tim**, a baby who survived an abortion following a diagnosis of Down Syndrome and was left to die, without medical care for 9 hours before a nurse provided life-saving medical treatment.<sup>22</sup>
- **Gianna Jessen**, a survivor of a saline abortion procedure. She had cerebral palsy due to a lack of oxygen to her brain during the abortion attempt but is today an outspoken advocate for equal rights for babies born alive following an abortion.<sup>23</sup>
- **Melissa Ohden**, who was saved by a nurse who heard her crying and found her lying among medical waste at a US hospital. Melissa went on to live a perfectly healthy life.<sup>24</sup>
- The **daughter of Sycloria Williams** who was delivered alive. To her mother's horror and without her consent, the abortion clinic's owner cut her baby girl's infant's umbilical cord and placed the baby in a plastic biohazard bag and threw it out.<sup>25</sup>
- An **unnamed baby** who was aborted and zipped into a medical bag whilst still breathing at Westmead Hospital following an abortion.<sup>26</sup>
- **Jessica Jane**, a baby who was born alive in the NT following a failed abortion and who lived for approximately 80 minutes.<sup>27</sup>
- **Kiyo Bleu Watson**, who was diagnosed with Edwards Syndrome at 15 weeks and was aborted at 18 weeks and 4 days. He was born alive and lived for ten hours. His mother said that watching her son die for ten hours was 'torture'. She said, "It was awful. I can't get my head around how he survived. I don't even have a word for how horrible it feels. There is a person I've read about who has survived with Edwards Syndrome to 40. Kiyo Bleu was so strong now I wonder if he would have survived. His heartbeat was so strong you could feel it. If I had known he would be born alive I probably would have made a different decision. I thought I was doing the right thing but now I think I have done the wrong thing. He just looked so normal".<sup>28</sup>
- A **baby** who survived an abortion and was discharged in a healthy state from hospital at 10 months.<sup>29</sup>
- **Faye Elizabeth Rippon** who lived for 1 day following her live birth after a termination at 21 weeks gestation. In this case the Coroner's report notes, "It is extremely distressing for the midwives caring for the mother to be presented with a live baby which is not to receive life-saving medical attention, not to mention lasting damage to the psyche of the parents. A similar case arose at Inquest in the Royal Devon and Exeter Hospital only six days ago so live birth post induction of labour for termination of pregnancy is not an isolated occurrence".<sup>30</sup>

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<sup>22</sup> Derek Scally, 'German Man Who Survived Abortion Dies Aged 21', *The Irish Times* (online, 9 January 2019) <<https://www.irishtimes.com/news/world/europe/german-man-who-survived-abortion-dies-aged-21-1.3752247>>.

<sup>23</sup> Lindsey Bever, "The Only Reason I am Alive is the Fact that the Abortinist Had Not Yet Arrived at Work", *The Washington Post* (online, 30 September 2016) <<https://www.washingtonpost.com/news/acts-of-faith/wp/2016/09/27/the-only-reason-i-am-alive-is-the-fact-that-the-abortinist-had-not-yet-arrived-at-work/>>.

<sup>24</sup> Adam Eley and Jo Adnitt, 'The Failed Abortion Survivor Whose Mum Thought She was Dead', *BBC News* (online, 5 June 2018) <<https://www.bbc.com/news/health-44357373>>.

<sup>25</sup> 'Doctor Investigated in Badly Botched Abortion', *NBC News* (online, 6 February 2009) <<https://www.nbcnews.com/id/wbna29037216#.UZyw3YKO9I>>.

<sup>26</sup> 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-d30c192faf006f73dcd9f85ec404e>>.

<sup>27</sup> Inquest into the death of Jessica Jane [2000] NTMC 37 (10 April 2000).

<sup>28</sup> Chloe Morgan, 'Mother, 27, Who Aborted her Baby at 18 Weeks due to a Rare Condition Reveals he was Born Alive When the Procedure Failed and Says it was "Torture" Watching him Die for 10 Hours', *Daily Mail* (online, 11 May 2021) <<https://www.dailymail.co.uk/femail/article-9565609/Devastated-mothers-tiny-baby-born-alive-abortion-18-weeks-lived-ten-hours.html>>.

<sup>29</sup> P Clarke, J Smith, T Kelly and M J Robinson, 'An Infant who Survived Abortion and Neonatal Intensive Care' (2005) 25(1) *Journal of Obstetrics and Gynaecology* 73 <<https://www.tandfonline.com/doi/epdf/10.1080/01443610400025945?needAccess=true&role=button>>.

<sup>30</sup> Dr Elizabeth Ann Earland, Senior Coroner for the Exeter and Greater Devon District, 28 July 2014 <<https://www.judiciary.uk/wp-content/uploads/2014/11/Rippon-2014-0349.pdf>>

## List of Recommendations

### Recommendation 1

**There should be statutory protections at the federal level for all babies born alive in Australia to receive medical care irrespective of the circumstances of their delivery.**

### Recommendation 2

**There should be national medical protocols put in place (by statute, regulation or otherwise) to govern the provision of medical care to newborn babies following an abortion.** These should include, but not be limited to:

- a. **Ensuring that newborn babies are immediately assessed for gestational age and viability by a medical practitioner.**<sup>31</sup>
- b. **The provision of medical care should be based on a formal-equality principle. All newborn babies are entitled to equal treatment under the law.** The basis for this equality principle is that a newborn baby possesses independent human rights upon its separation from its mother.

### Recommendation 3

**There should be mandatory and robust national data collection on babies born alive following an abortion.** This will require the cooperation of state and territory governments and should encompass data collection on the gestational age at birth, gender of the baby, reason for abortion, medical care provided after birth and length of life.

### Recommendation 4

**All pregnant women undertaking a second or third trimester abortion should be given comprehensive crisis pregnancy counselling and be made aware of the risks of late-term abortion, including live birth.**

According to one peer-reviewed study published in the Journal of Obstetrics and Gynaecology, '[m]any women do change their minds about an initial abortion decision. A change of mind in favour of continued pregnancy is far commoner in second trimester abortion applicants compared to first trimester applicants. In a study of 1419 women who booked for abortion, overall almost 10% subsequently opted to continue pregnancy to term. However, among applicants of over 18 weeks gestation, 75% decided to continue pregnancy'.<sup>32</sup>

### Recommendation 5

**All babies born alive following an abortion who die prior to discharge from the hospital should be referred to the Coroner for an inquest.**

As the Northern Territory Coroner stated, babies born alive following a failed abortion 'is not just something for medical practitioners and health professional[s] to consider and deal with. The public have a right to be informed and take part in any debate. The coronial process is the means by which they are informed. This is why it is important that these kinds of deaths be reported to the Coroner'.<sup>33</sup>

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<sup>31</sup> Note this is a recommendation in Inquest into the death of Jessica Jane [2000] NTMC 37, [34].

<sup>32</sup> P Clarke, J Smith, T Kelly and M J Robinson, 'An Infant Who Survived Abortion and Neonatal Intensive Care' (2005) 25(1) *Journal of Obstetrics and Gynaecology* 73.

<sup>33</sup> Inquest into the death of Jessica Jane [2000] NTMC 37, [35].

Recommendation 6

If the death is unavoidable, the baby must always be given palliative care, with proper attention given to pain relief and the emotional needs of the dying baby.

Recommendation 7

All babies born alive following an abortion who die in hospital after their birth are entitled to a birth certificate, death certificate and proper burial or cremation.