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Abortion & the Criminal Law: The Need for Decriminalisation



Abortion should be removed from the criminal law

Whilst abortion in Great Britain is accessible, it remains a criminal offence to procure an abortion under section 58 of the Offences Against the Person Act 1861, unless the medical procedure is conducted in line with the requirements stipulated in the Abortion Act 1967. Any woman who ends her own pregnancy is breaking the law and faces up to life imprisonment. Currently, in early 2023, there are two women in Great Britain facing up to life imprisonment for ending their own pregnancies.

Durham University research indicates that, whilst the offence of procuring a miscarriage criminalises the “unlawful” ending of a pregnancy, in recent cases the offence has been used where it is believed that a woman has harmed, or ended the life of her foetus. In these cases, the behaviour that is being highlighted for criminalisation is not the self-procured abortion, but the “killing” of a foetus. Thus, procuring a miscarriage is being used as a proxy for foetal homicide laws. Foetuses have limited legal protection in Great Britain, and they cannot be a victim of a homicide offence. Thus, use of section 58 of the Offences Against the Person Act 1861 to achieve an unofficial, or proxy foetal homicide offence is a misuse of the criminal law; resulting in an injustice for women. The injustice is greater when considering that women who self-abort their pregnancies late in gestation are incredibly vulnerable and are experiencing a “crisis pregnancy”.

We recommend:

Sections 58 and 59 of the Offences Against the Person Act 1861 are repealed to remove abortion from the criminal law.

Currently, in early 2023, there are 2 women facing up to life imprisonment for ending their own pregnancies. Over the past 8 years, at least 17 women have been investigated by police for ending their own pregnancies, though the actual number is likely to be higher. In one reported case, a teenage girl was investigated by police after a stillbirth at 28 weeks, suspected of obtaining an illegal abortion. Her phone and laptop were confiscated during her GCSE studies, causing such isolation and distress that she was driven to self-harm. She endured a long investigation which only concluded when the coroner found that the pregnancy had ended as a result of natural causes.



Abortion is a crime

Abortion is illegal in Great Britain. The Offences Against the Person Act 1861, s58, makes it a criminal offence, in England and Wales, to procure an unlawful miscarriage at any point in the pregnancy. In Scotland, abortion is an offence through case law. [1] Abortion can be accessed legally across Britain if the medical procedure is conducted according to the requirements outlined in the Abortion Act 1967, which provides a legal defence to doctors who are of the opinion, formed in good faith, that:

- a woman requesting an abortion is under 24 weeks pregnant and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or her family (s1(1)(a)); or
- the abortion is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman (s1(1)(b)); or the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated (s1(1)(c)); or
- there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities (s1(1)(d)).

However, if an abortion occurs outside of these legal requirements, then the abortion is illegal under the Offences Against the Person Act 1861, s58. Consequently, if a pregnant woman takes steps to end her own pregnancy, then she is breaking the law and could face up to life imprisonment for her actions.

Section 59 of the Offences Against the Person Act 1861 makes it illegal to supply or procure “any poison or other noxious thing”, or an instrument knowing that they are to be “unlawfully used or employed with intent to procure the miscarriage of any woman”. Consequently, any woman who obtains abortion medication for herself or someone else, such as her daughter, other than through an unauthorised abortion provider, is breaking the law and could face imprisonment.

Telemedical abortion: breaking the law

In 2022, the Government confirmed that provisions for at-home early medical abortions would be made permanent following a vote in Parliament earlier that year. [2] The change in the law allows women to access pills for abortions at up to 9 weeks and 6 days gestation, via a teleconsultation, and for both pills to be taken at home. This development in abortion provision is good news for women as it allows greater access to abortion and will assist in preventing crisis pregnancies. [3] A consequence of abortion continuing to be a criminal offence is that more women are now at risk of breaking the law and facing life imprisonment. For a not insignificant number of women, in the time between their request for the abortion medication from an authorised provider and the pills arriving in the post, their pregnancies will have ended through a spontaneous miscarriage. Legally, these women are only permitted to use the medication they have subsequently received for that specific pregnancy. However, an unknown number of women will do what many will do with leftover medication: place it in their cupboard for future use. If then, at a point in the future, they, or a woman they know, need abortion medication, they might make use of the abortion pills they were previously provided. In so doing, these women will be breaking the law, potentially unwittingly.

The risk that women will unknowingly commit the offence of procuring a miscarriage, and possibly also procuring drugs to cause abortion (section 59) if they give the pills to another woman, does not indicate a fault with telemedical abortion services. Provision of abortion medication for use in a woman’s home must continue; so supporting women’s health and wellbeing. Instead, the risk of criminalisation if women use leftover abortion medication offers a further imperative to decriminalise all aspects of abortion.

Crisis pregnancy

“Crisis pregnancy” is the term that Dr Emma Milne has developed to characterise women’s experiences of pregnancy that cause them a crisis. Durham University research indicates that whilst most women who discover they are pregnant and do not want to be, or feel they cannot be, immediately take steps to end the pregnancy, a small number of women find the news leaves them paralysed and unable to act. These women are incredibly vulnerable. It is the context surrounding them and their pregnancy that results in women facing a crisis that they feel they cannot address:

- poverty
- violence and abuse from a partner or family member
- limited social support
- a complicated obstetric history or a history of mental health problems.



Hayley*

After being unable to access an abortion from authorised providers due to the gestational stage of her pregnancy, Hayley took steps to end her pregnancy using medication ordered via the internet. She had previously experienced four other crisis pregnancies – all presenting late in gestation – and was described by the courts as having an obstetric “history which throws out the potential for disturbance, personal misery and entrenched problems”. Hayley pleaded guilty to procuring a miscarriage. The prosecution were unable to prove whether the baby died before or after birth, or the cause of death, as the body was never discovered. During the hearing, the judge stated “... the seriousness of the criminality here is that, at whatever stage life can be said to begin, the child in the womb was so near to birth that in my judgment all right thinking people would consider this offence more serious than that of unintentional manslaughter or any offence on the calendar other than murder”. [4]

The implication of the judge’s remarks is that Hayley’s act of ending her pregnancy is akin to a homicide offence. As noted, procuring a miscarriage criminalises the ending of a pregnancy only if it is ended outside of the requirements of the Abortion Act 1967. Instead of the perception of Hayley having taken steps to end her pregnancy, her actions were interpreted through a lens of foetal protectionism, and so the offence of procuring a miscarriage was treated as if it is equivalent to a foetal homicide law.

*Pseudonym.



Foetal protection and the law

The imperative to decriminalise abortion goes beyond a woman’s need to end an unwanted pregnancy in a safe and legal way. Research by [Dr Emma Milne](#), Durham University, concludes that the offence of procuring a miscarriage is being applied to cases where it is judged the woman has “killed” the foetus. [4]

In the legal jurisdictions of England and Wales, and Scotland, a foetus does not have equivalent legal protection to people who have been born; legally, this is known as the “born alive rule”. Consequently, a foetus cannot be a victim of a homicide offence, nor an offence against the person. However, as soon as an infant is born, they acquire the same levels of rights and legal protection, including full protection under the criminal law, as provided to any other living person.

The offence of procuring a miscarriage criminalises the “unlawful” ending of a pregnancy. A plain reading of the statute leads to the conclusion that the offence is not designed to protect foetal life – the foetus does not need to have died for the offence to have been committed – nor was it the intent of Parliament when enacting the offence to protect foetuses. As legal scholar Glanville Llewelyn Williams argued, when creating the offence of procuring a miscarriage, Parliament was primarily concerned with preventing and condemning harm to women due to the risk of an abortion resulting in the death of a woman. [5]

Abortion used to be a dangerous surgical procedure, of great risk to women, as were all operations prior to the development of antibiotics. However, recent application of procuring a miscarriage leads to a conclusion that the offence is being used specifically in cases where it is believed that a woman has harmed or ended the life of her foetus. [4] Notably, prosecutions have been of those women suspected of ending their pregnancy after the point of viability of the foetus. [4] The focus of prosecution on women who self-aborted a viable foetus occurred despite evidence that, prior to the introduction of home-use of abortion medication, thousands of women were illegally accessing the pills through non-authorised means. [6] No women who have ended a non-viable pregnancy through these illegal means have been prosecuted. The focus of prosecutions on women who end a pregnancy late in gestation points to the conclusion that procuring a miscarriage is being used as a proxy for foetal homicide laws. [4]

Whether we, as a society, should criminalise women who harm their foetuses (intentionally or unintentionally) is a complex issue, and one that is, ultimately, for Parliament to decide. Evidence from the United States of America, where foetal protection laws have been implemented in most states, indicates that criminalising women for conduct during pregnancy has had disastrous outcomes for foetuses and babies as well as women. For further details of the impact of foetal protection laws, see briefing [***Foetal Protection Laws: A Dangerous Future for British Women***](#).

Injustice for vulnerable women

Sections 58 and 59 of the Offences Against the Person Act 1861 need to be repealed to prevent the criminalisation of vulnerable women who are in crisis. Whilst some may argue that foetuses should be legally protected using homicide laws, that is not the current law in Great Britain. Using alternative criminal offences, such as procuring a miscarriage, to achieve an unofficial or proxy foetal homicide offence is a misuse of the criminal law that is resulting in an injustice for women.

The injustice is greater when the experiences of convicted women are considered. As Dr Emma Milne’s research illustrates, women do not seek to end a pregnancy from sources other than authorised providers unless they are experiencing a “crisis pregnancy”. [4]

About the research

Briefing based on research findings published in ***Criminal Justice Responses to Maternal Filicide: Judging the Failed Mother*** (Emerald Publishing, 2021). The research analysed court transcripts from 15 criminal cases of women heard in England and Wales between 2010 and 2019. These represent almost a complete sample of cases from the period. In each case, the woman's foetus/newborn child died in suspicious circumstances, and the mother of the child was convicted of an offence connected to its death. Cases were assessed to evaluate the nature of the death and the women's experiences.

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CRIMINAL JUSTICE RESPONSES TO MATERNAL FILICIDE

Judging the Failed Mother



This project is funded by:



Help and support

If you are pregnant and you need help and support, including advice about abortion, contact the British Pregnancy Advisory Service (www.bpas.org) or MSI Reproductive Choices UK (www.msichoice.org.uk).



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