

Abortion Rights Scotland submission of 21 February 2023

PE1969/C: Amend the law to fully decriminalise abortion in Scotland

While it is correct that the Offences Against the Persons Act 1861 does not apply to Scotland, historically Scots criminal law has criminalised abortion.¹ It is generally accepted that the Abortion Act 1967 did not decriminalise abortion in Scotland, England and Wales. Instead, it merely carved out an exception to the criminal law and allowed for abortion in very narrow and specific circumstances.² This means that any abortion that takes place that does not conform to these parameters is potentially a crime.³

Although the Abortion Act 1967 was considered revolutionary at the time, the law has not kept up with social and medical advances in reproductive healthcare. This now means that the constraints that the Abortion Act 1967 places on abortion sometimes operate to inhibit robust and patient centric abortion care. The fact that medical practitioners could be liable to prosecution introduces a further barrier to any changes in practice.

While it is the case that we do not generally see prosecutions for abortion in Scotland, the fact that the criminal law overshadows all regulation of abortion, means that there is always the potential for prosecutions. Just because a law is not being enforced does not mean that this will remain the case.

International Obligations

International human rights bodies have increasingly recognised that criminalising abortion is regressive and a barrier to gender equality.⁴ International human rights treaties have been interpreted as providing for access to abortion in situations of sexual crimes and fatal foetal

¹ See for example, the case of John Fenton (1761) – Reported in Burnett’s A Treatise on the various branches of the Criminal law of Scotland, (1811), p. 6.

² Sally Sheldon, ‘The Decriminalisation of Abortion: An Argument for Modernisation’ (2016) 36 Oxford Journal of Legal Studies 334, p. 335. Available at: <https://kar.kent.ac.uk/51583/>.

³ Doogan v Greater Glasgow and Clyde Health Board (2012) S.L.T. 1041, Para. 42. See also [S.5\(2\) of the Abortion Act 1967](#).

⁴ Lynsey Mitchell, ‘Reading narratives of privilege and paternalism: the limited utility of human rights law on the journey to reform Northern Irish abortion law’ Northern Ireland Legal Quarterly vol 72 No. 1 (2021): 89–131. Available at <https://nilq.qub.ac.uk/index.php/nilq/article/view/533>.

abnormalities (FFA).⁵ The Committee on Economic, Social and Cultural Rights (CESCR) calls on states party to the International Convention on Economic Social and Cultural Rights to ‘liberalize restrictive abortion laws; to guarantee women and girls access to safe abortion services and quality post-abortion care’.⁶ Various international human rights committees have also called on states to decriminalise abortion and remove punitive sanctions on women. The Committee on the Rights of the Child has advocated that abortion be decriminalised and called on the UK to ‘review its legislation’.⁷ The UN High Commissioner has also highlighted the need to decriminalise abortion to fully achieve women’s rights.⁸ The Committee on the Elimination of Discrimination Against Women (CEDAW) has repeatedly highlighted the UK’s abortion regime, especially the Northern Irish regime prior to 2019 in its UK reports.⁹ In response to criminal prosecutions of women in Northern Ireland,¹⁰ the UN Human Rights Council stated: ‘The UK should, as a matter of priority, amend its legislation on abortion in NI.’¹¹

The Case for Decriminalisation

There has been a growing movement towards removing criminal sanctions for abortion. The UK is at risk of becoming an outlier in its legal regulation of abortion. Abortion was decriminalised in Northern Ireland in 2019 following a much-publicised investigation by the CEDAW Committee, which criticised the regressive regime and called on the UK government to decriminalise abortion.¹² There are movements to repeal the Offences Against the Persons Act 1861, which would decriminalise

⁵ See for example HRC, Amanda Mellet v Ireland (9 June 2016, [CCPR/C/116/D/2324/2013](#)); HRC, KL v Peru (22 November 2005, [CCPR/C/85/D/1153/2003](#)); CEDAW Committee, LC v Peru (4 November 2011, [CEDAW/C/50/D/22/2009](#)); HRC, LMR v Argentina (28 April 2011, [CCPR/C/101/D/1608/2007](#)).

⁶ (CESCR) General Comment No. 22, The Right to Sexual and Reproductive Health, (2016) [UN Doc. E/C.12/GC/22 \(2016\)](#), para, 10. See also para 34.

⁷ CRC, Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, UN Doc. [CRC/C/GBR/CO/5 \(2016\)](#), para 65(c).

⁸ OHCHR (2020) Information series on sexual and reproductive health and rights: Abortion. Available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf

⁹ CEDAW: Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, UN Doc. [CEDAW/C/GBR/CO/7](#), para 51, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, [UN Doc.C/UK/CO/6](#), para 289.

¹⁰ In 2016, a student who miscarried after taking pills purchased online was found guilty and sentenced to three month’s imprisonment (suspended). The facts are narrated in [In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review \(Northern Ireland\) \[2018\] UKSC 27](#), para 89. In 2017, a mother was charged with procuring pills for her 15-year-old daughter. She was only acquitted after the trial judge ordered the jury to acquit her following the decriminalisation of abortion in Northern Ireland in October 2019.

¹¹ Human Rights Committee, Concluding Observations on UK, UN Doc. [CCPR/C/GBR/CO/7](#) [Auths/193] (2015).

¹² CEDAW Committee, Inquiry Concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Report of the Committee, 6th March 2018, UN Doc. [CEDAW/C/OP.8/GBR/1](#), para 85.

abortion in England and Wales. If Scotland does not act to decriminalise abortion, it is at risk of becoming an outlier.

Wider Stakeholder Views

The professional bodies of medical professionals all support decriminalisation of abortion.¹³ A wide range of women's and human rights organisations, as well as the Scottish Trades Union Congress (STUC) also support decriminalisation.¹⁴

Key arguments in favour of decriminalisation:

- Prosecution is not an appropriate course of action for those accessing healthcare, or those who assist them. Worryingly, women in England have been sentenced for procuring abortion medication and many others have been investigated.¹⁵
- The continued shadow of criminalisation means that any changes to the abortion framework is currently time consuming and bureaucratic. Such changes have been subject to lengthy court proceedings which are expensive and delay the implementation of patient-centric care.¹⁶
- There is no evidence internationally that decriminalisation of abortion leads to more abortions.
- The bureaucratic and cumbersome requirement that abortion needs to be signed off by two doctors distinguishes abortion from other medical procedures. There is no medical reason for such oversight.

¹³ BMA (2019) The removal of criminal sanctions for abortion: BMA position paper. Available at: <https://www.bma.org.uk/media/1963/bma-removal-of-criminal-sanctions-for-abortion-position-paper-july-2019.pdf>; RCOG and FSRH (2022) RCOG and FSRH statement on decriminalisation of abortion. Available at: <https://www.rcog.org.uk/media/ly1lmvge/rcog-fsrh-joint-decrim-abortion-position-statement-august-2022.pdf>; RCM (2016) Position statements: Abortion. Available at: <https://www.rcm.org.uk/media/5530/rcm-position-statement-abortion-statement.pdf>

¹⁴ <https://www.engender.org.uk/content/publications/Our-bodies-our-choice---the-case-for-a-Scottish-approach-to-abortion.pdf>.

¹⁵ "Think abortion is legal in Great Britain? Ask the two women currently facing life sentences". Available at: <https://www.theguardian.com/commentisfree/2022/aug/19/abortion-legal-great-britain-women-life-sentences-roe-v-wade>

¹⁶ Attempts by abortion providers to move to self-managed abortion pre-pandemic were undermined by anti-choice organisations who challenged this perceived 'relaxation' of the Abortion Act 1967. The amendment to the class of place that allowed for administration of abortion medication at home was challenged in the Scottish courts by the Society for the Protection of Unborn Children (SPUC) on the grounds that a woman's home was not a suitable premises as envisioned by the Abortion Act. (*Society for the Protection of Unborn Children v Scottish Ministers* [2018]). The Court upheld the Scottish Government's use of these powers at both first instance and on appeal (*SPUC Pro-Life Scotland Ltd v Scottish Ministers* [2019]) but implementation was delayed until the court proceedings were concluded.

- Evidence from medical professionals is that the two doctor rule delays access to abortion.¹⁷
- Anti-choice movements internationally are increasingly seeking to enforce legal restrictions on abortion world-wide. The overturning of Roe V Wade in the USA demonstrates the success of these tactics.

In view of this overwhelming support to modernise Scotland's abortion law, we ask the committee to seek further evidence.

¹⁷ Decriminalisation: What Would this Mean for Abortion Rights in Scotland? Available at <https://www.youtube.com/watch?v=-p801qh8KY4&t=455s>