

SHOULD WOMEN BE REMOVED FROM THE CRIMINAL LAW RELATED TO ABORTION?

A briefing on proposed amendment NC1 to the Criminal Justice Bill

FEBRUARY 2024

On Tuesday 28 November 2023, Labour MPs Dame Diana Johnson and Stella Creasy tabled amendments NC1 and NC2 respectively to the Government's Criminal Justice Bill. These amendments, which would both decriminalise abortion, were debated at Committee stage on Thursday 25 January 2024 and withdrawn. Now, Dame Diana has tabled a slightly amended version of her new clause (also NC1).

Recent calls for decriminalisation were sparked by the trial of Carla Foster, who was prosecuted for a late term illegal home abortion. Several more cases have come to light of women being prosecuted for taking abortion pills, obtained under the Government's pills by post abortion policy, past the legal limit.

This briefing scrutinises the amendment, examines the reasons women are being prosecuted for illegal abortion, and considers if removing abortion from the criminal law is the correct solution.

NEW CLAUSE 1

Dame Diana's amendment, New Clause 1, is:

"Removal of women from the criminal law related to abortion

For the purposes of sections 58 and 59 of the Offences Against the Person Act 1861 and the Infant Life (Preservation) Act 1929, no offence is committed by a woman acting in relation to her own pregnancy."

The Member's explanatory statement is:

"This new clause would disapply existing criminal law related to the accessing or procurement of abortion care from women acting in relation to their own pregnancy at any gestation, ensuring no woman would be liable for a prison sentence as a result of seeking to end her own pregnancy. It would not change any law regarding the provision of abortion services within a healthcare setting, including but not limited to the time limit, the grounds for abortion, or the requirement for two doctors' approval."

Some points about this amendment:

- The sections of the Offences Against the Person Act 1861 (OAPA) and Infant Life (Preservation) Act 1929 (ILPA) referred to here form the legal underpinning of the current abortion law. The 1967 Abortion Act merely sets out when doctors can lawfully perform abortions within this framework. Removing these offences for women would therefore remove any legal restrictions on women regarding abortion. A woman could abort for any reason, including the sex of the baby.

- As the explanatory statement says, this applies to a pregnancy at any gestation. This, therefore, would legalise abortion up to birth, if it is induced by the woman herself. This is a massive expansion of abortion, and one not supported by the public. Polling shows that only 1% of the general public support abortion up to birth and 70% of women would like to see a reduction (rather than removal) of UK time limits.ⁱ
- While the explanatory note claims that the amendment “would not change any law regarding the provision of abortion services within a healthcare setting, including...the time limit”, this provides limited protection. More than half of abortions are now carried out by a woman in her own home, using telemedicine. A woman who induced her abortion at home using pills (or any other method) at any stage of pregnancy, including just before natural birth, would commit no offence. In addition to the moral considerations of removing all legal protections from unborn babies, such abortions are dangerous and traumatic for women. While prosecutions are rare, laws against these dangerous and shocking abortions, where the baby is old enough to survive with a normal hospital delivery, help stop them taking place.
- This would create a two-tier system where abortions within a healthcare setting are legal up to 24 weeks, but dangerous self-induced abortions are legal up to birth.
- While the amendment applies only to a woman in relation to her own pregnancy, if self-induced abortions were never investigated, it is difficult to see how a third party could be charged in cases of coerced abortion.
- Section 59 criminalises a third party who “shall unlawfully supply or procure any poison...” and so already does not apply to a woman relating to her own pregnancy.
- Dame Diana has also tabled a paving amendment, seeking to NC1 into force on the day the Criminal Justice Bill receives Royal Assent. This would leave virtually no time for the Government to prepare the necessary secondary legislation/guidance and consultations.

ADDITIONAL POINTS TO CONSIDER

Protection of the Unborn

Both the 1861 Act and the 1929 Act recognise the unborn foetus as a child. Removing this recognition is an affront to human dignity enshrined in several international human rights instruments that the United Kingdom has signed and ratified. These include the Universal Declaration of Human Rights and the Convention on the Rights of the Child (CRC). The Preamble to the UN Convention on the Rights of the Child states that the child “needs special safeguards and care, including appropriate legal protection, before as well as after birth”. Removing the offence of a woman self-aborting up to birth would remove the few remaining legal protections for the unborn.

Prosecution of Women

As this amendment aims to prevent women from being prosecuted for abortion, it is important to examine the claims being made in this regard. In a debate on 14 November 2023, Stella Creasy said that “hundreds of women are now being prosecuted under outdated abortion legislation”ⁱⁱ. This contradicts figures that she and other abortion lobbyists have given in recent months. In July, she said in the Commons that there had been “67 prosecutions in the UK in the last 10 years”ⁱⁱⁱ. This figure is itself misleading, as it implies that 67 women had been prosecuted for illegal abortion. In fact, as mentioned above, the majority of such prosecutions are against men. A FOI request to the Metropolitan Police revealed that between 1 Jan 2012 - 31 July 2022, 42 people were arrested under ss58 and 59 of the OAPA and ILPA. Of these, 8 were female and 34 male. Of the 7 arrests that led to charges, all perpetrators were male.^{iv}

There has been an increase in women prosecuted this year for illegal abortion. Five women (including Carla Foster) are known to have been indicted. Firstly, those five prosecutions should be contextualized against the backdrop of over 200,000 legal abortions annually. It is not self-evident that a law should be revoked because

some individuals have transgressed it, especially on a serious moral and societal issue such as abortion. Most importantly however, we need to look at why these prosecutions are happening. A pivotal shift in recent years has been the implementation of the pills by post policy, allowing abortion providers to dispatch abortion pills to women without an in-person consultation. Consequently, instances have emerged where women have received these pills beyond the legal gestational limits (10 weeks under the policy), sometimes dramatically so.

Carla Foster

The tragic story of Carla Foster is a case in point. Ms. Foster acquired abortion pills by falsely telling a BPAS telephone operative that she was seven weeks pregnant. BPAS then sent her the pills without correctly confirming the gestation of the pregnancy, or ensuring her welfare, leading to the death of the unborn child, baby Lily, who was found to be between 32-34 weeks' gestation. The pills by post policy resulted in an illegal and dangerous late-term abortion, exposed a traumatised woman to prosecution and left a fully viable baby dead. None of this would have happened if Carla Foster had been seen and examined in person.

It is noteworthy that organisations who advocated for the pills by post policy, which precipitated this tragedy, are now using it to call for decriminalisation. During the trial, several organisations, including the Royal College of Obstetricians and Gynaecologists, and the Royal College of Midwives, were found to have lobbied the judge not to impose a custodial sentence. The judge slammed the letter as “inappropriate”, saying “it would be better if it had not been written at all”. He said it also “has the capacity to be seen as special pleading by those who favour wider access to abortions and is, in my judgment, just as inappropriate as it would be for a judge to receive a letter from one of the groups campaigning for more restrictive laws”. In addition, abortion provider BPAS, who had failed to properly treat Ms Foster, launched a campaign website, with a mechanism to contact MPs calling for decriminalisation, within minutes of her sentencing.

The crux of the issue lies not in the existing abortion law, then, but rather in a recent policy alteration in 2020, DIY home abortion, which enabled these illicit late-term abortions.^v

WOMEN INVESTIGATED FOR MISCARRIAGE/STILLBIRTH

In the Commons debate on 28 November 2023, Stella Creasy MP stated, “Indeed, we are increasingly seeing... any woman who has had a miscarriage or stillbirth being at risk of being dragged into a criminal investigation.”

To back up these claims, Ms Creasy referred to the cases of two “young teenagers”. The young woman referred to as ‘Megan’ in the debate was 15 years old at the time of her stillbirth, which occurred at 28-weeks’ gestation. The hospital staff contacted the police because they had reason to believe she had obtained abortion drugs online. They were aware that she had previously contacted the abortion provider BPAS, but no abortion was performed because she was past the 24-week legal limit. This information meant there was sufficient concern to warrant an investigation. A post-mortem found that her baby had died of natural causes and the case was dropped.^{vi}

In the other case, “another young teenager, unaware she was pregnant, delivered a stillborn child.” Domestic violence and abuse are often screened for and identified at pre-natal appointments. The fact that this young girl only discovered she was pregnant while miscarrying would have raised concerns for healthcare staff regarding her safety and wellbeing, including by whom she became pregnant under the legal age of consent. It is appropriate for the police to investigate situations like these. Where there are safeguarding concerns, it may not be the woman herself who is the subject of the investigation, but rather the person who fathered the unborn child or someone else in her life.

CONCLUSION

This amendment seeks to remove abortion from the criminal law and prevent women from being prosecuted for illegal abortion. However, examination of the issue shows that:

- This amendment does not solve the real problem behind women being prosecuted – the true cause of recent prosecutions is the pills by post policy.
- Repealing law relating to abortion would allow women to induce their own abortion at any time for any reason – an extreme and dangerous proposal.
- Cases where stillbirths have been investigated by police have involved minors where serious safeguarding concerns merit investigation.

If you need any more information, please contact Althea Williams, SPUC's Public Policy Manager, on altheawilliams@spuc.org.uk, or 0207 820 3121.

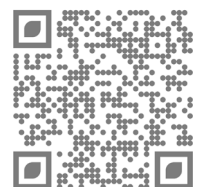
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- iii. [https://hansard.parliament.uk/Commons/2023-07-19/debates/3CD15C8E-02F6-490D-A9B0-35C05BDB64E3/OffencesAgainstThePerson-Act1861\(SentencingGuidelines\)?highlight=67%20prosecution#contribution-EA65139C-1983-48CC-B555-535E0AB9F7BAiv](https://hansard.parliament.uk/Commons/2023-07-19/debates/3CD15C8E-02F6-490D-A9B0-35C05BDB64E3/OffencesAgainstThePerson-Act1861(SentencingGuidelines)?highlight=67%20prosecution#contribution-EA65139C-1983-48CC-B555-535E0AB9F7BAiv). https://www.met.police.uk/SysSiteAssets/foi-media/metropolitan-police/disclosure_2022/september_2022/s58-oapa-s59-oapa-1861-infant-life-preservation-act-1929-crimes.xlsx
- iv. https://www.met.police.uk/SysSiteAssets/foi-media/metropolitan-police/disclosure_2022/september_2022/s58-oapa-s59-oapa-1861-infant-life-preservation-act-1929-crimes.xlsx
- v. See SPUC's briefing *Justice for Baby Lily: Why the Pills by Post policy must end*
- vi. *Women accused of illegal abortions in England and Wales after miscarriages and stillbirths*, The Guardian, July 2022, <https://www.theguardian.com/world/2022/jul/02/women-accused-of-abortion-in-england-and-wales-after-miscarriages-and-stillbirths>



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ABORTION: PUNITIVE MEASURES

A briefing on proposed amendment NC40 to the Criminal Justice Bill.

APRIL 2024

A number of amendments related to abortion have been tabled at the Report Stage of the Criminal Justice Bill. Dame Diana Johnson's NCI, tabled in February, would decriminalise abortion by removing women from the criminal law related to abortion (please see SPUC's standalone briefing on this amendment). Stella Creasy has now tabled a new amendment, NC40, which uses different means to decriminalise abortion.

THE FIRST DAY OF THE REPORT STAGE WILL TAKE PLACE ON WEDNESDAY 15 MAY.

This briefing scrutinises NC40, and considers what its consequences would be.

MS CREASY'S AMENDMENT IS:

"Abortion: Punitive Measures

- (1) No offence is committed under any of the provisions mentioned in subsection (3) by —
(a) a woman acting in relation to her own pregnancy, or (b) a registered medical professional acting with the explicit consent of a pregnant woman in relation to her own pregnancy, where that pregnancy has not exceeded 24 weeks.
- (2) No custodial sentence may be imposed under any of the provisions mentioned in subsection (3) in relation to a woman acting in relation to her own pregnancy.
- (3) For the purposes of this section, the relevant provisions are sections 58, 59, and 60 of the Offences Against the Person Act 1861, and (a) (b) the Infant Life (Preservation) Act 1929.
- (4) No proceedings for an offence under any of the provisions mentioned in subsection (3) may be instituted against a woman acting in relation to her own pregnancy or a medical professional who acted in good faith and with honest belief that the woman they assisted gave them a genuine account except by or with the consent of the Director of Public Prosecutions, who must personally exercise any function of giving consent.
- (5) In the event of making regulations or issuing guidance consequential to subsection (1), the Secretary of State must have regard to the need to withdraw punitive measures imposed on women who undergo abortion."

MEMBER'S EXPLANATORY STATEMENT IS:

This new clause would decriminalise abortion up to 24 weeks, avoiding the need for some of the requirements of the Abortion Act. It would ensure that late term abortions outside the Abortion Act do not result in custodial sentences, and that future regulations have regard to the recommendations of the Convention on the Elimination of Discrimination Against Women.

FULL DECRIMINALISATION?

- This amendment completely decriminalises abortion up to 24 weeks. This would remove the requirement to have any grounds for abortion, allowing abortion for any reason, including the sex of the baby.
- While abortion post 24 weeks would technically remain an offence, this amendment removes any possibility of a custodial sentence. Moreover, it sets a very high bar – direct intervention by the DPP – for any other form of sentence. So, a woman who aborted at 30 weeks would likely face no consequences at all. It could be argued that this is de facto full decriminalisation up to birth.

REMOVAL OF CUSTODIAL SENTENCES

- Removing any possibility of a custodial sentence for extremely late-term abortion is out of step with public opinion. In a recent opinion poll, when asked if the year-long sentence handed to a woman who aborted her baby at 32-34 weeks gestation was appropriate, 21% said the sentence was too short, and 28% said it was about right, versus 20% who said it was too lengthy.ⁱ
- Among adults who took a position, 71% thought that a custodial sentence of just over a year was “about right” or “too short”.

REMOVING ABORTION PROVIDERS FROM THE CRIMINAL LAW

- Unlike Diana Johnson’s amendment, which focuses on women, this amendment also removes abortion providers from the criminal law for abortions before 24 weeks. It is unclear what problem this is trying to solve, as we are not aware of any examples of doctors being prosecuted.
- It also sets a high bar of DPP involvement for prosecutions of doctors for abortions post-24 weeks. It would be very difficult to prove in a court of law whether a medical professional “acted in good faith and with honest belief that the woman they assisted gave them a genuine account”. A medical professional should be able to ascertain if a pregnancy is more advanced than 24 weeks using clinical criteria, not the woman’s account. This seems to be aimed at exonerating medics from the consequences of sending women abortion drugs past the legal limits.

INFANTICIDE

- S60 of OAPA deals with the crime of concealing the body of a baby who dies before, during or after birth, and is currently used when infanticide is suspected but cannot be charged due to lack of evidence. With this amendment, a woman who self-induced abortion at full term or killed her baby during birth could not be given a custodial sentence (and the DPP would need to intervene to bring any other kind of sentence).

HUMAN RIGHTS

- Section 5 speaks of the “need” to withdraw punitive measures on abortion. This comes from Paragraph 31 of the CEDAW General Recommendation No. 24: Article 12 of the Convention that, “When possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion.” Ms Creasy previously used CEDAW recommendations to change abortion law in Northern Ireland. The CEDAW committee referred to was not the UN speaking as a whole and its recommendations are neither binding nor international law.ⁱⁱ There is no “need” for the recommendation of a minor UN subcommittee to be written into UK domestic law.
- Ms Creasy has described this part of her amendment as a “lock”, “requiring our laws to be international human-rights compliant”. As stated above, there are no international human rights in play here.

INCREASING PROSECUTION OF WOMEN?

The key impetus for this amendment appears to be ending the prosecution of women for abortion. In a debate on 14 November 2023, Stella Creasy said that “hundreds of women are now being prosecuted under outdated

abortion legislation”.ⁱⁱⁱ This contradicts figures that she and other abortion lobbyists have given in recent months. In July, she said in the Commons that there had been “67 prosecutions in the UK in the last 10 years”.^{iv}

Jonathan Lord, medical director at MSI Reproductive Choices, told the BBC^v that he knows of up to 60 women facing criminal inquiries for suspected abortion crimes in England and Wales since 2018, compared with almost zero before. In response to these claims, public health consultant Kevin Duffy looked into these numbers. The Home Office publishes annual data^{vi} for the numbers and categories of police-recorded crimes and outcomes. Over the last nine financial years, up to March 2023, the average annual total of the relevant offences (procuring illegal abortion and intentional destruction of a viable unborn child) combined has been nineteen; in 2022/23, the total was twenty-eight. These figures do not seem to match Dr Lord's claims.

In addition, not all prosecutions are against the pregnant woman. FOI requests to police forces found that of the 51 cases of people being investigated for procuring illegal abortion there were 17 females, 13 males, and 21 cases with sex not recorded. For the offence of intentional destruction of a viable unborn child there were 15 females, 28 males, and 36 unknown – a total of 79 cases.^{vii} So many of these investigations are against men, and some may have been women causing another woman to miscarry.

The current campaign for decriminalisation is using the stories of just six women who have been who have been brought to court, charged with having committed their own illegal abortion.

These are very small numbers compared to the annual number of legal abortions, estimated to be 250,000 in 2022.^{viii} And it is a minuscule percentage of pregnant women – the 6 cases represent 0.00015% of pregnant women over 5 years.

Most importantly, however, we need to look at why these prosecutions are happening. A pivotal shift in recent years has been the implementation of the pills by post policy, allowing abortion providers to dispatch abortion pills to women without an in-person consultation. Consequently, instances have emerged where women have received these pills beyond the legal gestational limits (10 weeks under the policy), sometimes dramatically so.

One example was Carla Foster, who acquired abortion pills by falsely telling a BPAS telephone operative that she was seven weeks pregnant. BPAS then sent her the pills without correctly confirming the gestation of the pregnancy, or ensuring her welfare, leading to the death of the unborn child, baby Lily, who was found to be between 32-34 weeks' gestation. The pills by post policy resulted in an illegal and dangerous late-term abortion, exposed a traumatised woman to prosecution and left a fully viable baby dead. None of this would have happened if Carla Foster had been seen and examined in person.

WOMEN INVESTIGATED FOR MISCARRIAGE/STILLBIRTH

In the Commons debate on 28 November 2023, Stella Creasy MP stated, “Indeed, we are increasingly seeing ... any woman who has had a miscarriage or stillbirth being at risk of being dragged into a criminal investigation.” To back up these claims, Ms Creasy referred to the cases of two “young teenagers”. The young woman referred to as “Megan” in the debate was 15 years old at the time of her stillbirth, which occurred at 28-weeks' gestation. The hospital staff contacted the police because they had reason to believe she had obtained abortion drugs online. They were aware that she had previously contacted the abortion provider BPAS, but no abortion was performed.

because she was past the 24-week legal limit. This information meant there was sufficient concern to warrant an investigation. A post-mortem found that her baby had died of natural causes and the case was dropped.^{ix}

It is appropriate for the police to investigate situations like these. Where there are safeguarding concerns, it may not be the woman herself who is the subject of the investigation, but rather the person who fathered the unborn child or someone else in her life.

CONCLUSION

This amendment would fully decriminalise abortion up to 24 weeks, and de facto up to the point of birth. Unusually, it would remove doctors from the criminal law on abortion, not just women. Concerns have also been raised about including section 60 of OAPA, which is used to charge infanticide.

In addition:

- Actual numbers of women being prosecuted do not appear to match the claims made by campaigners.
- The rise in prosecutions is attributable to the pills by post policy, and this amendment would not solve the issues caused by it.
- Cases where stillbirths have been investigated by police have involved minors when serious safeguarding concerns merited investigation.

If you need any more information, please contact Alithea Williams, SPUC's Public Policy Manager, on alitheawilliams@spuc.org.uk, or call 0207 820 3121.

ENDNOTES

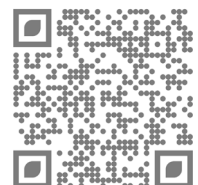
- Whitestone Insight, Right To Life UK Omnibus – 11th December 2023
- That has been specifically confirmed by the Northern Ireland Office in its explanatory memorandum to the Abortion (Northern Ireland) Regulations 2021, which states, with reference to paragraphs 85 and 86 of the CEDAW report: "In particular, those recommendations are not binding and do not constitute international obligations."
- <https://hansard.parliament.uk/Commons/2023-11-14/debates/89BEA327-4A7A-47E7-919D-9E8F5CDBCD15/EconomicGrowth#contribution-6ECDBEFD-5529-411B-A980-36A995F01713>
- [https://hansard.parliament.uk/Commons/2023-07-19/debates/3CD15C8E-02F6-490D-A9B0-35C05BDB64E3/OffencesAgainstThePerson-Act1861\(SentencingGuidelines\)?highlight=67%20prosecution#contribution-EA65139C-1983-48CC-B555-535E0AB9F7BA](https://hansard.parliament.uk/Commons/2023-07-19/debates/3CD15C8E-02F6-490D-A9B0-35C05BDB64E3/OffencesAgainstThePerson-Act1861(SentencingGuidelines)?highlight=67%20prosecution#contribution-EA65139C-1983-48CC-B555-535E0AB9F7BA)
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- Some are Men*, Percuity Blog, 23 February 2024, <https://percuity.blog/2024/02/23/some-are-men/>
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