

# The increasing investigations and prosecutions for illegal abortion in Britain: A case for decriminalisation

Clinical Ethics

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## Abstract

This paper presents a case for the decriminalisation of abortion in Britain in light of the increasing investigations into people experiencing pregnancy loss and prosecutions of those suspected of illegal abortion. This growing enforcement of the criminal abortion offences has coincided with the legal change to allow the home use of abortion pills through telemedicine, and comes in the context of global backlash against abortion rights. Framing abortion as a necessary healthcare service and human right, this paper demonstrates the harms caused by criminalisation and highlights how the law exacerbates socio-economic and other vulnerabilities. It is later illegal abortions that tend to be prosecuted, and while there are complex reasons as to why someone might require an abortion, the law prohibits abortion beyond 24 weeks except for narrow medical reasons, creating crisis situations for those that find themselves without legal access. Decriminalisation is necessary to move away from this culture of suspicion, hostility, and stigma that has been built around abortion.

## Keywords

Abortion, legal aspects, social aspects, health care

Abortion is a common procedure, and in the UK, 1 in 3 people capable of becoming pregnant will have an abortion at some point in their life.<sup>1</sup> However, despite its availability as a legal medical procedure, it also remains a criminal offence and in recent years, there has been a marked increase in the number of investigations and prosecutions for illegal abortion in Britain. In this article, I review the evidence that demonstrates this increase and highlight the legal and political context that has led to the increased enforcement of abortion offences. Framing abortion as a necessary healthcare service which governments must provide in compliance with international human rights law, I address the health-based harms associated with the criminalisation of abortion and the socio-economic inequalities that shape abortion decisions and access, and present a case for the urgent decriminalisation of abortion. While the argument for decriminalisation is not a new one, my original contribution to the existing literature is to reinstate this argument in the current context which, as I will demonstrate in this article, has changed markedly in recent years. It is this context that makes decriminalisation imperative.

## Abortion law in the UK

In England and Wales, abortion is criminalised by sections 58 and 59 of the Offences Against the Person Act 1861

(OAPA) and section 1 of the Infant Life (Preservation) Act 1929 (ILPA). Section 58 OAPA makes it a criminal offence for any pregnant person to terminate their own pregnancy, or for any third party to terminate a pregnancy, and carries a maximum life sentence. Section 1 ILPA created the offence of ‘child destruction’ where a foetus was capable of being born alive. Sheldon has highlighted that a key purpose behind the OAPA offence was to protect pregnant people from unsafe abortion, given that abortion procedures were particularly dangerous in the Victorian era.<sup>2</sup> The Abortion Act 1967 (AA) did not remove these criminal offences but created exceptions to the criminalisation of third parties for doctors. Section 1 provides that where two doctors certify in good faith that one of the four grounds stipulated by the AA has been met, they can carry out a legal abortion procedure. Prior to 24 weeks’ gestation, an abortion is permissible where

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continuing the pregnancy poses a greater risk to the pregnant woman's mental or physical health (s.1(1)(a) AA). After 24 weeks, abortion is limited to where the pregnancy poses a risk to the pregnant person's life, to prevent grave permanent injury to the pregnant person's physical or mental health, or where there is a substantial risk of serious foetal disability (s.1(1)(b)-(d) AA).

The AA also applies to Scotland. The OAPA never applied in Scotland, but abortion is criminalised by a patchwork of common law, historical case law, and the Concealment of Birth (Scotland) Act 1809. The AA was not, however, extended to Northern Ireland, where abortion remained almost entirely prohibited until 2019. Sections 58 and 59 OAPA made abortion a criminal offence, and the Criminal Justice Act (NI) 1945 also contained the offence of child destruction. The courts established narrow exceptions to permit abortion to save the life of the pregnant person or prevent serious permanent injury to their physical or mental health. While many pregnant people travelled to England for legal abortions, those that could not afford to do so obtained abortion pills online.<sup>3</sup> Prosecutions, while relatively rare, were brought against some individuals who purchased abortion pills, including a university student who was reported to the police by her housemates<sup>4</sup> and a woman who was charged for obtaining abortion pills for her 15-year-old daughter.<sup>5</sup>

Following recommendations made by the UN Committee on the Elimination of Discrimination Against Women in 2018<sup>6</sup> and in the context of decades of activism pushing for abortion access,<sup>7</sup> abortion was decriminalised in Northern Ireland in 2019.<sup>8</sup> While there was not yet a legal provision for abortion, the removal of OAPA offences and the offence of child destruction meant that those who terminated their own pregnancies were safe from prosecution. The charges against the woman who purchased pills for her daughter were dropped.<sup>9</sup> Regulations have since been passed to mirror the grounds for legal abortion set out in the AA, with one notable exception: abortion on request within the first 12 weeks' gestation.<sup>10</sup> Northern Ireland's abortion regime is now more progressive on paper than that of England, Wales, and Scotland, but there are significant issues with access to abortion services in the region.<sup>11</sup>

While there is no explicit right to abortion, international human rights bodies have increasingly recognised the importance of access to abortion services in order to uphold other rights, including the rights to life, health, privacy, and freedom from cruel, inhuman, and degrading treatment.<sup>12</sup> Under the right to health, the UN Committee on Economic, Social, and Cultural Rights has emphasised the need for states to make safe, legal, and high-quality abortion services available, accessible, affordable, and acceptable to those using them.<sup>13</sup> Moreover, international human rights bodies have agreed that the criminalisation of abortion is a human rights violation, and states should therefore remove criminal penalties for abortion.<sup>14</sup> The

UN Committee on the Elimination of Discrimination against Women, in its 2018 inquiry on abortion in Northern Ireland, stated that criminalisation 'has a stigmatizing impact on women and deprives them of their privacy, self-determination and autonomy of decision, offending women's equal status, constituting discrimination.'<sup>6</sup> In retaining its criminal offences for abortion, Britain falls short of these standards.

### *Criminal punishment in Britain*

Calls for the decriminalisation of abortion are not new. The case for decriminalisation in Britain has been presented by numerous scholars, who highlight the purposes of criminalisation,<sup>2</sup> its current effects,<sup>15</sup> the merits of decriminalisation,<sup>16</sup> and why decriminalisation is necessary in light of potential future reproductive technologies.<sup>17</sup> However, in light of an increasingly hostile context surrounding illegal abortion in Britain, this article aims to reiterate these claims and demonstrate the importance of decriminalisation at this critical juncture. In 2016, Sheldon made the argument in favour of decriminalisation in the context of the 'non-enforcement of the restrictive, punitive laws retained on the statute books' which suggested that 'as a society we have already implicitly chosen to value women's autonomy and health over the attempt to protect fetal life through the criminal law.'<sup>2</sup> This now appears not to be the case as the criminal law is being increasingly enforced, warranting a renewed call for decriminalisation in order to protect those that the law is currently punishing.

Prior to recent years, prosecutions for illegal abortions in England and Wales were relatively rare since the passing of the AA. In 2012, a woman (who I will subsequently refer to as A)<sup>3</sup> was sentenced under section 58 OAPA for terminating her pregnancy at 38–39 weeks' gestation by taking abortion pills.<sup>18</sup> She was initially sentenced to eight years' imprisonment, but this was reduced on appeal to three and a half years.<sup>19</sup> In 2015, another woman (who I will subsequently refer to as B) was similarly prosecuted under section 58 OAPA for taking abortion pills at 32–34 weeks' gestation, and sentenced to two and half years imprisonment.<sup>20</sup> Other prosecutions generally concerned people who attempted to terminate their intimate partners' pregnancies without consent.<sup>21</sup> While pregnant people do obtain and take abortion pills outside the scope of the AA at an earlier gestational stage, these cases have generally not been investigated or charged.

However, there has been a notable increase in the investigation and prosecution of pregnant people suspected of illegal abortion in the last few years. Freedom of Information requests have shown that in the ten-year period between 2010 and 2019, 17 cases concerning abortion (including both the termination of one's own pregnancy, and attempts by intimate partners) reached a court, resulting in 6 convictions.<sup>22</sup> In the four-year period

between 2020 and 2023, 11 cases concerning abortion reached a court, resulting in 5 convictions.<sup>22</sup> In 2022, charges were brought against a woman who gave birth to a healthy baby after doctors detected misoprostol (one of two commonly used abortion pills, which is also used to treat gastrointestinal ulcers) in her system.<sup>23</sup> The case was dismissed after the trial judge heard that she had taken the pills by accident, having been prescribed them back in her home country of Portugal, when she mistook them for thrush medication. The CPS provided no evidence that she had taken the pills with the intent to procure a miscarriage.

In 2023, another case garnered significant media attention after a woman (who I will subsequently refer to as C) was sentenced to two and a half years imprisonment for taking abortion pills during the first COVID-19 lockdown.<sup>24</sup> In March 2020, the law was changed to allow pregnant people to be prescribed abortion pills remotely, which they could then take at home within the first 10 weeks' gestation.<sup>25</sup> The pandemic meant that C had been forced to move back in with her ex-partner, along with her existing children, while hiding her pregnancy. She was between 32–34 weeks pregnant and contacted the British Pregnancy Advisory Service to obtain abortion pills remotely by telling them she was 9–10 weeks pregnant. C's sentence was subsequently reduced to a suspended sentence of 14 months, as Dame Victoria Sharpe at the Court of Appeal highlighted the exceptional mitigating factors of her case and saw 'no useful purpose' to detaining her.<sup>26</sup> Yet, these prosecutions continue to be brought: another young woman was also facing trial for taking abortion pills illegally during lockdown but her case was dropped in January 2024 due to 'evidential difficulties'.<sup>27</sup>

This increase in abortion prosecutions does not end here; they have also fed into a culture of suspicion around pregnancy losses. Pregnant people in England and Wales – including a 15-year-old girl – have been subjected to increased police investigation over illegal abortion following natural miscarriages and stillbirths.<sup>28</sup> Abortion provider MSI has reported a significant uptick in police investigations since 2018, with police requesting access to medical records and confiscating phones and laptops to track digital evidence.<sup>29</sup> In the cases of A and C, digital evidence from Google searches was used to infer that both women knew they were at a late gestational stage. In 2023, Tortoise Media reported that the police were also obtaining data from menstrual tracking apps in their investigations, and testing people for the presence of abortion pills following a pregnancy loss.<sup>30</sup> Between 2022 and 2023, 29 people had been investigated for illegal abortion. These investigations, even where they do not result in prosecution, can be particularly invasive and distressing, treating those who have experienced a potentially traumatising loss with hostility and suspicion and those who have had abortions as though they are criminals.

In Scotland, the lack of legislative clarity and the absence of high-profile prosecutions means that it is

difficult to track investigations and prosecutions. However, historical cases concerning abortion offences, either performed by the pregnant person or a third party where the pregnant person had died, have been identified by Brown<sup>31</sup> and Engender Scotland.<sup>32</sup> Freedom of Information requests issued in 2023 by Engender revealed that there have been 11 charges brought for abortion in Scotland since 2003, and a further 8 people (at least) have been investigated for abortion offences.<sup>32</sup> There has therefore been an increase across Britain, and these prosecutions are only likely to continue.

This change in the level of enforcement of criminal abortion offences raises significant concerns in the context of human rights. The UN Human Rights Committee has previously raised concerns over the prosecution of pregnant people for abortion offences in El Salvador, where those experiencing miscarriages, stillbirth, and other obstetric trauma are frequently prosecuted.<sup>33</sup> In 2018, the Committee recommended the immediate suspension of the criminalisation of abortion, and a review of the cases of all those currently imprisoned for such offences with the aim of securing their release.<sup>33</sup> Looking closer to home, in the context of Northern Ireland, CEDAW found the criminalisation of abortion to violate the right to health in punishing those that had abortions as well as those assisting them.<sup>6</sup> The law's scrutiny into people who have experienced pregnancy loss, the prosecution of those thought to have had an illegal abortion without sufficient evidence, and the eventual sentencing of those who did terminate their own pregnancies mirrors the patterns of other abortion regimes that international human rights bodies have heavily condemned.

### *The politics of prosecuting abortion*

The key factor that seems to have given rise to this increase in investigation and prosecution has been the move towards allowing telemedical abortion. The 2020 change in the law to allow the remote prescription of the abortion pills misoprostol and mifepristone (henceforth referred to as telemedical abortion) was met with opposition from anti-abortion groups.<sup>34</sup> Christian Concern, for example, made claims as to the safety of telemedical abortion, safeguarding for vulnerable pregnant people, and the ease of access to abortion pills beyond 10 weeks by providing false information.<sup>35</sup> The Society for the Protection of the Unborn made similar claims in an unsuccessful legal challenge to telemedical abortion in Scotland.<sup>36</sup> The World Health Organisation, however, views telemedical abortion as a safe and effective method<sup>37</sup> and safeguarding concerns have been dispelled by evidence that remote consultation can actually improve safeguarding.<sup>38</sup>

However, the potential for pregnant people to obtain a telemedical abortion beyond 10 weeks' has propelled suspicion towards abortion-seekers and pregnant people. With

fully remote telemedicine for early medical abortion, there is no requirement to visit a healthcare provider, take a test, or have an ultrasound scan before receiving abortion pills, as the pregnant person's last menstrual period will be used to estimate gestational age.<sup>39</sup> Prior to the move to telemedicine, all patients would have an in-person assessment and ultrasound scan to determine eligibility. 'No test' telemedicine for early medical abortion is a safe, effective, acceptable, and accessible pathway to abortion care,<sup>39,40</sup> and its implementation is supported by international human rights standards on access to abortion.<sup>41</sup> Without the determination of gestational age, Romanis notes that people will intentionally or unintentionally fall foul of the criminal law through the use of telemedicine.<sup>15</sup> However, one study found that the number of cases where gestational age was later than the estimate was low, concluding that the inadvertent treatment of those past the 10-week limit for telemedicine was not likely to be significant.<sup>39</sup>

While the likelihood of unintentional illegal use of abortion pills is low, pregnant people may nonetheless intentionally obtain telemedical abortion after the legal limit, as C's case demonstrates. However, telemedical abortion is unlikely to *increase* the number of illegal abortions, but rather provides an alternative avenue for obtaining abortion pills: prior to 2020, some pregnant people in Great Britain were already purchasing abortion pills from online providers.<sup>42</sup> A pregnant person might take abortion pills outside the scope of the AA for various reasons, including difficulties with accessing legal services due to geographical or financial limitations, barriers relating to age, gender identity, and disability, intimate partner or familial abuse, or requiring access to abortion at a later stage of pregnancy, which the law prevents.<sup>41</sup> While illegal abortion is therefore unlikely to have increased as a result of telemedicine, Sheldon and Lord highlight that prosecutions as a result of telemedicine may have increased because there is 'a greater awareness of abortion pills among health professionals and law officers, fuelling suspicion regarding unexplained pregnancy loss, particularly when late in a pregnancy that has been hitherto concealed'.<sup>43</sup>

The last few years have seen global and national backlash against abortion access. While abortion has been legalised across various countries, there has been a significant regression on abortion rights in others. In June 2022, the US Supreme Court overturned the constitutional right to abortion established in *Roe v Wade* in 1973, enabling individual states to pass their own restrictions on abortion.<sup>44</sup> Prior to this decision, anti-abortion politicians and organisations had already undermined abortion rights by making it difficult to access abortion services in practice and passing foetal protection legislation to criminalise those who had illegally terminated their own pregnancies, or were suspected of doing so.<sup>45</sup> Commentators expressed concerns that anti-abortion organisations elsewhere,

including in the UK, could be emboldened by the 2022 decision.<sup>46,47</sup> Indeed, US-based religious groups have funded the lobbying of UK politicians,<sup>46</sup> pregnant people have been manipulated with misinformation by 'crisis pregnancy' centres,<sup>48</sup> and OpenDemocracy have tracked the increasing visibility of the anti-abortion movement in the UK.<sup>49</sup> This can be seen most obviously in relation to government's 2022 consultation on whether to keep telemedical abortion: nearly 9000 responses were submitted by those affiliated with three 'pro-life' groups.<sup>50</sup> This increasing political pressure around telemedical abortion and abortion more broadly, while not directly linked to the increasing prosecutions, is nonetheless an important context for this growing hostility towards suspected illegal abortion.

### *A case for decriminalisation*

This recent trend of investigation and prosecution underscores the need for decriminalisation. Feminist scholars have highlighted the stigmatising nature of criminal abortion provisions, which imply wrongdoing on the part of an abortion-seeker even when they access legal abortion services.<sup>51,52</sup> Sheldon previously highlighted the symbolic moral condemnation of abortion through the criminal law, despite its non-enforcement.<sup>2</sup> Yet this moral condemnation is no longer merely symbolic – the criminal law is not just implying wrongdoing, but being used to actively ascribe criminality to those self-managing their abortions and invoke suspicion around those experiencing pregnancy loss. That this increasing enforcement of the criminal law has coincided with telemedical abortion highlights the paternalistic attitude towards pregnant people that underpins the AA – that pregnant people cannot be trusted to make their own abortion decisions.<sup>53</sup> As Kendal argues, all abortions are 'medically necessary to preserve the bodily autonomy, mental, and physical health' of the pregnant person, which justifies abortion on request.<sup>54</sup> The criminalisation of abortion interferes with this necessary healthcare service and risks the bodily autonomy, mental, and physical health of pregnant people. The World Health Organization supports the self-use of abortion pills,<sup>55</sup> which is currently illegal, as this is important where pregnant people otherwise lack access to abortion care.

International human rights bodies connect the decriminalisation of abortion to the prevention of maternal mortality and morbidity associated with unsafe abortion.<sup>13</sup> While taking abortion pills without medical supervision is relatively safe and effective, the existence of punitive criminal provisions can undermine safety by preventing people from seeking aftercare in the event of complications. Those who are present at a hospital with abortion-related complications may be reported to the police for doing so – indeed, B called for paramedics upon feeling unwell after taking abortion pills, which led to her prosecution.<sup>20</sup> In light of the recent

increase in prosecutions, the Royal College of Obstetricians and Gynaecologists has issued a statement that healthcare professionals should not report people suspected of illegal abortion to the police as it is never in the public interest to do so.<sup>56</sup> While this statement is welcome in light of healthcare professionals' involvement in some police investigations, the possibility of being reported will likely still have a chilling effect on those who do take abortion pills without medical supervision.

In the US and Latin American contexts, the criminalisation of abortion disproportionately affects people who are socio-economically disadvantaged, who are more likely to require an illegal abortion due to compounding inequalities.<sup>45,57</sup> While I cannot comment on the specific personal circumstances of those criminalised for illegal abortion in Britain, it is relevant to consider the broader social and economic factors that shape abortion decisions and access to sexual and reproductive healthcare. Abortion decisions are made in the context of 'the economic pressures of a society marked by poverty, racism, poor housing, and personal and institutional injustice'.<sup>53</sup> The UK is in a cost-of-living 'perma-crisis'<sup>58</sup> in which the issues of poverty, income inequality, housing inequality, the cost of childcare, and the rising costs of food and energy have been continually exacerbated. Approximately 3% of the UK population now use food banks.<sup>59</sup> Socio-economic deprivation also affects access to quality healthcare; the MBRRACE-UK study highlights that maternal mortality rates are highest for those living in the most deprived areas, an issue which disproportionately affects Black women.<sup>60</sup> These compounding inequalities shape reproductive choices – including the decision to have an abortion outside of the formal medico-legal system – as continuing a pregnancy and raising a child becomes expensive and, for some, impossible. Love argues that social class is an important perspective on abortion access, as it is working-class women who most severely face the effects of austerity.<sup>61</sup> The rise in prosecution rates for illegal abortion, in the context of the current period of economic austerity in the UK, ought to be a concern.

Socio-economic instability is just one reason as to why someone might require an abortion later into a pregnancy. Intimate partner abuse, sexual violence, mental health problems, discovery of the pregnancy at a late stage, and unexpected changes to one's personal circumstances are just some of the reasons that a pregnant person might seek an abortion after the 24-week limit.<sup>62</sup> Of those prosecuted, this includes a woman who took abortion pills in the context of intimate partner abuse and coercion and was given a two-year prison sentence.<sup>63</sup> Delays in accessing legal abortion services can also push people beyond the legal limit. These delays can be the result of financial or geographical barriers, or physical or information inaccessibility. Late abortions are, however, heavily stigmatised. The judge handing down A's first sentence, for example,

described her actions as akin to murder.<sup>18</sup> The AA does not permit access to abortion after 24 weeks beyond the limited medical grounds stipulated, suggesting that this point of foetal viability holds moral significance.<sup>64</sup>

The women sentenced for having illegal abortions after 24 weeks are often discussed using the language of crisis and vulnerability, marking these abortions as 'acts of desperation'.<sup>43</sup> This may be true for those who have been prosecuted, but this assumption perpetuates stigma against later abortions through the implication that such an abortion is morally wrong but should be forgiven due to the person's tragic circumstances. C, for example, had her sentence reduced and suspended due to the Court of Appeal's 'compassion' but she still now has a criminal record.<sup>26</sup> However, the other women charged did not have their sentences suspended – with A's abortion being described as a 'cold and calculated' 18 decision despite the fact that she, too, might have been described as in a situation of crisis. Thus, it is only those deemed *sufficiently* in crisis that might escape criminal punishment. Millar has critiqued the narratives surrounding decriminalisation that ascribe legitimacy to some abortions, and illegitimacy to others (usually those occurring later in the pregnancy).<sup>65</sup> To advocate for decriminalisation because it is only those in crisis who have these later abortions is firstly, to ignore the fact that someone may require a later abortion or terminate their own pregnancy without being in crisis and secondly, to maintain the exceptional status of abortion that separates it from other necessary healthcare services. The criminalisation of abortion is harmful because it is the criminalisation of a healthcare service which is necessary as a matter of human rights, not (just) because it criminalises people in crisis.

McGuinness and Montgomery have highlighted the legal determinants of health in relation to abortion: that the law has the potential to alleviate or exacerbate the social, economic, and other factors that shape health outcomes.<sup>66</sup> The criminalisation of abortion exacerbates existing inequalities and creates crisis around later abortions by prohibiting non-medical abortions beyond 24 weeks. For some pregnant people, the criminalisation of abortion also compounds with other legal determinants: Lonergan has argued the hostile environment for immigration and the lack of access to the NHS denies migrant women the conditions for reproductive justice, including access to contraception and abortion.<sup>67</sup> For a migrant pregnant person to have an illegal abortion (which, as Lonergan notes, is not uncommon) would risk not only criminalisation, but being subject to punitive immigration controls. In creating these vulnerabilities, the criminalisation of abortion causes and perpetuates myriad harms.

This context of deepening socio-economic inequality, legal vulnerability, and increasing investigations into people suspected of illegal abortion highlights the urgent need for legal change. The growing culture of suspicion and hostility which marks those having illegal abortions

(or suspected of them) as morally deficient not only fails to understand the complex issues behind abortion decisions but does nothing to address them. While, of course, decriminalisation will not in itself address the inequalities and vulnerabilities that curtail and shape abortion decisions, it is of the utmost importance that abortion-seekers and people experiencing pregnancy loss are not met with interrogation and punishment. Abortion has been decriminalised in Northern Ireland, and it is time to decriminalise abortion in the rest of the UK in line with international human rights standards. This will require the repeal of the OAPA and ILPA in England and Wales, and new legislation to decriminalise abortion in Scotland. While the new Labour government did not include abortion in its 2024 election manifesto, several Labour MPs have pushed for abortion law reform including decriminalisation in Northern Ireland,<sup>68</sup> so we can hope to see decriminalisation for the rest of Britain returning to the legislative agenda.

## Conclusion

The increasing enforcement of the criminal offences for abortion that apply in England and Wales has created a culture of hostility and suspicion around those experiencing pregnancy loss, and marks those having abortions outside the formal medico-legal system as criminals. In doing so, it exacerbates existing socio-economic and legal inequalities and creates the potential for harm. Abortion is a necessary healthcare service and should not be subjected to punitive criminal provisions, as international human rights bodies have recognised.

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## Note

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