10.09.2019 **Position Statement on:**

# Abortion in Scotland

The Scottish Council on Human Bioethics (SCHB) recognises that many abortions take place in the context of very challenging circumstances for the pregnant women, which means that a lot of compassion and empathy is necessary in discussing the topic. However, the SCHB remains deeply concerned about the possibility of ending a pregnancy because of the following reasons:

**1. A caring society should ensure that all pregnant women and their children are fully supported**

Sometimes, a woman may consider that she has no alternative but to terminate her pregnancy. For example, when her personal circumstances are extremely challenging or when it is likely that the child will be born with a disability or health condition with which she cannot cope.

*In response, the SCHB notes that:*

A caring society should do everything it can to understand the possible challenges of pregnant women while seeking to provide full support. Of course, having a child has life-changing implications including in terms of cost and the provision of long-term care. But with appropriate assistance as well as acceptance she may find that her position relating to a possible abortion may change with time.
Moreover, if some health challenges do exist, healthcare professionals should always be prepared to help.
This means that the traditional pro-life and pro-choice opposition should move forward towards a pro-woman and pro-child perspective.

**2. *Society should encourage alternatives to abortion when challenging pregnancies arise***

It is sometimes argued that although abortion is undesirable, women should be able to consider an abortion when no other solution seems possible. This is because, if women do not have a legal access to abortion, they will avail themselves of illegal and unsafe terminations in the 'back streets' leading to many deaths. It is also stated that no one should force a woman to give birth to a child she does not want.

*In response, the SCHB notes that:*

Since society does not sanction the killing of a person who is already born, in whatever circumstances, it is necessary to question why the killing of the unborn child should be considered different. Both the mother and the unborn child are members of society with a right to life. This means that society should do everything it can to protect the life of the unborn child and to assist the mother throughout the pregnancy and after childbirth.
A civilise society, by its very definition, is expected to be a just and caring community, demonstrating inclusion of diversity especially towards its most vulnerable and dependent members.

**3. The embryo/foetus has full inherent moral value and worth**

Some believe that the value of a human pre-natal or even post-natal life is purely subjective as well as relative and that the concept of inherent human value and worth is empty of meaning.

*In response, the SCHB notes that:*

The pregnant woman and the embryo/foetus have never been considered in UK law as having no moral status - a position that has not changed over the past centuries. This is because despite a growing scientific understanding of life, both before and after birth, moral status has never been reduced to aspects of size or self-awareness. The embryo/foetus can, in fact, be considered as being a living entity with a claim to full inherent value and worth.
For example, the families of foetuses who have died should be able to give them names, mourn their death as well as bury them with compassion and respect.

**4. The right to bodily integrity can be challenged by the concept of unconditional acceptance**

Those supporting unrestricted abortions argue, amongst other reasons, that the limitations and penalties associated with the practice only adds to its stigma and are too severe to be considered acceptable to women in a modern society. Instead, they suggest that abortions should be completely removed from criminal law while enshrining the principles of women's equality, bodily autonomy and reproductive rights.[1]
It is further suggested that abortion should be treated no differently to any other medical procedure and be available on demand, no questions asked.[2] In other words, a number of abortion campaigners indicate that the rigorous abortion regulations restrict a woman's ability to make her own decisions as an expression of personal freedom and autonomy.[3]

In this regard, American moral philosopher, Judith Thomson, presented a thought experiment in which a man wakes up one morning to find himself attached, intravenously, with an unconscious but famous violinist (another man) who has a fatal blood disease.[4] This happened because the sleeping man was found to be the only person who could help purify the artist's blood. It is moreover explained that the violinist can only safely be unplugged in nine months time.
Thomson suggests that it is permissible for the man, who discovers that he is being used in this way, to detach himself from the violinist even though this will cause the artist's death. Thus, it is proposed that by unplugging the violinist one does not violate his right to life but merely deprives him of something - the use of another person's body - to which he has no right. Moreover, if the first man allows him to go on using his blood, this is a kindness on his part, and not something the violinist can claim from him as his due.

For the same reason, Thomson argues that abortion does not violate the embryo/foetus' legitimate right to life, but merely deprives it of something — the non-consensual use of the pregnant woman's body and life-support functions — to which it has no right. Thus, when a pregnant woman decides to terminate her pregnancy, Thomson concludes that the embryo/foetus' right to life does not have priority over the pregnant woman's right to choose what happens to her body (even if it does result in the embryo/foetus' death).

*In response, the SCHB notes that:*

A tension exists, here, between the right to life, autonomy and bodily integrity of the woman and the right to life of the embryo/foetus. Both are based on the inherent value and worth of life.
However, in an ideal civilised society where everybody is seen as having equal and immeasurable value, the unconditional acceptance of the other, in solidarity, should be seen as having a greater value than autonomy. Moreover, in contrast to the violinist, the woman may be partly responsible for the very existence of her embryo/foetus which was created from her own body. Because of this, she has a responsibility towards the embryo/foetus who is growing inside her uterus whose very purpose is to welcome and gestate her child.

**5. The right to life of the prenatal child should come before the right of autonomy of the mother**

It may be possible to propose that the only concept that really matters is the right of autonomy of the woman. Thus, it may be suggested that an individual should always respect the autonomy of those who are self-aware and rational because he or she wants his or her autonomy to be respected by them in return in a kind of social contract.

*In response, the SCHB notes that:*

Such a social contract does not give any solid or robust protection to those who have less or no autonomy. Those who are powerful with a strong sense of control may, for example, begin to believe that they no longer need such a social contract for their autonomy to be respected. These controlling individuals may then impose their autonomy on the weak and vulnerable.
Indeed, though the concept of autonomy is very important in medical ethics, agreeing to the absolute autonomy of a person is another matter, especially when other individuals are present.

Thus, if abortion is only accepted because it is believed that the autonomy of some should be respected to the detriment of others, who are incapable of being autonomous, it would imply that the value of human life has no

[1] https://www.commonspace.scot/articles/11926/campaigners-call-abortion-decriminalisation-while-scottish-government-backs-current
The campaign is described at *www.wetrustwomen.org*.

[2] http://www.dailymail.co.uk/news/article-4908350/MAX-PEMBERTON-Relaxing-abortion-laws-feminism.html

[3] Engender, Our Bodies, Our Choice: The Case for a Scottish Approach to Abortion, 2016, https://www.engender.org.uk/abortion.

[4] Moral philosophy paper first published in 1971 and entitled "A Defense of Abortion".

inherent importance. In other words, that individuals both before and after birth only have worth if they have certain abilities or capacities. However, such a position would eventually undermine the very basis of civilised society. Indeed, such a society could no longer offer any robust arguments against ending the lives of any other non-autonomous individuals who may be considered as having an inferior claim to life.
Moreover, if the Scottish Parliament accepts that some lives can have less or no claim to life just because they are not autonomous it would endanger the very concept of equality in society as well as the very foundations on which the Parliament is grounded.
This means that the value and meaning of a life must have priority over autonomy. Indeed, it is only because society recognises the worth of persons that their autonomies are even respected. Those supporting abortion, therefore, cannot simply base their arguments on the absolute autonomy of the women wanting the procedure.

**6. Society should encourage women to consider abortions as an unacceptable form of family planning**

Since terminations may sometimes just be seen as a choice, the procedure may be considered by some women as a form of family planning enabling them to decide when and with whom to have a child. This is because, in the UK, abortions have virtually become accessible on demand.
The British Medical Association advises that: "*Given the risks associated with pregnancy and childbirth, and the risks of a woman having to continue a pregnancy against her wishes (compared with the minor risks associated with early medical abortion), there will always be medical grounds to justify termination in the first trimester*".[5]

*In response, the SCHB notes that:*

Individuals should be encouraged to inform themselves as much as possible about human reproduction procedures as well as the practicalities of avoiding conception. Prospective parents should be supported in their decision-making in order to ensure that they express unconditional acceptance and responsibility towards their children. Furthermore, those who do not have the capacity to make such an informed decision should be supported to avoid any situations where irresponsible behaviour could take place.

**7. There is an alternative to the abortion of disabled foetuses**

Some commentators argue that abortions should be able to be performed, even up to birth, for compassionate reasons when the foetus is expected to have significant physical and/or mental conditions.

*In response, the SCHB notes that:*

The notion that the unborn with disability should be aborted has implications for disabled people and the rest of society. In the same way as a negative message is being given concerning certain sexes when foetuses are aborted because of their sex, aborting disabled embryos/foetuses sends an implicit message of rejection to people with disabilities. Moreover, the decision to abort arises from a subjective judgement that these people will not have meaningful lives. It also draws on the very real fear that the disabled child may experience significant future challenges if his or her carers are no longer able to provide support.

The English peer, Lord Shinkwin, has suggested that, because no time-limits are present relating to abortions for disabilities, this represents a form of legal discrimination towards persons with disability.[6] In this regard, the SCHB agrees that any restriction of abortions to foetuses with a disability after 24 weeks is discriminatory.
This is in line with the UN Committee on the Rights of Persons with Disabilities which indicated, in 2017, that it was "*concerned about perceptions in society that stigmatize persons with disabilities as living a life of less value than that of others and about the termination of pregnancy at any stage on the basis of fetal impairment*."[7]
Medical staff should also be aware that present or potential medical conditions do not define the quality of a future life. Staff should therefore be trained about disability and equality awareness.[8]

The SCHB recognises that some severe embryonic/foetal disorders are either incompatible with extra-uterine life or may severely shorten life. But pre-natal children with congenital disorders should be treated with the same respect

[5] British Medical Association. 2014. *The law and ethics of abortion*. London: British Medical Association, 2.1.4.

[6] Because of this, he presented an *Abortion (Disability Equality Bill), 2016-2017* to the UK House of Lords but this has not been accepted.

[7] Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland, Convention on the Rights of Persons with Disabilities, 3 October 2017.

[8] The SCHB would draw attention to Down's syndrome Scotland's 2017 Health Report which makes several recommendations in this regard in order to address the reality that medical staff often exhibit 'a serious lack of care and support towards expectant/new parents.' https://www.dsscotland.org.uk/wp-content/uploads/2017/03/DSS-Listen-to-Me-pdf.pdf

as everyone else. Delivery should be timed, as far as possible, to optimise the survival of both mother and baby. Good palliative care as well as medical and surgical treatment, where appropriate, should always be provided.

This means that society should not only give disabled babies the same respect as those without disabilities, (whether inside or outside the womb), but should also help the mother find more compassionate and better alternatives to abortion. This should include the best medical and palliative care, the best social and emotional support as well as (where appropriate) assistance in letting the child be adopted.

**8. Travelling to another country to access abortion should not be encouraged**

Some women may consider a late abortion for a range of reasons that are out-with their control, including delayed recognition of pregnancy, changed life circumstances, delays around referral and appointment waiting times. In addition to financial implications, the need to travel often entails emotional, physical and practical challenges which may contribute to the taboo and perceptions of discrimination surrounding abortion. As a result, women may find the travel to be distressing and stigmatising.

*In response, the SCHB notes that:*

A state should never encourage its members to bypass its laws by travelling abroad. Instead, it should provide a compassionate and appropriate solution which values and protects the lives of all its members.

**9. The original intent of abortion legislation should not be undermined**

When medical abortions take place in the UK, women must take abortifacient medication[9] in a health facility rather than in their own homes. This was the intent of the law when it was accepted by the UK Parliament in 1967. However, since October 2017, Scotland's Chief Medical Officer has written to all health boards to indicate that the drug Misoprostol can now be taken by women outside of a clinical setting.[10]
The SCHB is very concerned about such an undermining of the intent of the original legislation.

**10. Generally, the father and mother of a child have a shared responsibility in his or her conception**

A genuine 'pro-child' approach should be to offer girls/women and boys/men education about the responsibilities of relationships to each other as well as to the potential future children. In other words, prospective parents should be informed about what it means to conceive together and the realities of what is involved in bringing up children responsibly.

**11. Fathers should not be ignored with respect to an abortion**

The SCHB recognises that it is only the woman who must make the final decision to accept the continuing pregnancy. Although some feminists may celebrate the possibility for women to access abortions as empowering and liberating them from patriarchal oppression, it has paradoxically resulted in the disempowerment and disengagement of men from the decision. As such, abortion is now seen as a woman's right to choose and as her sole responsibility. Indeed, the fact that abortion is now usually considered to be a woman's issue shows how the general culture has allowed fathers to abdicate responsibility for children.

**12. The psychological challenges of those performing abortions should be recognised**

The SCHB recognises that those undertaking abortions may be affected by significant psychological challenges. This is especially the case when few health care professionals are prepared to perform such procedures, meaning that they are given an ever-increasing number to perform.
In this regard, compassion should be shown to such healthcare professionals who should be offered counselling.

[9] Abortifacient medication is classified as a substance that induces abortion

[10] See: http://www.sehd.scot.nhs.uk/cmo/CMO(2017)14.pdf. Though this has been challenged in 2018, the situation has not changed since 2017. See: http://www.thenational.scot/news/16422186.display/

Scottish Council on Human Bioethics

**10.12.2018** **Position Paper on:**

# Abortion

## 1. Definitions and general information

Abortion (also known as Termination from the Latin word *aboriri*, 'to perish'): The ending of a pregnancy by the removal or expulsion of an embryo/foetus from the womb. Abortions can be spontaneous, commonly called a miscarriage, or induced, which is the deliberate interruption of a pregnancy resulting in the loss of life of the embryo/foetus.

Medical Abortions: A type of abortion in which abortifacient drugs are used to induce the expulsion of an embryo/foetus from the womb. The majority of pre-9-week terminations are medical abortions and involve the following steps:[11]

- Taking a drug called Mifepristone (which blocks the action of the hormone progesterone which is needed to maintain a pregnancy);
- Usually 24 to 48 hours later, taking a second drug called Misoprostol (which causes uterine contractions and the thinning of the cervix, thereby inducing a miscarriage);
- Within 4-6 hours, the lining of the womb then breaks down, causing bleeding and loss of the embryo/foetus.

Surgical Abortions: A form of abortion in which surgical instruments are used and is generally dependent on the stage of pregnancy:
|\
*Up to 15 weeks, two methods can be used***:**

- Vacuum Aspiration (most common method). Involves widening the entrance to the womb and removing the embryo/foetus using suction.[12]

- Dilation and Curettage: The embryo/foetus is pulled off the walls of the uterus with a curette, broken down and then evacuated using vacuum suction.

*Between 15-26 weeks, two further methods can be used*:

- Dilation and Evacuation which involves dilation of the cervix followed by the crushing and discarding of the foetus using surgical instruments and vacuum suction. This is carried out with conscious sedation or general anaesthetic.[13]

- Dilation and Extraction which requires surgical decompression of the foetus' head before evacuation.

*After 26 weeks, three methods can be considered:*

- Intact Dilation and Extraction (Partial-Birth) abortion in which a living baby is pulled feet-first out of the womb and into the birth canal (vagina), except for the head which is then punctured at the base with a surgical instrument. The baby's brain is then removed with a powerful suction machine which causes the skull to collapse, after which the now-dead baby is delivered.[14]

- The induction of labour. In places lacking the necessary medical skill for dilation and extraction, or where

[11] https://www.rcog.org.uk/globalassets/documents/guidelines/best-practice-papers/best-practice-paper-2.pdf

[12] Vacuum aspiration takes about 5 to 10 minutes and most women go home a few hours later.

[13] This normally takes about 10 to 20 minutes and the woman may be able to go home the same day.

[14] Questioned about the policy of the UK government on the issue in Parliament, Baroness Andrews stated that "We are not aware of the procedure referred to as "partial-birth abortion" being used in Great Britain." Text of a written answer to a parliamentary question at The House of Lords Hansard. 12 May 2003 : Column WA17, https://publications.parliament.uk/pa/ld200203/ldhansrd/vo030512/text/30512w05.htm#30512w05_sbhd0.

preferred by practitioners, an abortion (sometimes called 'induced miscarriage') can be initiated by inducing labour using hormones, such as Prostaglandins, with the aim of foetal demise. This procedure may be performed from 13 weeks gestation to the third trimester.[15]

- Hysterotomy which is similar to a Caesarean and is performed under general anaesthesia.

Therapeutic abortions: Abortions that are undertaken with the aim of preventing grave and permanent injury to the physical or mental health, or to save the life, of the woman. Two kinds of reasons are generally considered in this category:

*Clinical Reasons*

Generally, these are situations in which serious medical complications arise in the pregnancy and where it is decided to abort the foetus to prevent grave and permanent injury to the physical health, or to save the life, of the woman. These reasons are specifically described in UK Law.

*Psychological and Suicidal Reasons*

These are abortions undertaken with the aim of preventing grave and permanent injury to the mental health of the woman including the risk of her committing suicide.
In this regard, expressing suicidal feelings to others does not necessarily indicate that a person is at high risk. However, any expressed suicidal feelings should always be taken seriously and explored in some detail.

If a pregnant woman were to come to a healthcare professional stating that she was suicidal then it is important that this is fully assessed and not taken simply at face value. The following aspects would be relevant:

- Is there evidence of a mental disorder and, if so, does it predate the pregnancy?
- Is there a history of past suicidal behaviour or mental disorder?
- How advanced is the planning for suicide?
- To what extent does the pregnancy influence the suicidal thoughts?
- How does the woman think she will feel should the abortion go ahead?

Where suicidal feelings are established and not transient then a psychiatric referral for assessment of risk should be considered and where a decision relating to abortion is necessary most services would see the woman promptly. Admission is often rare but may be the most effective way of assessing risk. Mental health legislation can be used to admit for assessment, if necessary, but only if the risk to the patient's health and safety or that of others is felt to be seriously compromised and the patient refuses to be admitted willingly.
Abortion is rarely considered for the suicidal pregnant woman. However, if the mother's physical (and emotional) health is likely to be seriously affected by continuing the pregnancy, then it is legally possible for her to have an abortion in the UK.

## 2. Principles and purpose

The principles upon which decisions for an abortion are based are complex and controversial. Most relate to the tension between the perceived rights of the mother and the prenatal child. The mother may feel that her own rights will be undermined by giving birth to, and then looking after, a child she does not want. Equally, the prenatal child may have rights but is unable to express them.
Rights are generally based on the notion of inherent human dignity.

### Inherent Human dignity

Human beings are morally different from other living beings, such as nonhuman animals and plants, because they are considered to have full inherent dignity. Though this dignity is not easily defined, it is the basis of civilised and democratic society. Inherent human dignity cannot be lost, diminished or increased by physical and mental pleasure or suffering and remains with the individual through all circumstances.

### Human Personhood

Defining personhood is a controversial topic in philosophy being closely related to legal and political concepts of citizenship, equality, and liberty. In law, only a natural person or legal personality has rights, protections, privileges,

[15] Labour induced abortions after 18 weeks may be complicated by the occurrence of brief foetal survival, which may be legally characterized as live birth. For this reason, labour induced abortion is legally challenging in the U.S.

responsibilities, and legal liabilities.
There is no universal agreement about what personhood represents. Ideas vary according to culture, legislation, society and even the context in which it is being discussed.

From an historical perspective, the Roman philosopher, Boethius (477–524), defined a person "*as an individual substance of a rational nature*."[16] In the Middle Ages, the Italian Christian theologian, St Thomas Aquinas (1225 – 1274), then developed this definition by arguing that, since human beings are separate from one another, this makes them individuals. In addition, he stated that they are rational in that they "*have control over their own actions and are not only acted upon as are all other beings, but act of their own initiative*."[17] As a result, Aquinas argued that an entity becomes a person when the rational form is present. For him, this also included individuals who are not self aware.

The English philosopher John Locke (1632–1704) offered an alternative definition of a person as "*a thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing in different times and places*".[18]
This would mean, however, that not all human beings have personhood since some are not rational or even self-aware. From this perspective, personhood is dependent on a series of acquired characteristics or abilities, which human beings may hold in varying degrees.

A more inclusive perspective of a person, therefore, can be defined as any living being with full inherent dignity which is independent of age, size, stage of development, sentience[19], abilities or condition of dependency.

To date, there is no agreed point at which an unborn child becomes a person. Some argue that personhood begins at birth when the child is physically separated from his or her mother. Others argue that the status of moral personhood exists from the stage of conception when the embryo begins its existence.

**Human Rights**

Human rights are commonly understood as inalienable and fundamental rights to which an individual is inherently entitled simply because he or she is a person and which are inherent in all human beings regardless of their nation, location, language, religion, ethnic origin or any other status.

## 3. History

Abortifacients are known to have been used in China as long ago as in 3000 BC and ancient Egyptians are reported to have used herbs to induce intentional miscarriage as early as 1500 BC. Abortions were also frequently carried out in ancient Greece and Rome even though the Hippocratic Oath, which was written for physicians in the fourth or fifth century BC, indicates: "*I will not give to a woman a pessary to cause abortion*."

Large scale abortions only began in the Soviet Union in the 1920's. This unprecedented step was followed by the legalisation of abortion in Scandinavia in the 30's, Asia in the 40's, Western Europe in the 60's, and the United States in the 70's.

For centuries, British law fully and unconditionally protected the unborn child through Common Law from the stage of 'quickening' (at the latest), when the mother first felt her unborn child move.
Eventually, and because of improving medical knowledge about the origins of human life, the *Malicious Shooting or Stabbing Act 1803* was enacted for England and Wales which stated that it was an offence for any person to perform or attempt to perform a post-quickening abortion. The punishment was the death penalty or 'transportation' for 14 years though the *Offences against the Person Act 1837* eventually revoked the death penalty for post-quickening abortions.

Legislation was then updated with the *Offences Against the Person Act 1861* (for England, Wales and Northern

[16] Boethius. De duabis naturis 3; PL 64,1343

[17] Aquinas. Summa Theol. I. 29,1

[18] Locke, J. 1690 [1975]. *An essay concerning human understanding*. Oxford, UK: Clarendon Press, p. 335.

[19] Sentience is the capacity to feel, perceive, or experience subjectively. It is believed to appear 18 to 25 weeks after conception of the human foetus though some studies have indicated that this could be even earlier.
When is the Capacity for Sentience Acquired During Human Fetal Development? *Journal of Maternal-Fetal and Neonatal Medicine,* 1992, Vol. 1, No. 3 , Pages 153-165; Belle M, et al. Tridimensional Visualization and Analysis of Early Human Development. Cell. 2017 Mar 23;169(1):161-173.

Ireland but not Scotland) to make it clear, amongst other things, that the crime extended to the pregnant woman who attempted to abort her own foetus.
However, with the *Infant Life (Preservation) Act 1929*, English and Welsh law was amended so that abortion was no longer considered a crime if it was "*done in good faith for the purpose only of preserving the life of the mother*."

In 1938, the English gynaecologist, Dr. Alec Bourne (1886 – 1974), performed an abortion on a 14-year-old girl who claimed to have been raped by British soldiers. As a result, he was charged with performing an illegal abortion but then acquitted on the grounds that he had acted on the basis of the mental state of the girl.
During the Bourne case the judge also ruled that earlier legislation implicitly contained an exception permitting abortion to save the woman's life, which the judge interpreted broadly to mean not only saving her from death but also preventing her from becoming 'a physical or mental wreck'. However, despite these explicit and implicit exceptions for therapeutic abortions, the law did not permit the destruction of the unborn child for any other reasons.
As a result of the Bourne case, more abortions were carried out in the UK when the woman's physical or mental health was thought to be in danger. But Dr. Bourne later became so concerned about the results of his action that he became a founding member of the Society for the Protection of Unborn Children (SPUC).
The 1930s also saw the formation of the Abortion Law Reform Association (ALRA) which campaigned to permit abortion on much wider, including eugenic, grounds.

Eventually, in 1966, the Scottish politician, Mr. David Steel MP, introduced a bill into parliament which later became the *Abortion Act 1967* (for England, Wales and Scotland but not Northern Ireland) which indicated that when the conditions laid down by this Act were satisfied, no offence was committed under the *1861 Act*.

Hard facts about abortion in Britain before 1967 are few. Estimates of the annual numbers varied from 14,600 (from the Royal College of Obstetricians and Gynaecologists) to 100,000 (from the UK Home Office). In 1969, the first full year of the new law, 49,829 abortions were performed on residents of England and Wales.
For the 12 years before the *1967 Act*, legal and illegal abortions were the leading cause of maternal mortality in England and Wales. The first enquiry into maternal deaths in 1952–54 reported 153 deaths from abortion, which was "*procured ... by the woman herself in 58 instances*." The reasons for the death of the women, when abortions were done illegally, was sepsis in 50% of cases and air embolus in 25% of cases resulting from "*the injection under pressure of some fluid, nearly always soapy water, into the cervix or into the vagina*."
Other sources indicate that in the years 1952-4 the actual number of women dying from illegal abortions was about 40 per year. In the three years after legalisation (1967-1969) this had fallen to less than 30 deaths per year. But fatalities from illegal abortions did not disappear until 1982.[20,21]

In 1987, the English politician, Mr. David Alton MP, presented the *Abortion (Amendment) Bill* to try to limit abortions to 18 weeks since the *1967 Act* allowed abortions to take place up to the stage when foetuses could be born alive which was believed to be around 28 weeks.[22] This Bill, however, failed and was eventually replaced by the *Human Fertilisation and Embryology Act 1990* which made 24 weeks the upper time limit for abortions – except for disabled foetuses, who could now be aborted up to birth.

In the end, abortion became virtually on demand until 24 weeks in the UK (which is the highest limit anywhere in Europe). Moreover, the requirement that two forms be completed by separate physicians before the procedure is performed is often seen as a formality.

Interestingly, some discussions remain about the legality of abortion procedures in the UK. This is because some research suggests that abortions may expose women to the risk of post abortion trauma which means there may be a greater risk in having the procedure, in some cases, than continuing with the pregnancy.[23]

Induced abortion is, currently, the single most performed clinical intervention in the world. It is estimated that 53 million abortions take place every year, 20 million of which are performed under unsafe and illegal conditions, resulting in the deaths of approximately 100,000 women each year.[24]

---

[20] Peter Saunders, How many women really died from abortions prior to the Abortion Act? CMF Blog, 2012, http://www.cmfblog.org.uk/2012/06/17/how-many-women-really-died-from-abortions-prior-to-the-abortion-act/

[21] Royal College of Obstetricians and Gynaecologists Opinion: The Abortion Act, 40 years on, 2008, https://www.rcog.org.uk/en/news/campaigns-and-opinions/human-fertilisation-and-embryology-bill/rcog-opinion-the-abortion-act-40-years-on/

[22] For political purposes, however, it was acknowledged that some categories, such as disabled children and those conceived after incest and rape, could be excluded from this time limit.

[23] Jane Dreaper, Abortion 'does not raise' mental health risk, BBC News, 9 December 2011, https://www.bbc.co.uk/news/health-16094906

## 4. Religious Positions on Abortion

Generally, the earliest Christian writings condemn abortions. In the Middle Ages, however, St. Thomas Aquinas explicitly held that human embryos did not possess a spiritual soul and were only 'formed', as persons, 40 days after fertilisation in the case of male or 90 days in the case of female foetuses. But his stance was more influenced by Greek philosophy than by early Christian theology which contained no reference to the distinction between a 'formed' and 'unformed' embryo.[25,26] Moreover, throughout Christian history, it was always held that the early human embryo should never be deliberately attacked even in extreme circumstances.

In 1869, Pope Pius IX abolished the difference in legal penalties between early and late abortions after it was demonstrated that no specific distinction between 'formed' and 'unformed' embryos could be observed in biology. This was expressed, for example, in 1995 when Pope John Paul II indicated in *Evangelium Vitae* that: "*The human being is to be respected and treated as a person from the moment of conception; and therefore from that same moment his rights as a person must be recognized, among which in the first place is the inviolable right of every innocent human being to life*".[27]

The Roman Catholic Church now only accepts instances of double effect, of which the two most frequently cited are the removal of a cancerous uterus containing an embryo/foetus from a pregnant woman, and the removal of an inflamed fallopian tube resulting from an ectopic pregnancy (where the embryo has implanted in a fallopian tube). But in 1989, the Holy See ruled that it was not morally safe to perform any operation which directly destroyed the foetus, even though without it, both mother and child would die.[28,29]

According to canon 1398, a person who "procures a completed abortion" incurs automatic excommunication. Among other things, this must be understood in light of subsequent Magisterial teaching as referring to a "*direct abortion, i.e., every act tending directly to destroy human life in the womb 'whether such destruction is intended as an end or only as a means to an end*'" (Pope John Paul II's encyclical Evangelium Vitae, 62).
This position has caused problems when an abortion was seen as necessary to save the life of the mother.
One such case was that of US Sister of Mercy Margaret McBride who agreed to a termination, in 2009, on a 27-year-old woman who was eleven weeks pregnant and suffering from pulmonary hypertension. Her doctors at the Catholic St. Joseph's Hospital and Medical Center stated that the woman's chance of dying was "close to 100 percent" if the pregnancy was allowed to continue. The abortion took place and the mother survived.
After the abortion came to the attention of relevant Bishop, Sister McBride was informed that she had incurred an automatic excommunication and was subsequently reassigned from her post at the hospital. However, in 2011, her excommunicated was revoked.[30]

With respect to Protestant churches, the example of the Church of Scotland can be considered since it is one of a very few Reformed and Presbyterian national churches in the world. It is ruled by its General Assembly, the sovereign and highest court of the Church of Scotland, which (since 1560) has usually met for one week every year to guide and govern its members.
When the General Assembly met in 1966 it agreed to a 'Deliverance' on the topic of abortion which remains valid to this day. This states that abortion is a grave offence and can only be accepted when "*the continuance of the*

---

[24] Rebecca Gomperts, 'Women on Waves' sails to Ireland, Choices, Autumn 2001.

[25] David Jones, et al., A Theologian's Brief: On the Place of the Human Embryo Within the Christian Tradition and the Theological Principles for Evaluating Its Moral Status, Ethics & Medicine, Vol. 17:3, 2001.

[26] A similar stance was taken in a 17th century Roman Catholic book of penance ('Penitentials'), whereby the offence of abortion was graded according to whether the foetus was 'formed' or 'unformed'. The same distinction was invoked in Roman Catholic canon law which, from 1591 to 1869, only imposed excommunication for the abortion of a 'formed' foetus.

[27] John Paul II, *Evangelium Vitae*, 25 March 1995, paragraph 60.

[28] Condemnation of abortion in the present century appear in the 1930 encyclical on marriage, *Casti connubii*, which rejects the idea that the "innocent" unborn can in any way be considered an unjust aggressor; Vatican II's *Gaudium Spes* (1965), which refers to abortion as an "unspeakable crime"; and the 1974 Vatican *Declaration on Abortion*, which calls abortion "a question of human life, a primordial value, which must be protected and promoted".

[29] Some scholars have questioned whether craniotomy would be acceptable for the Catholic Church since the principle of double effect would not apply in this case. However, developments in medicine have now sidestepped the need for such procedures.
In many ways, the situation where the lives of both the mother and foetus are endangered, if nothing is done, is similar to the situation of conjoined twins who would both die if one was not killed in the separation process. See: http://www.newsweek.com/conjoined-twins-ethical-dilemma-separation-surgery-death-693562
For a discussion relating to ectopic pregnancies and the Catholic Church, see: See: http://www.bioethicsobservatory.org/2018/03/ectopic-pregnancy-ethical-dilema/24862

[30] See: https://en.wikipedia.org/wiki/Excommunication_of_Margaret_McBride

*pregnancy would involve a serious risk to the life or grave injury to the health, whether physical or mental, of the pregnant woman*".

Similarly, in the Eastern Orthodox Church, a human being is recognised as being made in the image of God from the moment of conception and should never be intentionally aborted.

Although there are different opinions among Islamic scholars about when life begins and when abortion is permissible, most agree that the termination of a pregnancy after 120 days (17 weeks) – the point at which, in Islam, a fetus is thought to become a living soul – is not acceptable. Several Islamic scholars contend that in cases prior to four months of gestation, abortion should only be permissible when the mother's life is in danger or in cases of rape.

In Judaism, orthodox Jews generally oppose abortion following the 40th day after conception though exceptions exist based on health conditions. Though some rulings seem to conflict, Reform and conservative Jews, on the other hand, tend to allow greater freedom for abortion.

## 5. United Kingdom of Great Britain and Northern Ireland – Legislation and Case Law

### 5.1. Developments

In UK law, an embryo/foetus has protected interests, although these are not equivalent to those of a person and the mother can overrule these rights through the *UK Abortion Act 1967*.[31] But as the embryo/foetus is not considered to have the same legal rights as a person who has been born, it does not have a direct right to life in law. In other words, the embryo/foetus is not a person in the eyes of the law until it is born alive.
Thus, in the UK, it is impossible to have a Court Case on behalf of an embryo/foetus though it can inherit a title of nobility such as a Dukedom. In 1979, it was also shown that a father is not able to legally stop his wife having an abortion.[32]

In 1997, the UK House of Lords heard the case of a man who had stabbed a pregnant woman injuring both her and her foetus. The child was born but died shortly afterwards resulting in the man being charged with murder. But because the House of Lords stated that only a human person could be murdered, if a foetus was born and subsequently died this could not be considered as murder. In other words, the foetus does not (for the purposes of the law of homicide or violent crime) have any relevant type of personality.
It was also indicated that the mother and the foetus were not a single organism with two aspects but two distinct and unique organisms living symbiotically. The fact that it is not a 'person' does not make it an adjunct of the mother. This means that the foetus does have some protected interests but these are different to those of the mother's arm or leg.[33]

In the UK, attempts were made by a local authority to make a foetus a ward of court because the mother was addicted to drugs and mentally unstable. But again, the UK Court of Appeal rejected the application since the foetus has no status as a legal person or rights under the law until it is born and separate from its mother.[34]

Concerning the possibility of treating a foetus against the mother's will, the Court of Appeal in England agreed, in 1998, that the mother's will prevails and that she has a right to refuse a Caesarean Section even if it means the death of a (wanted) child. Yet in this case, the court observed that: '*Whatever else it may be, a 36-week foetus is not nothing; if viable, it is not lifeless and it is certainly human*'. That was reiterated in the court's conclusion:

*"In our judgment while pregnancy increases the personal responsibilities of a woman it does not diminish her entitlement to decide whether or not to undergo medical treatment. Although human, and protected by the law in a number of different ways ... an unborn child is not a separate person from its mother. Its need for medical treatment does not prevail over her rights. She is entitled not to be forced to submit to an invasion of her body against her will, whether her own life or that of her unborn child depends on it. Her right is not reduced or diminished merely because her decision to exercise it may appear morally repugnant. The declaration in this case involved the removal of the baby from within the body of her mother under physical compulsion. Unless lawfully justified, this*

[31] S v. St George's NHS Trust *[1998] 3 All ER 673*: The right of a competent pregnant woman to refuse treatment even if that refusal may result in harm to her or her unborn child.

[32] Paton v. BPAS 1979.

[33] Case: A-G Reference (No. 3 of 1994) [1997]; https://www.independent.co.uk/voices/premature-babys-death-not-murder-but-manslaughter-1233310.html

[34] Re Foetus(In Utero) (1988).

*constituted an infringement of the mother's autonomy. Of themselves, the perceived needs of the foetus did not provide the necessary justification."*[35]

More than 200,000 abortions are performed annually in the UK. In 2014, it was indicated that 66,000 (37% of the total) of these were repeat abortions. One out of three women in England has had an abortion and approximately one in four pregnancies in England end in an abortion.[36] Moreover, abortion rates in England, Wales and Scotland continue to be considerably higher than the Western European average.

The reasons cited when requesting an abortion are many and varied, and the motivator may be the mother, the father, or even their extended families. In general, they fall into the following categories:

*Health risk to the mother*: Including conditions such as heart disease, high blood pressure, kidney problems, autoimmune disorders, sexually transmitted diseases, diabetes, cancer and infections.

*Personal circumstances*: Including the mother being too young to properly look after the child. The pregnancy may also be the result of rape or incest or the mother might suffer social stigma related to the pregnancy. Approximately 98% of abortions in the UK are performed because of a mother's personal reasons and choice.

*Lifestyle*: Including alcohol abuse, drug abuse, eating disorders, which can have a detrimental effect on the child.

*The possibility of having a disabled child*: Screening is offered to expectant mothers and, if a medical condition is detected, this can lead some women to request an abortion. Around 1% of abortions are related to disability.

With the *Abortion Act 1967* a liberalisation of abortions took take place across England, Wales and Scotland, but the legal and ethical questions have rolled on and will continue to do so.
While discussions around abortion often dissolve into the vitriolic, the desire to preserve life and to alleviate human suffering is generally evident in the convictions of many who contributed to the discussion.
Thus, with the aim of achieving the best possible outcome for individuals and society, extracting the good and filtering off the more negative aspects of this conversation will remain important.

## ***5.2*** **Present Situation**

### Offences Against the Person Act 1861
**Only applies to England, Wales and Northern Ireland (but not to Scotland)**

The *Offences Against the Person Act 1861* made it a crime to intentionally procure a miscarriage, or to provide substances for the purposes of abortion. In this regard, it is worth noting how the special status of the embryo relates, in some way, to personhood given the name of the *1861 Act* itself.
Section 58 (Administering drugs or using instruments to procure abortion) states that:

*"Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony".*

Section 59 (Procuring drugs ... to cause abortion) also indicates that:

"*Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour*".

Even though this Act only applied to England, Wales and Northern Ireland, someone who induced a miscarriage could (again depending on the circumstances) still be charged in Scotland with the Common Law crime of procuring an abortion.[37]

[35] St. George's Healthcare NHS Trust v. S [1998] 3 All ER 673, (1998) 2 CHRLD 323

[36] Birth statistics as published annually by the Office for National Statistics (ONS). Abortion statistics published annually by ONS and from 2002 by the Department of Health for England and Wales. For the figures for 2008, see: http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsStatistics/DH_099285.

[37] A Alison, *Principles of the Criminal Law of Scotland* (1832) 628 and J H A Macdonald, *A Practical Treatise on the Criminal Law of*

**Infant Life (Preservation) Act 1929**
**Only applies to England and Wales (but not to Scotland and Northern Ireland)**

In 1929, because of doubts about whether the law protected the gestating child, the British Parliament enacted the *Infant Life (Preservation) Act 1929* which created the offence of 'child destruction'. This ensured the protection of unborn children who were viable outside the womb (more than 28 weeks) and did so whether the child was in the process of delivery or not. Article 1 of this Act states that:

"*[A]ny person 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, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to penal servitude for life:*
*Provided 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.*
*For the purposes of this Act, evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be prima facie proof that she was at that time pregnant of a child capable of being born alive*."

In 1949, the Northern Irish legislature passed a motion which reflects the principle of the 1929 Act – that a child 'capable of being born alive' should not be aborted – 28 weeks being given as a guideline.
But in Scotland an abortion could still legally be performed at any stage of pregnancy.

**Criminal Justice Act (Northern Ireland) 1945**

Section 25 of the *Criminal Justice Act (Northern Ireland) 1945* states that performing an abortion in Northern Ireland can be punishable with a life sentence unless it is to save the mother's life.

**Abortion Act 1967**
**Only applies to England, Wales and Scotland (but not to Northern Ireland)**

Contrary to popular belief, the *Abortion Act 1967* did not legalise abortion, it simply provided strict criteria under which the procedure would not be an offence. For England, Wales and Scotland, Section 1(1) reads:

*"Subject to the provisions of this section, 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 of the pregnancy 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*

*(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."*

This means that the law gives the rights and responsibility for decision making to medical practitioners and not women. Much of the law is open to interpretation and asks doctors to make a judgement based on weighing up risks rather than specifying particular circumstances in which abortion would be legal.[38]
When deciding whether or not the continuance of a pregnancy would involve risk of injury to the physical or mental health of the woman, for the purposes of (A) and (B) above, physicians may take into account the pregnant woman's actual or reasonably foreseeable environment.

In England and Wales, the *Offences Against the Person Act 1861* and the *Infant Life (Preservation) Act 1929* were

---

*Scotland,* 5th edn, by J Walker and D J Stevenson (1948) 114.

[38] http://www.efc.org.uk/young_people/facts_about_abortion/uk_abortion_law.html

not repealed by the *Abortion Act 1967* which means it must operate within this historic criminal framework to permit the destruction of the embryo/foetus. Moreover, since an abortion remains *prima facie* a crime and only allowed in certain circumstances, the law must have some special concern for prenatal life.

Though no specific time limit was introduced by the *1967 Act*, it referred to the *Infant Life (Preservation) Act 1929* which states that, in England and Wales, no unborn child could be aborted who was capable of being born alive (more than 28 weeks). This also meant that an abortion could continue to be legally performed at any stage of pregnancy in Scotland (in a similar way to what happened before 1967 in Scots common law).

The *Abortion Act 1967* does not apply to Northern Ireland. Women who self-induce an abortion (or individuals who help a woman to do so) would, normally, be prosecuted in Northern Ireland under the *Offences Against the Persons Act 1861* where they can face a maximum sentence of life in prison.
However, an exception exists when it is necessary to preserve the life of the mother, or where there is a risk of real and serious adverse effect on her physical or mental health, which is either long term or permanent.

**Human Embryology and Human Fertilisation Act of 1990**
**(Only applies to England, Wales and Scotland (but not to Northern Ireland for abortion)**

The *Human Embryology and Human Fertilisation Act of 1990* was enacted primarily to control new infertility treatments and to monitor experiments on embryos. But with this legislation, the concept of viability was reduced from 28 to 24 weeks for England and Wales and created a completely new limit of 24 weeks for Scotland, which was deemed to be the point at which a foetus was viable outside the womb.[39]
The *1990 Act* also liberalised the abortion law by allowing disabled babies to be aborted up until birth. This means that physicians can even cite disabilities such as cleft palate or a malformed hand as 'serious abnormalities' deserving a late abortion.[40]

**Proposed changes to abortion legislation**

*Reducing the abortion limit*

In 2008, the UK parliament debated whether the time limit for an abortion should be reduced from 24 to either 22 or 20 weeks for England, Wales and Scotland. But after a free vote, this was opposed by 304 votes to 233.[41]

*Decriminalising abortion in the UK*

Within the current parameters, women and healthcare providers in England, Wales and Northern Ireland can still be prosecuted under the *1861 Act* if any of the conditions in the *Abortion Act 1967* have not been met. In Scotland, on the other hand, such prosecutions would only take place under Common Law.

A number of discussions have been initiated about the possibility of decriminalising abortion in the UK. But this could only happen in England and Wales if sections 58 and 59 of the *Offences Against the Person Act 1861* were repealed. This would render the *Abortion Act 1967*, with all its provisions including its present 24 weeks gestation limit, null and void. The fall-back position for England Wales would then be the *Infant Life (Preservation) Act 1929*, which makes it illegal to destroy a child 'capable of being born alive' defined as being more than 28 weeks.
If the *Infant Life (Preservation) Act 1929* were also to be repealed it would make abortion legal for any and every reason right up to birth.
In this regard, the British Medical Association indicated, in 2017, that it would now back the decriminalisation of abortion.[42]

In Scotland, by contrast, since procuring abortion is a Common Law offence unless there is a lack of wicked intent, complete decriminalisation would require new legislation. 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.

[39] It is interesting that the stage of 'viability outside the womb' was chosen as a criteria since this is variable depending on geographical location and, indeed, on scientific developments. See also: http://www.legislation.gov.uk/ukpga/1990/37/contents

[40]Surgical Interventions for Congenital Anomalies, Farmer D, Sitkin N, Lofberg K, Donkor P, Ozgediz D. Essential Surgery: Disease Control Priorities, Third Edition (Volume 1). Washington (DC): The International Bank for Reconstruction and Development / The World Bank; 2015 Apr. Chapter 8.

[41]"MPs back 24-week abortion limit". *BBC News*. 2008-05-20. Archived from the original on 8 February 2011. Retrieved 2011-02-11.

[42] http://www.bbc.co.uk/news/health-40418986

Thus, whereas decriminalisation in England and Wales would involve a process of repeal, complete decriminalisation in Scotland would mean enacting new legislation to clarify that abortion was not a crime.[43]

*Self administrating an abortion*

Medical abortion involves taking two different medicines. The first tablet, called Mifepristone, blocks the action of the hormone progesterone, which is needed to maintain the pregnancy. The second tablet, called Misoprostol, can be given on the same day, or 24, 48 or 72 hours apart.
In the USA, France and Sweden, routine abortifacient medication, such as Mifepristone and Misoprostol, can be administered by a pharmacy and taken at home. However, this avenue is seemingly blocked under the terms of the *Abortion Act 1967* because the pill detaches the embryo from the womb lining and Section 5(2) of this Act makes clear that an abortion *"done with intent to procure woman's miscarriage is unlawfully done unless authorised by section 1 of this Act".*

This means that for medical abortions in the UK, women must take abortifacient medication[44] in a health facility rather than in their own homes. For example, women must attend multiple appointments so that individual doses of abortifacients can be administered. It should be noted, however, that the UK does allow Mifepristone and Misoprostol to be taken at home but only following miscarriages. As a result, a discussion is taking place whether a distinction should exist between the treatment of women with pregnancies that have ended through miscarriage or abortion.[45]
In it also worth noting that Scotland's Chief Medical Officer has written to all health boards, in October 2017, indicating that the drug Misoprostol can now be taken by women outside of a clinical setting.[46]

## 6. Scotland – Legislation and Case Law

### 6.1 Developments

In Scotland, abortion was viewed, before the *Abortion Act 1967*, as a Common Law offence without strictly defined limits. In other words, it was settled law that any improper act *"by the mother or any other person calculated to destroy the fetus or cause its premature expulsion from the body of the mother constitutes a common law crime, that of abortion".*[47]
The only exception to this was medical necessity, where the need to terminate the pregnancy was in the interests of the health of the mother. In these circumstances a physician, using his or her own clinical judgment, could undertake a legal abortion.
This means that it was possible to interpret the law more liberally than in England. Abortions were illegal in Scotland but could be carried out if certain medical criteria existed and when physicians believed they were acting in good faith and, for the most part, when there was a serious risk to the life of the mother. This remained the general consensus of medical practitioners in Scotland at the time.

Abortion was only a crime in Scotland if criminal intent could be demonstrated with the burden of proof lying with the legal prosecution. Additionally, in Scots Law, the victim of the crime of abortion or attempted abortion was the potential child. It is obvious, therefore, that in Scots Law the unborn child has always been given a status of personhood, with the right to life.[48]

It was relatively rare for charges to be brought because of the shared interest of all involved of preventing this from happening. In addition, under Scots law, it was recognised that an abortion may be necessary to protect the life or health of the mother.[49]

---

[43] Mary Neal, Devolving Abortion Law, Edinburgh Law Review, 2016, Volume 20 Issue 3, Page 399-404, (https://doi.org/10.3366/elr.2016.0375)

[44] Abortifacient medication is classified as a substance that induces abortion.

[45] See for example: https://www.bbc.co.uk/news/health-45007707

[46] See: http://www.sehd.scot.nhs.uk/cmo/CMO(2017)14.pdf. Though this has been challenged in 2018, the situation has not changed since 2017. See: http://www.thenational.scot/news/16422186.display/

[47] Butterworths (1987)*The Laws of Scotland: Stair Memorial Encyclopaedia*

[48] Ought Scots law recognise the distinct legal personality of a foetus? An international, interdisciplinary conference of the Centre for Responsibilities, Rights and the Law McGroarty, J.P. (2008)

[49] See Macdonald, Criminal Law of Scotland, 5th Ed., Minnie Graham 1897, 2 Adam 412c.p. 415.

Most criminal prosecutions were brought against those who were not qualified physicians and/or those who performed the procedures for financial gain. There were only 20 such cases in Scotland in the five years leading up to the *Abortion Act 1967*. Although figures on backstreet abortions vary largely across different sources, the practice was something all involved wanted to prevent.

Two key figures illuminate the medical, political and social context in which the *1967 Act* was brought into being in Scotland. These were Aberdeen-based gynaecologist Professor Dr. Sir Dugald Baird (1899 – 1986) and Professor of Midwifery at Glasgow University, Dr. Ian Donald (1910 – 1987), who was also a practising Protestant.
In this period, both Aberdeen and Glasgow were in the grips of widespread unemployment and poverty as well as inadequate housing. However, despite their economically similar contexts, on the issue of abortion they differed greatly.
Because Donald was based in Glasgow, he worked in the Scottish city with the strongest anti-abortion sentiment. He was also the inventor of the prenatal ultrasound and used this newfound technology as a means to educate women on the development of their foetuses while trying to encourage them not to choose an abortion. In fact, Donald took part in establishing the Society for the Protection of the Unborn Child. Moreover, his views reflected the conviction of many of the leading obstetricians in Glasgow at the time.
Aberdeen, on the other hand, appeared to have a far more liberal environment with Baird becoming increasingly vocal on abortion. He presented abortion as part of the 'fifth freedom'; in other words, 'the freedom from the tyranny of excessive fertility'. He had a meaningful influence on Mr. David Steel MP and was central to the formation of the Abortion Legislation Reform Association.[50]
The disparity between the two cities was significant. Donald claimed, in 1966, that an abortion was carried out in just 1 in every 3750 pregnancies in Glasgow, while in Aberdeen it was 1 in every 50.

### 6.2. Present Situation

In 1991, medical methods of termination were licensed for use in Scotland for abortion under 10 weeks gestation. These used drugs such as Mifepristone with or without the addition of prostaglandin. The *Abortion (Scotland) Regulations 1991* reflect this change in abortion provision and also placed an upper limit of 24 weeks on abortions for most reasons.[51]
Whereas, previously in Scotland, physicians were allowed an overall authority to make use of their clinical judgement with regard to abortion, in 2013, it was acknowledged that there was an absence of suitable guidelines for this practice or to accurately assess possible risks to the physical and mental health of the woman.
In addition, although there was no legal requirement for one of the authorising doctors to have seen the pregnant woman before the termination, the Scottish Government stated that they would prefer this to happen.

The number of terminations of pregnancy in Scotland in 2016 was 12,063 (33/day); down from 12,134 in 2015, remaining below the 2008 peak of 13,908 terminations.
Although the number of terminations performed under Ground D in the *Abortion Act 1967* (there is substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped) accounted for less than 2% of all terminations performed in Scotland, this has steadily increased from 136 in 2011 to a high of 214 in 2016.[52]
At present, 80% of terminations in Scotland take place before 12 weeks of gestation and less than 0.1% of all abortions take place after 24 weeks, mainly because of serious foetal anomaly which could not be confirmed at an earlier stage.

In addition, research indicates that the decisions of young women whether or not to have an abortion are often dependent on the economic and social contexts of their lives.[53] Deprived areas have both higher rates of pregnancy under aged 18 and lower rates of abortion. Moreover, an audit of women seeking abortions from 16 weeks onwards in Scotland in 2013-14, indicated that 87% of women were from deprived areas.[54]
These statistics may indicate that women in lower income groups may take longer to both confirm a suspected pregnancy and decide whether to have an abortion than women in less deprived areas. This may happen because they may be less aware of their options and entitlements as well as feeling less confident in requesting them.
In this regard, the perception of opportunities available to women may shape their views about abortion. For

[50] David, G & Davidson R 2006, ''A Fifth Freedom' or 'Hideous, Atheistic Expediency'? *The Medical Profession and Abortion Law* Reform in Scotland, c. 1960 – 1975' Medical History, Vol 50, no. 1, pp. 29 – 48.

[51]The Abortion (Scotland) Regulations 1991, No. 460 (S.41); http://www.isdscotland.org/Health-Topics/Sexual-Health/Abortions/

[52] http://www.isdscotland.org/Health-Topics/Sexual-Health/Publications/2017-05-30/2017-05-30-Terminations-2016-Report.pdf

[53] Joseph Rowntree Foundation (2004) *A Matter of Choice? Explaining national variation in teenage abortion and motherhood*

[54] Cameron et al. (2015) *Characteristics of women who present for abortion towards the end of the mid-trimester in Scotland: national audit 2013-14*

example, women whose background and life experiences give them a strong belief that they can have a career were generally those who chose to have an abortion rather than continue with the pregnancy.

***Late abortions***

Scotland has fewer late abortions than England. Although the legal gestational limit for most abortions is 24 weeks, abortions for non-medical reasons are not normally provided after 18-20 weeks in Scotland. Women who request such late abortions must usually travel to England if they wish to proceed with the termination. In 2013, for example, 182 women travelled from Scotland to England in order to access a late abortion.[55]
It is worth noting, however, that centres do exist in Scotland which perform late abortions in the case of foetal anomaly. Thus, women seeking late abortions report that this disparity creates an environment of moral judgement, discrimination and stigmatisation.[56]
Published research indicates that "*every tertiary hospital maternity service in Scotland currently possesses the necessary nursing and medical skills in their existing workforce to provide a late medical abortion service*".[57]

It remains unclear why Scotland's delivery of abortion services is more restrictive than other areas of Britain, with academic literature suggesting that beliefs relating to the moral status of the prenatal child, limited resources and 'institutional inertia' being significant factors.[58]
In addition, a survey of practitioners at a conference for abortion care providers in Scotland showed that only a quarter of participants were prepared to administer late abortion procedures, with lack of expertise, lack of medical centres, lack of support from senior hospital management and nurses' unwillingness to participate in late abortions all cited as reasons.[59]

Furthermore, whilst doctors in Scotland agree that a woman's autonomy in decision making concerning an abortion exists, and despite the fact that 80% of abortion providers support the expansion of provision up to the legal threshold of 24 weeks, many physicians still do not want to take part in these procedures. [60]

## 7. Legislation and Case Law – International

### 7.1. International

### United Nations:

***International Covenant on Civil and Political Rights (Article 7)***
The UN Human Rights Committee established that laws restricting abortions for medical reasons ('therapeutic abortion') constitute a violation of the right to be free from torture or cruel, inhuman or degrading treatment in the *International Covenant on Civil and Political Rights*.

***UN Convention on the Rights of the Child 1990***
This states in the Preamble that "*the child ... needs ... appropriate legal protection before as well as after birth*". But this is ambiguous especially if the legal protection of the foetus conflicts with the rights of a pregnant girl under the same Convention. Indeed, under this Convention, the rights of a pregnant girl are generally interpreted as superseding those of her foetus.[61]

It is also worth noting that the expression '*a woman's health and reproductive rights*' in the context of international documents often includes the right to legal and safe abortion and the right to birth control.

---

[55] Cameron et al. (2015) *Characteristics of women who present for abortion towards the end of the mid-trimester in Scotland: national audit 2013-14; Cochrane and Cameron (2013) Attitudes of Scottish abortion care providers towards provision of abortion after 16 weeks' gestation within Scotland*

[56] Cameron et al. (2015) *Characteristics of women who present for abortion towards the end of the mid-trimester in Scotland: national audit 2013-14*

[57] Cochrane and Cameron (2013) *Attitudes of Scottish abortion care providers towards provision of abortion after 16 weeks' gestation within Scotland*

[58] Pearson (2015) *Abortion in Scotland (Dissertation MSc in Equality and Human Rights, University of Glasgow)*

[59] Cochrane and Cameron (2013) *Attitudes of Scottish abortion care providers towards provision of abortion after 16 weeks' gestation within Scotland*

[60] Cameron et al. (2015) *Characteristics of women who present for abortion towards the end of the mid-trimester in Scotland: national audit 2013-14*

[61] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en

**Council of Europe:**

***Council of Europe Parliamentary Assembly***

The Council of Europe Parliamentary Assembly in its *Resolution 1607 (2008) Access to safe and legal abortion in Europe* states:[62]

*"The Parliamentary Assembly reaffirms that abortion can in no circumstances be regarded as a family planning method. Abortion must, as far as possible, be avoided. All possible means compatible with women's rights must be used to reduce the number of both unwanted pregnancies and abortions.*

*The Assembly affirms the right of all human beings, in particular women, to respect for their physical integrity and to freedom to control their own bodies. In this context, the ultimate decision on whether or not to have an abortion should be a matter for the woman concerned, who should have the means of exercising this right in an effective way.*

*The Assembly invites the member states of the Council of Europe to: allow women freedom of choice and offer the conditions for a free and enlightened choice without specifically promoting abortion."*

***European Court of Human Rights***

The European Court of Human Rights gives human beings the right to life but refused to consider the right to life of the unborn. It reasoned, "*firstly, that the issue of such protection has not been resolved within the majority of the Contracting States themselves ... and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life*."[63]

The Court further noted that the life of the foetus was intimately connected with that of the mother and could be protected through her. In other words, under European law, the foetus is generally regarded as an *in utero* part of the mother and thus its rights are held by the mother.[64]

***Vo v. France[65]***

The European Court of Human Rights 2004 case *Vo v France* is important for raising the question whether an unborn child is considered to have a right to life. Relying on Article 2 of the *European Convention on Human Rights*, the applicant, Mrs. Vo, complained that the state had refused to classify the unintentional killing of her unborn child as involuntary homicide. She maintained that France had an obligation to pass legislation making such acts a criminal offence.
But the Grand Chamber of the Strasbourg court was of the opinion that, having regard to those considerations, it was neither desirable, nor even possible (as matters stood), to answer in the abstract the question whether the unborn child was a person for the purposes of Article 2 of the Convention.
The European Court of Human Rights then broke the issue into two components:

1. Does Article 2 apply to unborn children?
2. Does Article 2 require that criminal penalties must apply to unintentional homicides?

The court decided that the first of these questions could be sidestepped by means of the second question. It also agreed that the French government had not breached their duties under the Convention by not applying criminal penalties to the unintentional destruction of a foetus. The court then decided that the first question could thus be ignored, noting that the Convention and its subsequent jurisprudence had not "*ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child".*

[62]Council of Europe Parliamentary Assembly: Resolution 1607 (2008) Access to safe and legal abortion in Europe

[63] CASE OF VO v. FRANCE (Application no. 53924/00), Judgement, Strasbourg, 8 July 2004

[64] Asim Kurjak, Frank A. Chervenak, eds. (2006).*Textbook of Perinatal Medicine, Second Edition*. CRC Press. p. 218.

[65] CASE OF VO v. FRANCE (Application no. 53924/00), Judgement, Strasbourg, 8 July 2004

## 7.2. Other countries

### USA

In early colonial America, strict laws against sex out-with marriage meant that abortions were kept secret. In 1873 the Comstock laws were passed, making information on birth control, family planning and abortion illegal to possess or distribute, even by doctors to their patients. By 1900, abortion was illegal except if it was necessary to save the life of the mother.

In 1973, abortions became legal in USA as a result of the *Roe v Wade* case. In 1976, the USA passed the *Hyde Amendment* which prohibits any federal funds being used for abortion services with the exceptions of incest and rape. It also allowed individual states to pass similar prohibitions.

In 2010, the US House of Representatives and the US Senate voted to ban late 'partial birth' abortions, i.e. induced labour followed by the destruction of an infant.

### Republic of Ireland

Abortion is illegal in the Republic of Ireland where the unborn child is accorded personhood and the right to life though some limited abortions are allowed to save a mother's life.

However, a referendum in 2018 amended this position while permitting legislation to be prepared for the termination of pregnancies.

### France

Abortion became possible in France in 1975. The time limit is 15 weeks except when there is serious risk to life of the mother.

### Germany

In 1975, West Germany's Federal Constitutional Court interpreted the guarantee of dignity in the nation's Basic Law as imposing a duty to protect unborn life. At the same time, Germany's legislature enacted an uneasy compromise in 1976 which allowed women to make their own decisions about abortion in the first 12 weeks of pregnancy after participating in a counselling process designed to persuade them to carry the pregnancy to term. This was presented as a far more effective form of regulation in deterring abortion than a criminal ban while respecting both the high value of unborn life and the self-determination of the woman. The state thus tries to win the woman over as an ally in the protection of the unborn child while noting that criminal punishment may just push abortion practice underground.

After the 12 weeks, however, and in the case of conditions such as Down syndrome, abortions remain possible to term. Decisive in such cases is not the diagnosis itself but the woman's ability – or inability – to cope with the situation and the child.

In 2015, Germany had 135 abortions per 1000 live births as compared to 255 abortions per 1000 birth in the UK.

### Australia

In 2008, Australia's State of Victoria decriminalised abortion, making it legally accessible for the first 24 weeks of a pregnancy. The law in Australia now varies from state to state.

### China

Abortion in China is legal and is available on request for women. While gender selective abortion is illegal, it is the only explanation for the unequal population numbers of men and women in China.