

RTL Briefing: UK Abortion Law & ‘Decriminalisation’

Summary:

Abortion Law:

- Different abortion laws operate in the three jurisdictions of:
 - England and Wales
 - Scotland
 - Northern Ireland
- In all three jurisdictions, abortion is a crime. The law throughout the United Kingdom criminalises those who perform abortions (including women who self-abort) throughout pregnancy:
 - England and Wales, and Northern Ireland, under section 58 of the **Offences Against The Person Act 1861**.
 - In Scotland, under **Scots Law** (Scottish Common Law).
- There is also the crime of ‘**Child Destruction**’, which criminalises those who destroy a child after 28 weeks gestation:
 - In England and Wales, under the **Infant Life (Preservation) Act 1929**.
 - In Northern Ireland, in sections 25 and 26 of the **Criminal Justice (Northern Ireland) Act 1945**.
 - Scotland has no analogous crime in its statutes.
- The **Abortion Act 1967** provides exemptions from prosecution to the crime of abortion according to the 1861 Act for doctors who perform abortions under certain grounds.
 - It did not apply exemptions to the 1929 Act. This meant that all abortions had an effective upper limit of 28 weeks, after which it became ‘Child Destruction’.
- When the Abortion Act was amended by the **Human Embryology and Fertilisation Act 1990**, the exemption was extended to the 1929 Act, and a new ‘upper limit’ applied to for most abortions to 24 weeks. This legalised some abortions notably for foetal impairment, *up to birth*.

Decriminalisation:

- To ‘decriminalise’ (remove the criminal penalties of the 1861 Act or the 1929 Act against) abortion, would:
 - Remove all limitation on abortion, legalising abortion on demand, for any reason (including sex-selection), and
 - **void all Abortion Act protections (e.g. conscience protections)**
 - either up to 28 weeks (if only the 1861 penalties were removed), or,
 - up to birth (if the 1929 penalties were removed also).

Abortion Law in England and Wales:

Under **sections 58 and 59** of the **Offences Against The Person Act 1861** (the ‘1861 Act’), an Act which consolidated English, Welsh, and Irish criminal law, abortion is a crime throughout pregnancy:

- Section 58 prohibits a woman performing an abortion on herself or a person performing an abortion on her (whether by chemical or surgical means).
- Section 59 prohibits someone providing abortifacient drugs for the purpose of abortion.

The **Infant Life Preservation Act 1929** (the ‘1929 Act’) created a new crime of ‘**Child Destruction**’, which applies to anyone who, “*with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother*”.

- Since the Act takes **28 weeks** gestation as *prima facie* evidence that a child could be born alive, Child Destruction is applicable to any abortion performed after that point in pregnancy.
- The Act created an exemption from prosecution under its own provisions by requiring that it be “proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother”.

The famous ***Rex v. Bourne case*** created an analogous defence against prosecution under the 1861 Act, became possible where a doctor believes in good faith that the abortion is necessary to save the mother’s life, which not only meant if she would die, but if on reasonable grounds and with adequate knowledge, he was of the opinion that the probable consequence of the continuance of the pregnancy would be to make the patient a “physical and mental wreck”.

The **Abortion Act 1967** (the ‘1967 Act’) created further exemptions for prosecution from the crime of ‘Abortion’, but not ‘Child Destruction’, where two doctors in ‘good faith’ believe abortion is necessary to prevent:

- Risk to the life of the mother, greater than if the pregnancy were terminated (including in emergencies).
- Grave permanent injury to her physical or mental health (including in emergencies).
- Risk of (non-grave) injury to her physical or mental health.
- Risk of (non-grave) injury to the physical or mental health of any existing children of her family.
- Risk that if the child would be born with such physical or mental abnormalities as to be ‘seriously handicapped’.

After the 1967 Act, abortion was thus made available under the grounds that the Act specified, but **with an effective upper limit of 28 weeks for all abortions** (the exemptions due to court cases notwithstanding), since its exemptions applied only to the crime of Abortion under the 1861 Act, and not the crime of Child Destruction under the 1929 Act.

Under section 37 of the **Human Fertilisation and Embryology Act 1990** (the ‘1990 Act’):

- The exemptions from prosecution in the 1967 Act were extended to Child Destruction as well as Abortion.
- A new ‘upper limit’ of 24 weeks was added for abortions that take place to prevent risk of (non-grave) injury to the physical or mental health of the mother.

These mean that the *de facto* situation in England and Wales is that:

- Abortion is available, if carried out by a medical professional according to the procedures mandated in the 1967 Act, up to birth for all grounds specified in the 1967 Act, except for ‘Ground C’ (mental and physical health), for which availability exist at 24 weeks.
- Due to the lax way in which the 1967 Act is applied, in practice abortion on demand exists up to 24 weeks, since the vast majority of abortions (99%) take place under ‘Ground C’.
- Any abortion that takes place outside of this context is illegal, and those who perform them may be and are prosecuted for the crimes of Abortion or Child Destruction.

Abortion Law in Scotland:

In Scotland, Abortion is a crime under **Scots Law** (the common law of Scotland). The 1861 Act consolidated English, Welsh, and Irish criminal law, but not Scottish law, and so does not apply in Scotland.

The 1929 Act only applied to England and Wales, and did not apply to Scotland. There is no crime analogous to Child Destruction in Scottish law.

The 1967 Act, as amended by the 1990 Act, created exemptions from prosecution under Scots Law in exactly the same way as it did to the 1861 Act for England and Wales.

These mean that the *de facto* situation in Scotland is that:

- Abortion is available, if carried out by a medical professional according to the procedures mandated in the 1967 Act, up to birth for all grounds specified in the 1967 Act, except for ‘Ground C’ (mental and physical health), for which availability exist at 24 weeks.
- Due to the lax way in which the 1967 Act is applied, in practice abortion on demand exists up to 24 weeks.
- Any abortion that takes place outside of this context is illegal, and those who perform them may be prosecuted for the crime of Abortion.

Abortion Law in Northern Ireland:

Since the 1861 Act consolidated Irish criminal law along with English and Welsh criminal law, it applies to Northern Ireland, and so Abortion is a crime there in the same way as in England and Wales.

The 1929 Act did not apply to Northern Ireland, but its provisions were transposed into Northern Irish law by sections 25 and 26 of the **Criminal Justice Act (Northern Ireland) 1945** (the ‘1945 NI Act’).

Since then, the 1967 Act was not applied to Northern Ireland, but various court cases have created similar exemptions to those found in England and Wales, for abortions undertaken to safeguard the life of the mother (including to prevent serious long term damage to her physical or mental health).

These mean that the *de facto* situation in Northern Ireland is that:

- Abortion is unavailable, though it could be if carried out to save the mother’s life or to safeguard her from a serious and long term threat to her physical or mental health.
- Those who perform Abortions may be prosecuted for the crimes of Abortion or Child Destruction.

The Potential Implications of Decriminalisation:

‘**Decriminalisation**’ means the removal of something from criminal law. With reference to abortion, to date this has only been tried once in the UK: in England and Wales.

In 2017, the ‘**Abortion (Decriminalisation): Ten Minute Rule Bill**’ (the ‘Johnson Bill’) was tabled by Diana Johnson MP (Lab; Kingston-upon-Hull).

- The description of the Bill when attempted as a Ten Minute Rule Bill was: “to amend sections 58 and 59 of the Offences Against the Person Act 1861 to decriminalise consensual abortions; and for connected purposes”.
- The Bill ran out of time shortly after it was introduced, but it provides a preview of what future decriminalisation Bills might look like.
- Its stated intentions did not include amending or repealing the 1929 Act, so it would have presumably left this in place, though repeal of the 1929 Act also could be covered by “connected purposes” (the 1861 Act being mentioned only for rhetorical effect).
- Given devolution of abortion law to Scotland, this Bill would not have affected that part of the UK, hence its limitation to the 1861 Act and “connected purposes”.

Assuming that the Johnson Bill would have only affected the 1861 Act:

Since the 1861 Act applies to England, Wales, and Northern Ireland directly, the Johnson Bill would have affected these provisions in one of two ways:

- 1) It could have repeal the 1861 provisions altogether. With the 1929 Act left untouched, this would have the effect of **totally decriminalising abortion before 28 weeks, in England, Wales, and Northern Ireland**, as the 1929 crime

of Child Destruction (kicking in at 28 weeks) would remain, subject to exemptions under the Abortion Act.

- 2) It could have amended the 1861 such so as to remove their applicability to England and Wales. With the 1929 Act left untouched, this would have the effect of **totally decriminalising abortion before 28 weeks in England and Wales, but not Northern Ireland**, on the same grounds as above.

In practice, this would have meant:

- **Abortion would have been legalised for any reason prior to 28 weeks**, reversing the lowering of the upper limit for the vast majority of abortions in 1990.
- Any woman could have aborted her pregnancy using abortifacients **for any reason (including, for example, sex-selection) prior to 28 weeks.**
- The 1967 Act would become largely a dead letter prior to that point, with its provisions only applying as exemptions to the 1929 Act in the third trimester:
 - This would have included the Conscience Clause of the 1967 Act, as doctors only have a right to conscientious objection against direct participation in abortions that take place according to the Act.

Assuming the Johnson Bill affected the 1929 Act as well:

Since this applies to England and Wales alone, the Johnson Bill would only affect the 1929 Act by repealing it altogether.

- **This would have the effect of totally decriminalising abortion altogether in England and Wales.**
- Abortions post-28 weeks **would still be illegal in Northern Ireland** due to the 1945 NI Act (unless the Johnson Bill also repealed sections 25 and 26 of that Act, which might be seen as unlikely).

In practice, this would mean:

- The legalising of *abortion on demand, for any reason, up to birth* in England and Wales.
- The only limitations would be on medical professionals in terms of professional guidance standards, or abortion ‘providers’ in terms of regulation. There would be nothing to stop any woman from aborting at any point of pregnancy based on any motivation.

Appendix: Texts of Laws

Offences Against the Person Act, 1861 (E&W; Ire):

Original:

<http://www.legislation.gov.uk/ukpga/Vict/24-25/100/crossheading/attempts-to-procure-abortion/enacted>

Current (as amended*):

<http://www.legislation.gov.uk/ukpga/Vict/24-25/100/crossheading/attempts-to-procure-abortion>

s.58: <http://www.legislation.gov.uk/ukpga/Vict/24-25/100/section/58>

s. 59: <http://www.legislation.gov.uk/ukpga/Vict/24-25/100/section/59>

Infant Life Preservation Act, 1929 (E&W):

<http://www.legislation.gov.uk/ukpga/Geo5/19-20/34/contents>

Criminal Justice (Northern Ireland) Act, 1945 (NI):

s. 25: <http://www.legislation.gov.uk/apni/1945/15/section/25>

Abortion Act, 1967 (E&W; Scot):

Original:

http://www.legislation.gov.uk/ukpga/1967/87/pdfs/ukpga_19670087_en.pdf

Current (as revised by the Human Fertilisation and Embryology Act 1990):

<http://www.legislation.gov.uk/ukpga/1967/87/contents>

Human Fertilisation and Embryology Act, 1991 (E&W, Scot):

s. 37: <http://www.legislation.gov.uk/ukpga/1990/37/section/37>