

Engender submission to the Abortion Law Review Expert Group: Offences

February 2025

1. INTRODUCTION

The remit of the Abortion Law Reform Expert Group is “to identify potential proposals [...] for reforms to ensure that abortion services are first and foremost a healthcare matter.”

To achieve this, our view is that abortion should be removed from specific criminal law, with no applicable offences, and regulated like other healthcare. **If women are to be empowered to decide for themselves, abortion must be removed from the reach of the courts, sanctions, policing, and the political system in the UK.**

The provision of all forms of medical care is closely regulated using clinical and professional frameworks. Following decriminalisation, abortion would continue to be regulated to the same standards as other medical and surgical procedures, including any evidence-based restrictions. Under such a model, unsafe and non-consensual abortion would be covered by general law.

2. EXPERT GROUP PRINCIPLES AND OFFENCES

2.1 Abortion is a healthcare matter

Best practice guidance from **the World Health Organisation is clear that regulation of abortion should be removed from the law.** The WHO recommends full decriminalisation of abortion on the following basis:

- “Decriminalization means removing abortion from all penal/criminal laws, not applying other criminal offences (e.g. murder, manslaughter) to abortion, and ensuring there are no criminal penalties for having, assisting with, providing information about, or providing abortion, for all relevant actors.
- Decriminalization would ensure that anyone who has experienced pregnancy loss does not come under suspicion of illegal abortion when they seek care.
- Decriminalization of abortion does not make women, girls or other pregnant persons vulnerable to forced or coerced abortion. Forced or coerced abortion would constitute serious assault as these are nonconsensual interventions.”¹

¹ WHO (2022) Abortion care guideline. Available at:
<https://iris.who.int/bitstream/handle/10665/349316/9789240039483-eng.pdf?sequence=1>

In the UK, the evolving landscape, with regard to the availability of abortion pills and rising investigations into suspected illegal abortions in England, has the potential to lead to increased unsafe abortions. We advocate for a model that takes the WHO's findings into account and adheres to their guidelines in as far as possible.

Anecdotal evidence from clinicians across the UK, including within Scotland, tells us that healthcare professionals are operating within "a climate of fear" due to the current criminalisation of abortion.² This includes uncertainty around responsibilities when women present undergoing miscarriage, the influence of media reporting on prosecutions of abortion in England, and the backdrop of fear and stigma associated with the criminalisation of abortion.

The removal of specific offences for abortion would bring Scotland in line with international health guidance, improve service provision, support workforce wellbeing and efficiency, and help to destigmatise abortion, repositioning it as a healthcare matter.

2.2 Supports equitable access to abortion care

The WHO guideline identifies that barriers to abortion create intersectional impacts for:

- learning disabled women
- young women and girls
- women in remote and rural areas
- women facing financial hardship
- women with lower levels of educational attainment.

Meta analysis of the criminalisation of abortion shows that negative impacts are disproportionately experienced by disadvantaged groups, including single women and socioeconomically disadvantaged women.³ In the USA, criminalisation disproportionately affects women of colour.⁴ Researchers argue that the current GB legal abortion framework does not adequately protect the rights of people with disabilities or those experiencing mental ill-health.⁵

Intersectional evidence on access to abortion in Scotland is lacking. However, based on what we **do** know about wider reproductive health inequalities, criminalisation may also carry additional impacts for:

- LGBTI people
- Migrant women
- Asylum seeking women and others with insecure immigration status

² Engender (2024) Outdated, harmful and never in the public interest: The urgent need to modernise Scotland's abortion law and prevent prosecutions. Available at:

<https://www.engender.org.uk/content/publications/ENGENDER--FINAL-DECRIM-REPORT---21-05-24.pdf>

³ De Londras et al (2022) The impact of criminalisation on abortion-related outcomes: a synthesis of legal and health evidence. Available at: <https://gh.bmj.com/content/7/12/e010409>

⁴ Riley et al (2022) A public health crisis rooted in white supremacy. Available at: <https://pmc.ncbi.nlm.nih.gov/articles/PMC9558193/>

⁵ Furgalska and de Londras (2024) Towards a rights-based approach for disabled women's access to abortion. Available at: <https://academic.oup.com/medlaw/article/32/4/486/7716015>

- Women from faith-based communities
- Care-experienced women and girls
- Lone mothers
- Unpaid carers
- Other marginalised groups of women and girls.

Negative impacts may relate to delays associated with criminalisation, where marginalised groups are more likely to present for later abortions, and structural discrimination, including institutional racism, homophobia and transphobia, across health and criminal justice bodies.

2.3 Advancing gender equality

The WHO guideline states that:

“A human rights approach that advances gender equality is essential and must be applied in all contexts providing services to people seeking health care.”

Access to abortion on request, without barriers and stigmatisation such as criminalisation, underpins realisation of economic, social and cultural rights for women, girls and pregnant people. These include safety and security, access to employment, training and education, adequate income and housing, household resources, financial security, and high standards of health and wellbeing. Non-discrimination and equality in accessing healthcare is also compromised by the current framework, which does not work optimally to reduce women’s health equality with men and has intersectional impacts.

Barriers to timely and accessible abortion care, including the threat of sanctions for healthcare staff, fuel structural gender inequality. This relates to domestic abuse and sexual violence, financial insecurity and poverty, and women’s health (see referenced report for details).⁶

2.4 Positive impact on service delivery

Decriminalisation would remove unnecessary “chilling” pressures on healthcare professionals, who are exposed to potential criminal sanctions at work.

When authorising an abortion, doctors must also consider their own exposure to criminal sanctions. If they are deemed to incorrectly judge a woman’s decision against the restrictions of the Abortion Act, they may be subject to investigation and criminalisation. This puts pressure on medical professionals and potentially compromises the relationship between doctors and patients seeking to end their pregnancies. **The European Court of Human Rights has recognised that criminalisation of abortion can create a “chilling effect” on doctors.**⁷

⁶ Engender (2024) Outdated, harmful and never in the public interest: The urgent need to modernise Scotland’s abortion law and prevent prosecutions. Available at:

<https://www.engender.org.uk/content/publications/ENGENDER--FINAL-DECRIM-REPORT---21-05-24.pdf>

⁷ European Court of Human Rights (2007) *Tysic v. Poland*. Available at: https://reproductiverights.org/wp-content/uploads/2020/12/Tysic_decision.pdf. European Court of Human Rights (2010) *A, B and C v. Ireland*. Available at: <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-102332%22>}}

Globally, criminalisation of abortion has severely undermined access to necessary care, where women have been refused abortion or reported to the police by medical professionals, often after undergoing miscarriage. These violations have largely been avoided in Britain since the Abortion Act was introduced. However, the increasing availability of abortion medication online is changing the landscape rapidly, and the legal framework needs to be adapted.

Following a sharp increase in prosecutions in England in recent years, the Royal College of Obstetricians and Gynaecologists (RCOG) has developed best practice guidance for healthcare professionals alongside other professional bodies. This emphatically states that staff should not contact the police with regards to abortion, pregnancy loss or unattended delivery. This position is based on patient confidentiality and best interests, as well as the clear lack of public interest in investigating women in these circumstances. Dr Raneer Thakar, President of RCOG stated:

“Outdated, antiquated abortion laws mean women who have experienced unexplained pregnancy loss are... vulnerable to criminal investigation, and health professionals are placed under unacceptable and unwarranted scrutiny.”

In the current context of increasing prosecutions, there is a need for this guidance to be promoted widely, as practitioners in other areas (for instance in A&E, treating a woman presenting with a miscarriage, or neonatal care, treating a preterm baby) could potentially suspect abortion and contact police.

2.5 Complies with international human rights standards

International human rights bodies have consistently recognised access to abortion as a fundamental component in the realisation of women’s rights. The UN Committee on the Elimination of Discrimination against Women (CEDAW) has been explicit in its criticism of barriers to abortion access, including criminalisation. It has noted “[e]ven in countries in which abortion is legal, restrictive conditions [...] often impede access”.⁸

Numerous UN bodies, agencies and special procedures have called on states to repeal discriminatory abortion laws and to decriminalise abortion. These include but are not limited to the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child, the Committee on the Rights of Persons with Disabilities, and the Office of the High Commissioner for Human Rights.⁹

As set out in the WHO guideline:

“[Human rights bodies and mandate holders] have clarified that States should not criminalize medical procedures needed only by women, including abortion nor criminalize those who have undergone an abortion, or punish or apply criminal sanctions

⁸ CEDAW (1999) General Recommendation 24: Article 12 of the Convention (women and health) [A/54/38/Rev.1]. Available at: <https://www.refworld.org/legal/general/cedaw/1999/en/11953>

⁹ Details at: Engender (2024) Outdated, harmful and never in the public interest: The urgent need to modernise Scotland’s abortion law and prevent prosecutions. Available at: <https://www.engender.org.uk/content/publications/ENGENDER--FINAL-DECRIM-REPORT---21-05-24.pdf>

against those who assist women in having abortions. Under international human rights law, States must not require health workers to report cases of women or girls who have had abortions, or whom they suspect of having had abortions, and States must provide post-abortion care in all circumstances and without the risk of criminal sanction.”¹⁰

The guideline also states that:

“Treaty monitoring bodies have called for the decriminalization of abortion in all circumstances. They have further clarified States’ human rights obligations in relation to abortion. These include that:

- States may not regulate pregnancy or abortion in a manner that runs contrary to their core obligation to ensure that women and girls do not have to resort to unsafe abortions. If they do, their restrictions on access to abortion must be revised.
- The regulation of abortion must not jeopardize the lives of pregnant women, subject them to physical or mental pain or suffering (including where this constitutes torture or cruel, inhuman or degrading treatment or punishment), discriminate against them, or interfere arbitrarily with their privacy
- The regulation of abortion must be evidence based and proportionate to ensure respect for human rights.”

Full decriminalisation of abortion is recommended by numerous international human rights bodies, including CEDAW, CESCR and the Human Rights Council.¹¹

2.6 Evidence based

Numerous countries have enacted abortion law reform in recent years, to liberalise regulation and to increase the degree of access to abortion on request. In 2024, 77 countries across the world now allow abortion on request within varying gestational periods.¹²

Global and national evidence clearly demonstrates that:

1. Decriminalisation does not lead to an increased abortion rate or to unsafe abortion¹³
2. Decriminalisation is associated with reduced stigma and improved quality of care¹⁴
3. Criminalisation results in negative impacts on health outcomes, health systems and human rights¹⁵

¹⁰ WHO (2022) Abortion care guideline. Available at:

<https://iris.who.int/bitstream/handle/10665/349316/9789240039483-eng.pdf?sequence=1>

¹¹ ibid

¹² Centre for Reproductive Rights ‘The world’s abortion laws’. Available at:

<https://reproductiverights.org/maps/worlds-abortion-laws/> accessed 24 January 24.

¹³ Johnson, Keogh and Norman (202) “What would be the likely impact of decriminalisation on the incidence, timing, provision and safety of abortion?” in Sheldon ed. Decriminalising abortion in the UK. Available at:

<https://bristoluniversitypressdigital.com/display/book/9781447354024/ch006.xml>

¹⁴ <https://pubmed.ncbi.nlm.nih.gov/28630538/>

¹⁵ Sheldon (2015) The decriminalisation of abortion: An argument for modernisation. Available at:

<https://academic.oup.com/ojls/article/36/2/334/2472463>

4. Criminalisation does not align with the reality of safe and effective contemporary care ¹⁶
5. Criminalisation does not reduce the incidence of unsafe abortion ¹⁷
6. Criminalisation negatively impacts health professionals and their work.¹⁸

In Scotland, people overwhelmingly support the right to abortion. In December 2024, 90% of people agreed that women should have the right to an abortion?¹⁹

3. A DECRIMINALISED REGULATORY FRAMEWORK FOR ABORTION IN SCOTLAND

The provision of medical care is closely regulated by clinical and professional frameworks rather than specific criminal law. Under full decriminalisation, abortion would continue to be regulated to the same standards as other medical and surgical procedures. Regulation would be carefully designed to ensure that a wide set of criteria, including safety, were met.

According to the British Medical Association, regulation of abortion once decriminalised would be determined by:

- The independent regulators of healthcare professionals, including the GMC, the Nursing and Midwifery Council, and the General Pharmaceutical Council
- Healthcare Improvement Scotland
- The civil and criminal laws that apply to other aspects of healthcare.²⁰

3.1 Offences for unsafe and non-consensual abortion

Full decriminalisation of abortion would remove specific abortion offences from the criminal law in Scotland. However, this would not mean that all related behaviour would be removed from the scope of the law. Non-consensual and unsafe abortion would remain subject to criminal sanctions. Negligence by medical professionals and illegal behaviour that resulted in non-consensual abortion, including forms of violence, would be covered by general criminal offences ‘against the person’, those governing medical malpractice or the regulation of drugs. This is in line with other areas of healthcare, including surgery and dentistry.

Existing criminal offences that criminalise non-consensual or unsafe abortion in Scotland

As set out by the British Medical Association, “the civil and criminal laws that apply to other aspects of clinical care will continue to apply to abortion. For example:

¹⁶ De Londras et al (2022) The impact of criminalisation on abortion-related outcomes: a synthesis of legal and health evidence. Available at: <https://gh.bmj.com/content/7/12/e010409>

¹⁷ Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (2011) Note by the Secretary-General. Available at: <https://digitallibrary.un.org/record/710175?ln=en&v=pdf>

¹⁸ International Federation of Gynaecology and Obstetrics (2022) FIGO calls for the total decriminalisation of safe abortion. Available at: <https://www.igo.org/sites/default/files/2022-04/FIGO-Statement-FIGO-Calls-Total-DecriminalisationSafe-Abortion-EN.pdf>

¹⁹ <https://yougov.co.uk/topics/politics/trackers/should-women-have-the-right-to-an-abortion?crossBreak=scotland>

²⁰ BMA (2019) How will abortion be regulated in the United Kingdom if the criminal sanctions for abortion are removed? Available at: <https://www.bma.org.uk/media/1141/bma-guidance-on-the-regulation-of-abortion-in-the-uk-2019.pdf>

- informed consent
- assault
- medical negligence and gross negligence manslaughter
- wilful neglect or ill-treatment, and
- data protection and confidentiality.”²¹

It recommends that the following circumstances are covered by ongoing criminal sanctions. Existing areas of Scots law would or could criminalise these activities in Scotland.

1. Individuals perform an abortion without appropriate training

This could be criminalised by common law “offences against the person”, such as reckless injury or culpable and reckless conduct. Clear prosecutorial guidance regarding these offences in relation to abortion should be introduced after decriminalisation is in place.

2. Individuals maliciously and covertly try to procure an abortion or administer an abortifacient, without the woman’s consent

This could be criminalised by common law “offences against the person”, such as the administration of a noxious substance. Clear guidance should set out context and application in relation to abortion, including with regards to ‘informed consent’ and other terminology.

3. Individuals illegally supply abortifacients

This is a criminal offence under the Human Medicine Regulations 2012.

4. Individuals illegally procure abortifacients on behalf of others

This could be criminalised through law regulating use of drugs and medicine, such as the Misuse of Drugs Act 1971. Illegality in this scenario would be determined by the particular model of decriminalisation. A non-blanker approach to navigate issues including malicious intent, consent, coercion and scale would be needed. This should be set out in prosecutorial guidance.

Under decriminalisation of abortion, the criminal law could therefore remain largely unchanged.

3.2 Would new offences related to abortion be needed?

There has been some suggestion that new offences would be required to capture the particular wrongs of causing a woman to miscarry, either through violence or ingestion of substances. However, existing criminal law in Scotland covers these situations.

Violence leading to miscarriage

There has been some discussion in Scotland on specifically criminalising violence that causes miscarriage, known as a ‘child destruction offence’. This reflects court cases in other parts of the UK where it has been brought to court as a separate charge, alongside offences against the

²¹ Ibid.

woman. However, unintended consequences of these charges must be carefully considered.²² In other countries, there are examples of these offences being used against pregnant women themselves, particularly marginalised women who use drugs or alcohol.²³

In Scotland, there is flexibility in the existing law where injuries cause a pregnant woman to miscarry, or cause the death of a child who is born prematurely. Existing common law offences are used to prosecute such violence, and several men have recently been convicted of such assault.²⁴ The common law offence of assault can be ‘aggravated’, meaning the accused’s intent or the result of an attack can be specified to make the offence more serious. This is reflected in sentencing. It is a common aggravation that the accused’s actions included a high risk of danger (often referred to as ‘assault to danger of life’). Where such an aggravation is specified on a charge, there is no need to provide corroboration. This can be important in the prosecution of violence against women, which often occurs in private without other witnesses.

Driving offences have also been used in related prosecutions in Scotland. In the recent unreported case of *HM Advocate v Morrison*,²⁵ there was a conviction for causing serious injury (which included but was not limited to miscarriage) by dangerous driving.²⁶ There is also scope for prosecution under the Domestic Abuse (Scotland) Act 2018.²⁷ Where a child is born alive but then subsequently dies from injuries sustained in utero, a charge of culpable homicide may be possible.²⁸

Broader non-consensual abortion

There is scope within the current criminal law to deal with broader non-consensual abortion cases. Legal experts have set out the role of aggravations to existing offences (which operate in the same way across Scotland, England and Wales). As abortion is a ‘regulated activity’ under health and social care legislation, it is a criminal offence to offer services without being registered.²⁹

²² Andrew Learmonth (2022) ‘Men whose abuse leads to miscarriage escaping prosecution in Scotland’. Available at: <https://www.heraldscotland.com/politics/23112491.men-whose-abuse-leads-miscarriage-escaping-prosecution-scotland/>.

²³ See, for example: Amnesty International (2017) “Criminalizing pregnancy: policing pregnant women who use drugs in the USA”. Available at: <https://www.amnesty.org/en/documents/amr51/6203/2017/en/>.

²⁴ See, for example: *HM Advocate v Rackstraw* (2022), unreported. BBC (2022) ‘Man found guilty for killing woman’s unborn child’. Available at: <https://www.bbc.co.uk/news/uk-scotland-south-scotland-60071378>.

²⁵ *HM Advocate v Morrison* (2022), unreported. See also *HM Advocate v Cuthbert and McIlravey* (2016), unreported. BBC (2016) ‘Couple jailed for ‘appalling’ abuse of pregnant woman’. Available at: <https://www.bbc.co.uk/news/uk-scotland-tayside-central-37406963>.

²⁶ Connor Gordon (2023) ‘Man convicted of running over pregnant woman who lost her baby’. Available at: <https://www.glasgowtimes.co.uk/news/23486043.man-convicted-running-pregnant-woman-lost-baby/>.

²⁷ Where the assault formed ‘a course of conduct’, corroboration may not be needed regarding an assault that led to miscarriage. See: *A(C) v HM Advocate* [2022] SCCR (Scottish Criminal Case Reports) 267.

²⁸ Hume (1797) Commentaries on the law of Scotland respecting the description and punishment of crimes (reprinted Butterworths 1986) Volume I, 187; *McCluskey v HM Advocate* (1989) SLT (Scottish Law Times) 175, 176-177.

²⁹ Herring, and others (2020) ‘Would decriminalisation mean deregulation?’ in Sheldon and Wellings (eds) Decriminalising abortion in the UK: What would it mean? Bristol University Press. Available at: <https://bristoluniversitypressdigital.com/edcollchap-0a/book/9781447354024/ch006.xml>.

Lastly, the common law offence of ‘administration of noxious substances’ can capture certain conduct that leads to miscarriage against the will of the pregnant person. This might include, for instance, coercive behaviour by a women’s abusive partner or the relative of a younger woman giving them abortion medication without their knowledge or consent.

If new offences were considered necessary in future, then targeted legislation could be created by the Scottish Parliament.

3.3 The Concealment of Birth (Scotland) Act 1809

The Concealment of Birth (Scotland) Act dates from the early 19th century. It is based on a law enacted in 1690,³⁰ which positioned women as committing murder if they were deemed to have ‘concealed’ a birth. It “directed juries to capitally convict women who had concealed their pregnancy and the birth of an illegitimate infant that had subsequently died, with or without direct evidence of murder.”³¹ The 1809 Act in Scotland repealed this law, stating that “the punishment of death has been found too rigorous for such an offence.” Instead, the crime is punishable with imprisonment.

This legislation does not formally govern abortion, but it is used in the modern context to prosecute women, and third parties, where an illegal abortion is suspected. It puts women suffering stillbirth and other extreme circumstances at risk of criminalisation and punishment.

Review of the Concealment of Birth Act, with a view to its repeal, is long overdue. It has been used in the modern day to prosecute women who have induced and concealed an abortion in later stages of pregnancy. These cases (as well as those prosecuted under the Abortion Act and for concealment of birth in England)³² demonstrate that women in this position act within desperate circumstances, are often vulnerable, and are at risk of lasting physical and mental harm.³³ We do not believe that criminalising these women in can ever be in the public interest.

The Act also places undue suspicion on women who may have experienced miscarriage and stillbirth, placing them at risk of potential police investigations. It criminalises failure to seek assistance “during the birth”, operating under the assumption that all women and pregnant people will be able to seek medical attention, or will be aware that they are in labour. This may affect multiply-marginalised groups more acutely, including women with insecure immigration status, disabled women and trans people.

³⁰ ‘Act Anent Murthering of Children’, see Internet Archive: https://archive.org/details/bim_early-english-books-1641-1700_act-anent-murthering-of-scotland-privy-council_1690
https://www.silvercityvault.org.uk/index.php?a=ViewItem&key=QnsiTil6MSwiUCI6eyJpdGVtX2lkljpbOTgwNzNdfX0&pg=1&WINID=1708961246593#24_bEIST1hoAAAGN5gbs2Q/98073.

³¹ Bennett (2017) ‘Scottish women and the hangman’s noose’ in Capital punishment and the criminal corpse in Scotland, 1740-1834. Palgrave Macmillan.

³² This is an offence under Section 60 of the Offences Against the Person Act 1861.

³³ Durham University (2022) Concealment of birth: A case for repeal. Available at: <https://www.durham.ac.uk/media/durham-university/research-/research-centres/centre-for-gender-and-law/vulnerable-women/Concealment-of-Birth.pdf>; Sheldon and Lord (2023) Guest editorial: Care not criminalization: reform of British abortion law is long overdue. Available at: <https://jme.bmj.com/content/50/1/e1>.

Analysis of cases brought under the English offence of concealment of birth suggests that it is misused to obtain convictions where women are suspected of causing the death of an infant, but where evidence is lacking. The research finds that “other offences more appropriately and accurately” cover these circumstances and that the concealment of birth offence is obsolete.³⁴ Furthermore, it is being applied to “suspected but unproven crimes, resulting in injustices for vulnerable women who experience ‘crisis pregnancies’”. Whilst this analysis refers to the English system and commentary on the Scottish offence is scarce, the same risks apply and the “more appropriate” offences cited by the research have equivalents in Scots law.³⁵

Scotland’s Concealment of Birth Act has no place in a modern abortion care framework.

FOR FURTHER INFORMATION

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ABOUT US

Engender is a leading feminist policy and advocacy organisation in Scotland, working to increase women’s social, political and economic equality, enable women's rights, and make visible the impact of sexism on women and wider society. We work at Scottish, UK and international level to produce research, analysis, and recommendations for intersectional feminist legislation and programmes.

³⁴ Durham University (2022) Concealment of birth. A case for repeal. Available at: <https://www.durham.ac.uk/media/durham-university/research-/research-centres/centre-for-gender-and-law/vulnerable-women/Concealment-of-Birth.pdf>.

³⁵ The offences cited are ‘perverting the course of justice’ and ‘disposal of a corpse with intent to obstruct or prevent a coroner’s inquest when there is a duty to hold one’.