

STATES OF JERSEY

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DRAFT TERMINATION OF PREGNANCY (AMENDMENT) (JERSEY) LAW 200

**Lodged au Greffe on 25th January 2005
by the Health and Social Services Committee**

STATES GREFFE



Jersey

DRAFT TERMINATION OF PREGNANCY (AMENDMENT) (JERSEY) LAW 200

European Convention on Human Rights

The President of the Health and Social Services Committee has made the following statement –

In the view of the Health and Social Services Committee the provisions of the Draft Termination of Pregnancy (Amendment) (Jersey) Law 200- are compatible with the Convention Rights.

(Signed) **Senator S. Syvret**

REPORT

The States of Jersey approved the Termination of Pregnancy Law in 1997. The ‘in-principle’ decision to introduce such a Law was an extremely difficult one for the States to make. Many strongly-held views on the subject were expressed from many sections of the community. The actual Law, when finally introduced, contained an unusually narrow definition of foetal abnormality and this definition has caused difficulty in a number of cases. The precise nature of the problem is explained in detail below in the text of the consultation document that was issued by the Committee. The Health and Social Services Committee, having reviewed the matter and considered responses to the consultation document, is minded to seek to amend the Law.

Response to consultation

The Committee prepared a discussion paper proposing 2 amendments to the Termination of Pregnancy (Jersey) Law 1997, with a discussion period from Monday 29th November to 24th December 2004. The intention was, firstly, to inform politicians, users of the services, local voluntary and charitable organisations and the general public, of the complex ethical and clinical dilemmas which the proposed amendments sought to address, and secondly, to invite comment on the principal issues.

A range of comments were submitted.

There were 9 written responses in support of the amendments – and 2 women who approached the Department who made telephone calls of support but were unwilling to give their names as they said they were speaking as past users of the Termination of Pregnancy Service. These responses asserted the woman’s right to choose, and the illogical position of Jersey-based clinicians screening pregnant women but then having no means of lawfully treating women when the results of screening were known.

There were 13 written responses opposed to the amendments. The majority of responses opposed the concept of termination of pregnancy *per se*. Many believed that the current Law breached the Human Rights (Jersey) Law 2000 (not yet in force). There was an element of support for the continuation of the legal requirement for the Medical Officer of Health to continue to make an annual report to the States on the operation of the current Law on governance grounds.

At its meeting on 7th January 2005, the Committee considered all of the written responses. However, the Committee did not believe that the discussion period had raised any new views nor revealed evidence that it was unaware of when it was first minded to propose the principal amendments. The Committee therefore seeks the approval of an amendment to the Termination of Pregnancy Law. The reasons for seeking this change were articulated in the discussion document issued by the Committee and that text is reproduced below.

The consultation paper

The subject of abortion is contentious and continues to generate strong and honourably held emotional views amongst both politicians and members of the general public. This is so in Jersey as it is in other jurisdictions across the developed world. There are those who believe that life is so precious it must be protected at all costs and there can be no compromise on this principle. The protection of life at all costs extends to include the life of a developing foetus, even if there is a high risk or a definitive diagnosis that such a foetus would be severely clinically compromised and would have to endure an extremely poor quality of life. There are those who take a different view. They believe that there are circumstances in which a developing foetus could be aborted if significant incurable abnormality was detected. But those who subscribe to this latter view believe that there should be a choice – a choice as to whether that foetus should be terminated or not – and that the woman who carries the foetus through pregnancy is the person who must make that choice.

The Abortion Act 1967 applicable in England, Wales and Scotland sought in common with subsequent laws to strike the right balance – to give choice to pregnant women but within legally defined parameters.

The Termination of Pregnancy (Jersey) Law 1997

The Termination of Pregnancy (Jersey) Law 1997 (subsequently referred to as “the Law”) also looked to strike this balance. In the debate which presaged its passing, all the full range of sentiments and views were widely expressed.

There are 4 grounds for carrying out a lawful termination. Three of these are –

1. Article 2(1) – being that the termination is immediately necessary to save the life of the women.
2. Article 2(2)(a) – being that the termination is necessary to save the life of the women or to prevent grave permanent injury to her physical or mental health.
3. Article 2(2)(c) – being that the woman’s condition causes her distress, that the woman fulfils the residency requirements in the 1997 Law, that the pregnancy has not exceeded its 12th week and that the requirements for consultation in the 1997 Law have been complied with.

These provisions appear to be broadly accepted.

The Health and Social Services Committee (“the Committee”) propose to amend the third ground, in Article 2(2)(b)(i), which it deems unfairly restrictive and causing extreme distress to Jersey women and their families. This distress is not confined to those pregnant women who wish to have an abortion – it is also causing distress to those pregnant women who wish to be screened for foetal abnormality, an obviously much wider group of women.

Article 2(2)(b)(i) describes this third ground as –

‘two approved registered medical practitioners (one of whom practises in obstetrics and gynaecology and one of whom practises in paediatrics), having examined the woman, are each of the opinion, formed in good faith, that, at the time of the examination, the foetus is suffering from an incurable abnormality of such seriousness that, if born at full term, it would be likely to have an exceedingly poor quality of life’.

When making an assessment of the ‘quality of life’, one is making a subjective judgement. Many of the factors that inform an individual’s opinion will be relative. A person’s world view, their religious convictions, their socio-economic circumstances and other such factors will largely shape their opinion and perspective on what is a ‘poor quality of life’. Thus one person’s judgement may well be of a different standard – that is, an uncompromising and non-negotiable standard – than another person’s judgement and standards. To comply with the Law, medical practitioners *have* to adopt the most uncompromising of these standards. This means that to abort a foetus with a diagnosis of spina bifida, Down’s Syndrome or complex congenital heart disease is unlawful in the context of the Law as it could be argued that, *in extremis*, the foetus might not have ‘an exceedingly poor quality of life’.

The Committee deems it reasonable for a pregnant woman and her family to wish to avoid having a child with a serious handicap. In most other jurisdictions in the developed world, the termination of pregnancy for a serious handicap is lawful. In these other jurisdictions it is the pregnant woman with her family who – with guidance and counselling – has the right to choose whether to terminate the pregnancy or not. To use the legal test of ‘an exceedingly poor quality of life’ is deemed by the Committee to be impracticable and unworkable when one has to draw the line as to what is reasonable, what is ethical, and what is lawful.

However, it is important to state that in articulating these matters it does not follow that people with such disabilities should not be respected nor does it follow that people with these disabilities lead lives of diminished value or worth. Some women will be content to continue with their pregnancy notwithstanding an adverse diagnosis. That is their choice. It is contended here that it is that choice – the pregnant woman’s choice – which should determine what must happen if her foetus is diagnosed as having a serious handicap.

The epidemiology of Jersey

Over 90% of Jersey women present for prenatal screening for chromosomal and structural abnormalities of the foetus. In today’s society many women only embark upon a pregnancy later in life with the understanding that these tests are available – giving them the choice to interrupt their pregnancies if a serious abnormality is found.

Jersey is noteworthy in that approximately 22% of pregnant women are over the age of 35 years– the age when chromosomal abnormalities become increasingly common. In the U.K., this figure is nearer 13%. Each year in Jersey there are on average 3 to 4 Down’s Syndrome pregnancies and from 5 to 10 severe structural abnormalities discovered. It should be noted that approximately one to 2% of all pregnancies have some form of congenital abnormality.

Antenatal screening and testing

The antenatal screening programme and the subsequent hierarchy of testing spans the period from 12 to 20 weeks and such conditions as Down’s Syndrome are only definitively diagnosed towards the end of this period.

It could be viewed as unethical for clinicians to undertake any form of screening programme without being able to offer the patient – or client – some tangible and practical course of action should that screening programme

indicate a high probability of risk. To do otherwise is to condemn the patient to possessing extremely important knowledge about themselves but without the means to take available, practical steps in the light of that knowledge.

The Committee has received a number of approaches from women who have been pregnant and who have been faced with this dilemma – that dilemma being that they are strongly advised to participate in antenatal screening and testing but if they have a foetus diagnosed with an incurable abnormality (and they are over 12 weeks pregnant) then under the Law they cannot have a termination given the test of ‘exceedingly poor quality of life’.

Put plainly, women who are at high risk of or are diagnosed as carrying a foetus with a serious handicap have their pregnancies terminated in other jurisdictions if they are more than 12 weeks into their pregnancy. Those who have the personal means to pay privately can, and do, travel abroad. Faced with the prospect of a two-tier service – in other words, a service for those who can afford to pay for their own travel and treatment, and no service for those who cannot afford to pay – the Department of Health and Social Services makes funds available to those who lack their own means to be able to travel elsewhere. This simply cannot be the right way of managing the termination of pregnancy for the women of Jersey.

Thus it is proposed that Article 2(2)(b)(i) of the Termination of Pregnancy (Jersey) Law 1997 be amended to read –

‘two approved registered medical practitioners (one of whom practises in obstetrics and gynaecology and one of whom practises in paediatrics,) having examined the woman are each of the opinion, formed in good faith, that, there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped’.

The duty of the Medical Officer of Health

The Committee also propose to repeal Article 9 of the Law. This Article states –

‘The Medical Officer of Health shall lay before the States, every calendar year, a report upon the operation of this Law in the preceding calendar year which shall include such information as may be prescribed’.

Such a report – which is in the public domain – describes the number by category (categories of termination as per Article 2) of terminations, which take place. It is proposed that the Law is amended to repeal this requirement to report to the States. The report frequently describes very small numbers of patients – and women who have had termination can readily identify themselves from the report. This is recognised to be unnecessarily distressing for them and potentially intrusive of patient confidentiality. The data will still be collated and used internally within the Department of Health and Social Services for research and epidemiological purposes.

Regulatory reform

The opportunity has also been taken to make a number of minor amendments in support of proposition P.134/2004 – ‘Regulatory Reform’, adopted by the States on 15th September 2004.

Financial and manpower implications

This Amendment to the principal Law has no manpower or revenue implications.

European Convention on Human Rights

Article 16 of the Human Rights (Jersey) Law 2000 will, when brought into force by Act of the States, require the Committee in charge of a *Projet de Loi* to make a statement about the compatibility of the provisions of the *Projet* with the Convention rights (as defined by Article 1 of the Law). Although the Human Rights (Jersey) Law 2000 is not yet in force, on 21st January 2005 the Health and Social Services Committee made the following statement before Second Reading of this *projet* in the States Assembly –

In the view of the Health and Social Services Committee the provisions of the Draft Termination of Pregnancy (Amendment) (Jersey) Law 200- are compatible with the Convention Rights.

Explanatory Note

Article 1 defines the Termination of Pregnancy (Jersey) Law 1997 as the ‘principal Law’.

Article 2 is an amendment that is consequential upon *Articles 7 and 8*.

Article 3 amends Article 2 of the principal Law. The amendment is to the provision making it lawful to carry out a termination, before the end of the 24th week of a pregnancy, on the ground of foetal abnormality.

As enacted, the Law required 2 doctors approved by the Health and Social Services Committee (the ‘Committee’) for the purposes of the Law, one being a practitioner in obstetrics and gynaecology and the other being a paediatrician, to be of the opinion, formed in good faith, that, at the time of examination, the foetus was suffering from an incurable abnormality of such seriousness that, if born at full term, it would be likely to have an exceedingly poor quality of life.

As amended, the Law would require those doctors to be of the opinion, formed in good faith, that there is a serious risk that if born, the child would suffer from such physical or mental abnormalities as to be seriously handicapped. This amended ground replicates the ground which has been used in the United Kingdom since 1967, when the Abortion Act 1967 was enacted, save that it will remain a requirement, in Jersey, that the termination is carried out before the end of the 24th week of pregnancy.

Articles 4 and 5 are amendments that are consequential upon *Articles 7 and 8*.

Article 6 repeals Article 9 of the principal Law, being the requirement for the Medical Officer of Health to report annually to the States upon the operation of the principal Law.

Article 7 amends Article 10 of the principal Law so as to repeal and amend provisions empowering the Committee to impose certain requirements by Order of the Committee.

Two of the repealed provisions relate to fees. The first is the power to specify a fee to be charged for a termination carried out, within the first 12 weeks of pregnancy, on the ground that the woman’s condition causes her distress. The Committee will continue to charge a fee for such terminations but, as it already does with other services for which a fee is charged, will set the rate administratively rather than through an Order. The second is a power to regulate fees charged where a termination on this ground is carried out in a nursing home.

One of the amendments has the effect that the information to be supplied to the Medical Officer of Health need no longer be specified in an Order. However, the Medical Officer of Health’s power to call for information is limited to that which he or she reasonably requires in order to report to the Committee upon the operation of the Law and it remains the case that, by virtue of Article 10(2) of the principal Law, the information given must not be such as would identify the woman whose pregnancy has been terminated.

The remaining repeals and amendment are of powers to require the certification of opinions given for the purposes of establishing the ground for a termination and of powers to specify the form of certificates given where the principal Law requires a woman to undergo 2 consultations before she has a termination on the ground that her condition causes her distress.

Article 8 replaces the provisions repealed by *Article 7* regarding the certification of opinions and the form of certificates. It inserts a new Article 10A in the principal Law which requires a person giving an opinion to record and certify it using a form provided by the Committee and requires a certificate to be given using a form provided by the Committee. A failure to comply with Article 10A is an offence liable to a fine up to level 2 on the standard scale (£500).

Article 9 is the citation and commencement provision.



Jersey

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Arrangement

Article

<u>1</u>	<u>Interpretation</u>
<u>2</u>	<u>Article 1 amended</u>
<u>3</u>	<u>Article 2 amended</u>
<u>4</u>	<u>Article 3 amended</u>
<u>5</u>	<u>Article 4 amended</u>
<u>6</u>	<u>Article 9 repealed</u>
<u>7</u>	<u>Article 10 amended</u>
<u>8</u>	<u>Article 10A inserted</u>
<u>9</u>	<u>Citation and commencement</u>



Jersey

DRAFT TERMINATION OF PREGNANCY (AMENDMENT) (JERSEY) LAW 200

A LAW to amend the Termination of Pregnancy (Jersey) Law 1997.

Adopted by the States [date to be inserted]

Sanctioned by Order of Her Majesty in Council [date to be inserted]

Registered by the Royal Court [date to be inserted]

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

1 Interpretation

In this Law “principal Law” means the Termination of Pregnancy (Jersey) Law 1997.^[1]

2 Article 1 amended

In Article 1(1) of the principal Law^[2] the definition “prescribed” shall be deleted.

3 Article 2 amended

In Article 2(2)(b)(i) of the principal Law^[3] for the words beginning “that, at the time” and ending “poor quality of life,” there shall be substituted the words “that there is a substantial risk that, if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped,”.

4 Article 3 amended

In Article 3(2)(c) of the principal Law^[4] the words “, in such form as may be prescribed,” shall be deleted.

5 Article 4 amended

In Article 4(1)(a) of the principal Law^[5] the words “, in such form as may be prescribed” shall be deleted.

6 Article 9 repealed

Article 9 of the principal Law^[6] shall be repealed.

7 Article 10 amended

In Article 10(1) of the principal Law^[7] –

- (a) sub-paragraphs (a), (b), (e) and (f) shall be deleted;
- (b) in sub-paragraph (g) for the words “as may be specified to be supplied to him” there shall be substituted the words “to be supplied to the Medical Officer of Health as he or she may reasonably require for the purpose of reporting to the Committee upon the operation of this Law”;
- (c) in sub-paragraph (h) the words “the form in which and” shall be deleted.

8 Article 10A inserted

After Article 10 of the principal Law^[8] there shall be inserted the following Article –

“10A Forms

- (1) An approved registered medical practitioner shall make a record of and certify his or her opinion referred to in Article 2 by completing a form printed and made available by the Committee for the purpose.
- (2) The certificate given by a registered medical practitioner to a woman under Article 3(2), (c) or 4(1)(a) shall be in a form printed and made available by the Committee for the purpose and signed by the registered medical practitioner.
- (3) A person who fails to comply with paragraph (1) or (2) shall be guilty of an offence and liable to a fine of level 2 on the standard scale.^[9]”

9 Citation and commencement

This Law may be cited as the Termination of Pregnancy (Amendment) (Jersey) Law 200- and shall come into force on the seventh day following its registration.

[1] *Volume 1996-1997, page 553.*

[2] *Volume 1996-1997, page 555.*

[3] *Volume 1996-1997, page 556.*

[4] *Volume 1996-1997, page 558.*

[5] *Volume 1996-1997, page 559.*

[6] *Volume 1996-1997, page 561.*

[7] *Volume 1996-1997, page 561.*

[8] *Volume 1996-1997, page 563.*

[9] *Volume 1992-1993, page 437.*