

## The Decriminalisation of Abortion

### 1) What would it mean to 'decriminalise' abortion?

'Decriminalising abortion' is best understood as the removal of specific criminal prohibitions against abortion. This would, of necessity, require parliamentary reform. There is no possibility for a UK court simply to strike down abortion legislation (as happened in Canada).

Decriminalisation would not leave the performance of abortions unregulated (or somehow 'outside' of law). Abortion would be subject to the same complex mass of general criminal, civil, administrative and other legal provisions that govern all medical procedures.

It should be noted that the repeal of criminal prohibitions against abortion does not guarantee good access to high-quality, state-funded abortion services. Decriminalization will not remove (or prevent the future erection of) other kinds of barriers.

### 2) What specific criminal prohibitions would need to be removed to decriminalize abortion?

**a) Offences Against the Person Act (1861), ss.58-60.** This statute applies in England, Wales and Northern Ireland. Abolishing these offences would have the effect of removing criminal prohibitions against abortion pre-viability and concealment of birth.

**b) Infant Life Preservation Act (1929) and section 25 of the Criminal Justice (Northern Ireland) Act 1945.** The first applies in England and Wales, the latter in Northern Ireland. Simultaneously repealing these provisions would have the effect of removing specific criminal prohibitions at any point in pregnancy, including post-viability. Alternatively, the relevant offences created by these statutes could be more tightly drawn (see below).

**c) Common law prohibitions against abortion.** Abolishing common law (judge made) prohibitions would be necessary to decriminalize abortion in Scotland. It might also be advisable to clarify that that old common law prohibitions in England, Wales and Northern Ireland have no residual effect/cannot be revived.

### 3) What kinds of conduct *should* remain subject to criminal sanction? What would happen in these cases if abortion were to be decriminalized?

#### a) Non-consensual abortion

Ss.58-9 of the OAPA and the offence of child destruction under the ILPA are sometimes prosecuted where a wanted pregnancy is lost as a result of an assault. If these offences were abolished, it would be important to give close attention to the question of whether existing criminal law sanctions are adequate to recognise fully the nature and extent of harm suffered in this context. In such a case, it is likely that a woman's attacker could also be charged under general criminal offences of assault causing actual or grievous bodily

harm (ss. 47 and 20, OAPA 1861), which respectively carry penalties of up to two and seven years of imprisonment. It might be thought desirable to amend the definition of 'grievous bodily harm' to make clear that it includes provoking the non-consensual miscarriage of a pregnancy, regardless of whether the woman suffers any other harm. Where abortion drugs are administered to a pregnant woman without her knowledge, this should constitute a criminal offence of 'maliciously administering poison' so as to 'inflict grievous bodily harm' (s.23 OAPA, maximum penalty of 10 years' imprisonment) or 'maliciously administering poison ... with intent to injure, aggrieve or annoy any other person' (s 24 OAPA, up to 5 years' imprisonment). However, again, it might be felt expedient to clarify the law on this point.

#### **b) Supply of abortion pills**

Where medicines are available only on prescription (as is the case for mifepristone and misoprostol), it is a criminal offence under *The Human Medicines Regulations* (2012), Reg 214(1) to sell or to supply them otherwise than in accordance with a prescription given by an appropriate practitioner.

#### **c) Unsafe practice and/or practice by unqualified providers**

Where the safety of patients is negligently or wilfully jeopardised, professionals may be liable in criminal law and civil law (typically negligence), or they may face disciplinary sanction. Where an abortion provider is not professionally qualified, it is possible that surgical terminations would constitute a criminal offence even where a woman has consented to the procedure, as consent does not offer a complete defence to the infliction of actual or grievous bodily harm. This might be usefully clarified in any reform process.

#### **d) Killing a fetus/child in the process of birth**

The ILPA was introduced to close a technical loophole: where a woman went into spontaneous labour and someone killed her fetus/child as it was in the process of being born but before it was separate from her body, that person had apparently committed no crime (having neither procured a miscarriage nor killed a 'person in being'). While there is no reported case of this happening, if the ILPA were to be repealed, this would reinstate this hypothetical loophole. There is thus a case for the creation of a specific, narrowly drawn offence (e.g. unlawfully killing a fetus/child who is in the process of being born, other than to preserve the life or health of the pregnant woman). This could be achieved by amending, rather than repealing the ILPA.

#### **e) Concealment of birth**

While deliberately killing a new born child would remain subject to the law of murder and infanticide, it is difficult to identify a clear rationale for why concealing a pregnancy or birth should be subject to criminal sanction. There is a public health argument for requiring the safe, hygienic disposal of dead bodies. However, any facts that would support a prosecution for concealment of birth would already also be punishable as a failure to register a birth, a failure to notify the registrar of the place and date of disposal of a dead body under ss. 2 and 3(1), Births and Deaths Registration Act (1953) and, possibly, under the common law offence of preventing the lawful and decent burial of a dead body.