

Women's Health Victoria



Termination of Pregnancy Post 20 Weeks Background Paper

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What is a 'late' termination?

There is no agreed definition of a 'late' termination¹. The Medical Practitioner Board of Victoria in a report on late terminations of pregnancy defined them as those undertaken at 20 weeks or more gestation². These are also known as 2nd or 3rd trimester terminations.

Number of post 20 week terminations in Victoria

Very few post 20 weeks terminations are undertaken in Victoria. In 2004, 220 Victorian women underwent terminations later than 20 weeks gestation³. More than half of these were for foetal abnormality. From 2000 to 2004, only 35 terminations were undertaken post 28 weeks in Victoria. The vast majority of these were for foetal abnormality. For Victorian women who had post 20 week terminations in 2004 for other reasons (listed as psychosocial), most of these were young women (under 25 years).

A lack of accurate data collection data in Victoria makes it difficult to identify the exact numbers of terminations carried out and what percentage of all terminations are undertaken post 20 weeks gestation. The Department of Human Services has noted that Victorian data on 2nd and 3rd trimester terminations may 'seriously overestimate' the number actually carried out as other procedures may have been recorded using the same data code^{4,5}.

One effect of legislative change in Western Australia⁶ is the mandatory collection of annual statistics on induced abortion. These statistics show number of terminations performed after 20 weeks gestation is a relatively small proportion of total terminations performed. In fact between 1998 and 2002, terminations performed after 20 weeks gestation amounted to 0.5% of all performed⁷. The Western Australian Department of Health has noted that since legislative changes, rates have remained stable for both pre and post 20 week terminations⁸. Similar rates are reported in the UK where for many years 98.4% to 99% of terminations are performed before 20 weeks⁹.

¹ Senator K. Patterson, 'Questions on notice: Health: Abortion', Senate, Debates, (10 May 2005), p.252, available at <http://www.aph.gov.au/hansard/senate/dailys/ds100505.pdf>, accessed 4 April 2005.

² Medical Practitioners Board of Victoria (1988). Report on Late Terminations of Pregnancy.

³ Consultative Council on Obstetrics and Paediatric Mortality and Morbidity Services (2004). Annual Report. Department of Human Services, Victorian Government

⁴ Medicare items which may result in abortive outcomes (items 16525 and 35643) are also used for procedures that are not abortions per se, such as those carried out following a miscarriage. It is not possible to differentiate between different procedures reported under the same item number. The Medicare Benefits Schedule definition of these items is as follows. Item 16525: management of second trimester labour, with or without induction, for intrauterine foetal death, gross foetal abnormality or life threatening maternal disease, not being a service to which item 35643 applies. Medicare item 35643: evacuation of the contents of the gravid uterus by curettage or suction curettage.

⁵ Hospital Morbidity Data Set, cited in K. Patterson 'Questions on notice: Health: Abortion', Senate, Debates, (10 May 2005), p.252, available at www.aph.gov.au/hansard/senate/dailys/ds100505.pdf

⁶ In 1998, the Acts Amendment (Abortion) Act was enacted in Western Australian. It made changes to Criminal Code and a new section was added to the Health Act the provision of the termination. The result was that it is lawful to perform a termination where it is (i) performed by a medical practitioner in good faith and with reasonable care and skill; and (ii) justified under section 334 of the Health Act.

⁷ J.E. Dickenson, 'Late pregnancy terminations within a legislated medical environment', Australian and New Zealand Journal of Obstetrics and Gynaecology, Vol. 44 (2004), p. 337.

⁸ Department of Health (2005). Induced abortions in Western Australia 199-2004: Report of the WA abortions notification system. Department of Health, Government of Western Australia.

⁹ Prochoice Forum (2004). Late Abortion: A review of the evidence. Prochoice Forum: UK.

What are the reasons for post 20 week terminations?

As has been shown, the vast majority of terminations are undertaken prior to 20 weeks. The British Medical Association¹⁰ has identified a number of factors affecting the timing of the decision to terminate. These are as follows:

- *Failure to recognise the pregnancy earlier.* Some women do not recognise that they are pregnant until late into the pregnancy. These are often younger women, whose bodies are still developing, and pre and peri menopausal women, who do not expect to be pregnant at this stage of their lives.
- *Delay in seeking abortion due to personal circumstances.* Delays in seeking abortion are often due to the woman's apprehension (including difficulty in confiding in parents or partner), failure of anticipated emotional or economic support (from family, partner, or employer), or an unanticipated change in the woman's socio-economic circumstances (in relation to her partner, or others dependent on her as a carer).
- *Diagnosis of foetal abnormality.* Many abnormalities are not diagnosed until the latter part of the second trimester and the woman needs time to consider the information provided, to come to terms with it and make a decision about how to proceed.
- *Difficulty in accessing abortion.* Some women make a decision to have an abortion earlier in pregnancy but experience delays in accessing the service.

These reasons are echoed in a review of the evidence regarding terminations in the 2nd and 3rd trimester¹¹. This report suggests that in at least 80% of cases, for the reasons outlined above, women seeking terminations later in their pregnancy did not realise they needed to request abortion until they were more than three months pregnant.

The Public Health Association of Australia have noted that advances in scanning and testing for foetal abnormalities together with the increased risk of foetal abnormalities for women choosing to have children later in life may be responsible for any increases in numbers of second and third trimester terminations¹².

Legal status of termination prior to 20 weeks in Victoria

Laws that regulate the practice of medicine apply to the provision of termination. In addition, under Victorian law, termination of pregnancy is currently in the Crimes Act.

Section 65 of the Victorian Crimes Act (1958) outlines that an unlawful abortion carries a sentence of a maximum 10 years in gaol. Section 66 states that anyone supplying or procuring goods to cause an abortion is liable to a maximum of 5 years in jail¹³. However, the legislation does not define what constitutes a legal termination. A judicial

¹⁰ English, Veronica & Mussell, Rebecca (2005). Abortion time limits : a briefing paper from the BMA. British Medical Association. London, United Kingdom. May 2005

¹¹ Lee, E (2004). Why women have late abortions. In "Late Abortion: A review of the evidence. Prochoice Forum: UK.

¹² Public Health Association of Australia (2005). Abortion in Australia: Public Health Perspectives. 3rd Ed.

¹³ Crimes Act 1958 (Vic), s65-66

interpretation of the legislation was provided by the late Justice Menhennitt in his 1969¹⁴.

In accordance with Justice Menhennitt's ruling, a termination is lawful if the person performing it honestly believes on reasonable grounds that it is 'necessary' and 'proportionate'. That is *necessary* to preserve the pregnant woman from a serious danger to her life or to her physical or mental health, beyond the normal dangers of pregnancy and childbirth. *Proportionate* in that the risks inherent in performing the termination were not out of proportion to the danger to be averted. As a result of this ruling, termination of pregnancy is generally thought of as legal in Victoria. The Menhennitt ruling did not put an upper gestational limit on termination.

Legal status of termination post 20 weeks in Victoria

Termination of pregnancy is also referred to in Section 10 of the Crimes Act (1958)¹⁵. This section relates to the offence of child destruction. It defines child destruction as unlawfully causing the death of a child capable of existence independent of its mother. It defines 'capable of being born alive' as 28 weeks or more gestation. This brings a sentence of a maximum 15 years in jail.

However advances in medical technology means that viability is a shifting standard. They provide medical practitioners and their patients increased opportunity for foetal screening and subsequently greater information about the health status of the foetus. This is particularly salient as women are having children later in life and therefore subject to greater risk of foetal abnormalities. Advances in medical technology have also increased our capacity to maintain the life of babies born prematurely. The divide between the gestational age of terminated foetuses and those of medically supported premature births is rapidly closing. These advances present ethical challenges for society about the reasons women terminate a pregnancy, especially with regard to post 20 week terminations and terminations based on foetal abnormalities.

Post 20 weeks termination in other jurisdictions

South Australian law regarding 2nd and 3rd trimester termination is very similar to Victorian except that the penalty is life imprisonment. The laws vary in other states. Most identify some crime similar to that of 'child destruction' but not all are clear as to whether this relates to post 20 week termination. In Tasmania it is a crime to cause the death of a child "who has not become a human being" unless it is necessary to preserve the life of the woman concerned¹⁶.

In Western Australia the crime of "killing an unborn child" attracts a life imprisonment¹⁷. Similar penalties exist in the Northern Territory and in Queensland. Queensland criminal law refers to destroying "a child" before birth but does not refer to gestational stage. In the Australian Capital Territory, it is a crime to "prevent a child being born alive" or 'contribute to the child's death". There is no child destruction offence in New South Wales.

¹⁴ R v Davidson (1969) VR 667 (Menhennitt J)

¹⁵ Crimes Act 1958 (Vic), s10

¹⁶ Criminal Code 1924 (Tas), s165

¹⁷ Criminal Code 1913 (WA), s290

Overseas experience demonstrates that countries with lower rates of termination tend to have more liberal laws than Australia¹⁸. Germany and the Netherlands are two examples of this.

How do we reduce the number of post 20 weeks terminations?

The decision to continue or terminate an unplanned and/or unwanted pregnancy can be difficult for many women¹⁹. These decisions should be made without pressure from others and women should never be made to feel guilty or judged for their decision. As outlined by the Public Health Association of Australia, control of fertility is crucial to a woman's ability to maintain her health²⁰.

There will always be demand for second and third trimester abortions and provision must be made for such services to be available. It is not appropriate that women's access to these health services is controlled through the criminal code. Accurate collection of data regarding termination is important to assist in the development and provision of methods to reduce the incidence of unwanted pregnancies as well as the effective support of women experiencing them. In addition a comprehensive statewide sexual and reproductive health policy is needed in Victoria. This should include the following:

- Improved access to and provision of termination services, including removal of abortion from the Crimes Act in Victoria
- Unbiased, relevant and accurate information and support for women experiencing an unwanted pregnancy
- More thorough and inclusive sex education in schools
- Increased access to, and counselling on, appropriate contraceptive choices
- The protection of privacy of medical records, particularly for young people
- Maintaining affordable contraception
- Protecting access to over the counter emergency contraception and making it available in a variety of settings.

¹⁸ Talina Drabsch (2005). Abortion and the law in NSW. Briefing Paper No 9/05. NSW Parliamentary Library Research Service.

¹⁹ Teng, C. (1999). Unplanned pregnancy: eeni, meenie, minnie, mo.... It's no game. HealthSharing Women, 9(3), 11-15.

²⁰ Public Health Association of Australia (1998). Family Planning and Fertility Control. Fact Sheet 2 in The Regulation of Abortion in Australia: Public Health Perspectives. Canberra: Public Health Association of Australia.