

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 Althea Williams, SPUC's Public Policy Manager, on altheawilliams@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)
- <https://www.bbc.co.uk/news/uk-68305991>
- <https://www.gov.uk/government/statistics/police-recorded-crime-open-data-tables>
- Some are Men*, Percuity Blog, 23 February 2024, <https://percuity.blog/2024/02/23/some-are-men/>
- 250,000 abortions in E&W in 2022*, Percuity Blog, 5 February 2024 <https://percuity.blog/2024/02/05/250000-abortions-in-ew-in-2022/>
- 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-abortions-in-england-and-wales-after-miscarriages-and-stillbirths>

ABORTION: PUNITIVE MEASURES

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

MAY 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 SECOND DAY OF THE REPORT STAGE WILL TAKE PLACE ON TUESDAY 4 JUNE.

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.



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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.