

Devolving Abortion Law

The power to legislate in relation to abortion was devolved to the Scottish Parliament under section 53 of the Scotland Act 2016 (“SA 2016”), which deletes section J1 from part 2 of Schedule 5 to the Scotland Act 1998 (“SA 1998”). This article briefly describes the existing legal context against which the transfer of power takes place, discusses some of the issues associated with exercising the power, and reflects upon assurances that there are no plans to change the law in this area.

A. BACKGROUND

During the Smith Commission negotiations, the proposed devolution of abortion enjoyed support from the Green Party, the Scottish National Party, the Conservatives and the Liberal Democrats.¹ Labour negotiators strongly opposed it, however, and reportedly made the reservation of abortion a “red line issue” – a non-negotiable condition of their agreement to any package.² The case for devolving abortion was quite compelling: the relevant portfolios, health and criminal justice, were already within the jurisdiction of the Scottish Parliament, and the parliament already had power over other highly controversial matters (for example, it has debated assisted suicide several times in recent years). The Labour Party’s opposition was apparently motivated by fear that the democratic process in Scotland may yield a less liberal

¹ BBC News, “Scottish Parliament to be given powers over abortion laws”, BBC News Online, 14 Oct 2016, available at <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-34527208>.

² D Maddox, “Labour forced Smith Commission to drop abortion law”, *The Scotsman*, 30 Nov 2014, available at <http://www.thenational.scot/news/stand-off-over-devolution-of-abortion-law.8770>.

approach to abortion than that currently allowed for by the Abortion Act 1967 (“the 1967 Act”), which applies throughout Scotland, England, and Wales.³ Because of Labour opposition, the Smith Commission’s final report⁴ did not recommend the devolution of abortion, and it was not included in the initial version of the Scotland Bill. Nevertheless, the Scottish Secretary later announced to the Scottish Affairs Committee at Westminster that the UK government had decided to amend the Bill to include abortion, on the basis that there was “no convincing constitutional reason” for continuing to reserve it.⁵ The Scottish Government, while welcoming the decision, immediately announced that it had no plans to change the law in the area, no doubt keen to avoid the unedifying and divisive experience of a public abortion debate in Scotland.⁶

B. THE EXISTING LAW

In Scotland, as in England and Wales, abortion is governed by the 1967 Act as amended by the Human Fertilisation and Embryology Act 1990 (“the 1990 Act”). Section 1(1) of the 1967 Act provides that:

³ B Riley-Smith, “Smith Commission: devolving abortion controls to Scotland triggers fears over abortion tourism to England”, *The Telegraph*, 28 Nov 2014, available at <http://www.telegraph.co.uk/news/uknews/scotland/scottish-politics/11260056/Smith-Commission-Devolving-abortion-controls-to-Scotland-triggers-fears-over-abortion-tourism-to-England.html>.

⁴ The Smith Commission, *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2014).

⁵ BBC News Online (n 1).

⁶ *Ibid.*

...a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—

- (a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or
- (b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or
- (c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or
- (d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

The selective decriminalisation effected by the 1967 Act notwithstanding, abortion remains a *prima facie* crime throughout Great Britain. Any induced abortion that did not comply with the conditions set out in the 1967 Act would be dealt with under the pre-1967 law, which is different in Scotland than in England and Wales. In England and Wales, depending on the circumstances of the case, abortion could result in a charge under section 58 (if performed by the woman herself) or section 59 (if performed by a third party) of the Offences Against the Person Act 1861 (“the 1861 Act”), which makes it an offence to procure a miscarriage and carries a maximum penalty of life imprisonment. If the foetus was “capable of being born alive”,⁷ the alternative charge of “child destruction” (which carries the same penalty) would be available under section 1 of the Infant Life Preservation Act 1929 (“the 1929 Act”). In

⁷ For simplicity, I will use the terms “capable of being born alive” and “viable” interchangeably, although Norrie correctly points out that there is a not-insignificant legal distinction between them: K McK Norrie, “Abortion in Great Britain: one Act, two laws” [1985] Crim LR 475 at 477-479.

Scotland, someone who induced a miscarriage could (again depending on the circumstances) be charged with the common law crime of procuring an abortion.⁸

Before 1967, defences to a charge of abortion/procuring a miscarriage were available in both jurisdictions. In the cases of *R v Collins*⁹ and *R v H Windsor Bell*¹⁰ the English courts had appeared to accept that there would be a defence to a charge under the 1861 Act if the abortion had been performed to save the life of the pregnant woman. The 1929 Act enshrined this defence in statute, section 1(1) providing that “no person shall be found guilty of an offence under this section unless it is 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 case of *R v Bourne*¹¹ extended the defence to cover abortion performed to avoid danger to *health* as well as to *life*, since Macnaghten J was unconvinced that a “perfectly clear line of distinction” could be drawn between them.¹²

In contrast with England, as Norrie has noted, “the Scots common law seems always to have recognised that not all induced abortions are criminal.”¹³ He explains:¹⁴

Scots criminal law has a quite different theoretical foundation to English criminal law, being based primarily on the wickedness of the accused’s intent, and so was able to recognise much more easily than English law that a doctor performing an abortion *for therapeutic reasons* does not have wicked and felonious intent, and is therefore not acting criminally... Though Gordon describes the therapeutic exception to the crime of procuring abortion as “ill-

⁸ A Alison, *Principles of the Criminal Law of Scotland* (1832) 628 and J H A Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, 5th edn, by J Walker and D J Stevenson (1948) 114.

⁹ [1898] 2 BMJ 59 at 129.

¹⁰ [1929] 1 BMJ 1061 at 1061.

¹¹ [1938] 3 All ER 615.

¹² *Bourne* at 617.

¹³ Norrie (n 7) at 482.

¹⁴ *Ibid.*

defined”, it was nevertheless well-settled, and Mason and McCall-Smith are undoubtedly correct in pointing out that Mr Bourne, the surgeon who instigated his own prosecution in order to determine the limits of therapeutic abortion in English law, would not have been charged had he carried out his abortion in Scotland, there clearly being no wicked and felonious intent on his part.¹⁵

In Scotland, then, it seems that prior to 1967, abortion was lawful at common law up until birth provided that there was no wicked intent, and that demonstrating “therapeutic intent” (life-saving or otherwise) would be one way of establishing lawfulness. After *Bourne*, therefore, it might be said that Scots and English law had arrived at roughly the same place via different routes,¹⁶ at least as far as non-viable foetuses and embryos were concerned: it was lawful in both jurisdictions to abort them in order to avoid danger to the woman’s life or health.

In relation to viable foetuses, however, the jurisdictions differed considerably. Scots law made no special provision in relation to late-term foetuses, meaning that they too could be aborted lawfully as long as there was no wicked intent. By contrast, under the 1929 Act in England and Wales, the abortion of a “child capable of being born alive” (a capacity which was presumed at twenty-eight weeks’ gestational age)¹⁷ was lawful only if performed to save the woman’s life. Therapeutic intent other than the intent to save life was insufficient to render lawful the abortion of a late-term foetus.

The coming into force of the 1967 Act did not immediately create consistency across the jurisdictions, since the original Act made no explicit provision for time limits and relied instead on the twenty-eight week presumption enshrined in section 1(2) of the 1929 Act

¹⁵ Ibid, emphasis added.

¹⁶ “Roughly” because the absence of wicked intent in Scotland could presumably also be established in other ways.

¹⁷ Infant Life Preservation Act 1929 s 1(2).

(which did not extend to Scotland). The effect was that abortion under the grounds set out in the 1967 Act was subject to a twenty-eight week upper limit in England and Wales, but was available in Scotland without limit of time (just as there had been no time limit under the pre-existing Scots common law). Only when the 1990 Act amended the 1967 Act to uncouple it from the twenty-eight week presumption in the 1929 Act,¹⁸ and apply explicit time limits of twenty-four weeks to two of the grounds (those concerning risk to the health of the women or her existing children), did the same rules eventually apply on both sides of the border.

C. NO PLANS FOR CHANGE?

Few issues are capable of generating as much rancour and division as abortion. The last time arguments about abortion dominated public debate in Britain was during the late 1980s, leading up to the enactment of the 1990 Act. Since then, although a few private members' Bills and tabled amendments in Westminster have sought to address isolated aspects of the legislative framework (seeking, for example, to lower the time limit from twenty-four weeks, or to clarify that abortion purely on grounds of foetal sex would be unlawful), these have all been unsuccessful.

Pro-choice campaigners are pressing for change on both sides of the border, however. The British Pregnancy Advisory Service ("BPAS") campaign "We Trust Women" seeks the complete decriminalisation of abortion, arguing (*inter alia*) that the penalties attached to the crimes of abortion and child destruction in the 1861 and 1929 Acts are too harsh; that the requirement for two doctors' authorisation is unnecessary; and that the legal framework governing abortion in Britain reflects outdated attitudes to abortion and to women.¹⁹ The campaign is highly controversial, since decriminalisation would mean the removal of time

¹⁸ 1967 Act s 5(1) as amended.

¹⁹ The campaign is described at www.wetrustwomen.org.

limits and statutory conscience rights as well as the sanctions for unlawful abortion; it would amount to official acceptance of “abortion on demand”. Although the campaign was formally launched on 9 February 2016, BPAS has been arguing for complete decriminalisation at least since June 2014.²⁰ Upon the news that abortion lawmaking powers would be devolved, BPAS urged Scotland to “lead the way” in effecting decriminalisation.²¹

In England, since the relevant crimes are contained in the 1861 and 1929 Acts, repeal of the relevant provisions would remove the crimes completely (and the 1967 Act would become meaningless in their absence). In Scotland, by contrast, since procuring abortion is a common law crime unless there is a lack of wicked intent, “complete decriminalisation” would require the overturning of the common law position. The repeal of the 1967 Act would simply place Scotland back in its pre-1967 position, under which abortion is a *prima facie* crime and an absence of wicked intent would require to be established on a case-by-case basis. Thus, whereas decriminalisation in England and Wales would involve a process of repeal, complete decriminalisation in Scotland would mean enacting new law to clarify that abortion was not a crime.

Experience at Westminster teaches us that the introduction of any legislation which even touches on the issue of abortion will be a fraught, polarising and protracted process. As BPAS themselves have previously acknowledged:²²

Since 1990, when the abortion law was last amended, governments and their civil servants have done their best to keep abortion out of Parliamentary politics. It’s easy to understand why. Abortion is a complex and polarising topic, which confers political advantage on no party.

²⁰ BPAS, “Four good reasons for Britain to decriminalise abortion altogether” (2014) BPAS Reproductive Review: Issues in Abortion, Pregnancy, and Birth, available at <http://www.reproductivereview.org/index.php/rr/article/1592/>.

²¹ K Devlin, “Sturgeon urged to decriminalise abortion”, *The Herald*, 9 Feb 2016, available at http://www.heraldscotland.com/news/14262301.Sturgeon_urged_to_decriminalise_abortion/.

²² BPAS (n 22).

Abortion is something that policymakers, like most people, accept but don't want to talk about. And the way in which the Abortion Act was drafted has allowed services to develop as society has needed them.

It is understandable that the Scottish government would also like to avoid debating abortion. If the UK Parliament were to change the law in England and Wales in a way that altered or repealed the 1967 Act, however (either in response to the BPAS campaign or for any other reason), the devolved institutions would, as a matter of practical necessity, need to decide whether any changes ought to apply in Scotland as well, or whether the existing law should continue in force (the latter would be the default position). Intense lobbying would naturally ensue from those on both sides of the debate who would like to see changes to the current law. Depending upon the scale of any change south of the border, the Scottish Parliament could foreseeably find itself building abortion law in Scotland from the ground up, debating a range of highly flammable issues such as time limits, sex selective abortion, abortion on grounds of disability, and statutory rights of conscience for health care professionals. In relation to the latter, the fact that regulation of the health professions is still reserved to Westminster²³ may present an irksome, though not unsurmountable, complication. In any case, it is far from inconceivable that one or more of these issues could end up on the agenda at Holyrood regardless of the preferences of Scottish politicians.

D. CONCLUSION

It should be acknowledged that as things stand there is no evidence of either government being receptive to demands for decriminalisation, and in the aftermath of the "Brexit" vote on 23 June 2016, it seems very unlikely that either parliament will have time in the near future to

²³ SA 1998 Sch 5, part 2, head G2.

become embroiled in debating abortion. Once the post-Brexit constitutional activity eventually subsides, however, campaigners will undoubtedly seek to place abortion back on the political agenda.

Section 53 of SA 2016 notwithstanding, there is an important sense in which, politically if not legally speaking, Scotland remains at the mercy of Westminster where abortion is concerned. Although the UK Parliament can no longer make abortion law for Scotland directly, it could, if it disturbs the 1967 Act, create considerable political pressure forcing Holyrood to confront the issue. Scotland is a relatively small polity in which strong views can become heightened and interest groups' influence magnified. Moreover, it currently faces a period of constitutional uncertainty of unknown duration: there will be plenty of tests of Scotland's institutions and social solidarity in the coming months and years. There is probably no good time for an abortion debate; arguably, however, there are times when one would be particularly unwise. Nevertheless, the main parties in Scotland have a duty to make their positions on abortion clear to the Scottish electorate, given that they may be unable to control whether and when the issue arrives at Holyrood.

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