The law on abortion—time to re-think?

Letitia Egan & **Nicholas Whitehorn** review the evidence for reforming the abortion law in the UK

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IN BRIEF

▶ The anachronistic wording of s 58 OAPA 1861 renders the mens rea dangerously unclear and, worse still, risks criminalising vulnerable women.

For most parts of the UK, the issue of abortion appears to be a settled debate, but in reality it is a topic which continues to stir passions. This is something Labour leadership hopeful Rebecca Long-Bailey discovered recently when drawing the opprobrium of her fellow candidates for stating that the legal limit for terminating disabled foetuses should be reduced (*https://bit.ly/39O54Aj*).

Significantly, in 2019 renewed political focus led to sections 58 and 59 of the Offences Against the Person Act 1861 being repealed in Northern Ireland, legalising abortion there for the first time. While abortion in prescribed circumstances has been legal in the rest of the UK since 1967, a recent case at first instance *R v W & Others*, unreported, November 2019, St Albans Crown Court, revealed that the s 58 offence continues to create issues here, too.

That its archaic language makes it difficult to interpret and apply may not distinguish it from many other areas of criminal law, but of more concern is that it risks criminalising pregnant women who are aptly described as victims.

As the government conducts a public consultation on what legislation should replace these provisions in NI, this article asks whether the law should be re-considered across the rest of the UK.

According to s6 of the Abortion Act 1967, the "law relating to abortion" can be found at sections 58 and 59 Offences Against the Person Act 1861. For the purposes of this article we shall focus on s 58, which reads as follows: '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 [an offence], and being convicted thereof shall be liable to [imprisonment] for life.'

So far, so simple — or so it might seem— however, the recent prosecution brought in *R v W & Others,* heard before Mr Justice Andrew Baker, revealed that this aged legislation may even lead to argument amongst practitioners about the very meaning of 'miscarriage'.

A further issue raised by *W* is that the offence does not contemplate a situation where a woman is subject to force or coercion which falls short of duress. Can it be right that a woman, under severe pressure to commit an act which endangers her health, will only be afforded a defence if she can demonstrate that she felt at risk of very serious personal injury or death if she refused? It is worth remembering that this is an offence carrying a maximum sentence of life imprisonment. This leaves pregnant women in emotionally abusive relationships vulnerable to criminalisation when they should be properly viewed as victims.

R v W & Others

R v W & Ors involved an allegation of conspiracy between four individuals: W (the unborn child's mother), L (the unborn child's father) and R and C, both friends of L. The facts were that at 26 weeks pregnant, two weeks over the legal abortion limit, W ingested a quantity of abortion tablets, misoprostol and mifepristone. The tablets, which had been sourced over the internet by R, were administered to W by L, who was instructed on their medical use and effects by C. The tablets, rather than terminating the foetus, stimulated early labour and the baby, 'M', was born, very premature but able to survive with medical intervention.

Initially W was treated by police as a victim, having been subjected to several months of pressure to undergo a termination by L. L had previously forced W to make a number of appointments at abortion clinics (which she would invariably cancel) and multiple social workers and medical professionals were able to testify at trial that she had confided in them about the pressure she was under. When W withdrew her statement against L, as many victims of domestic violence do, the police and CPS took the extremely unusual decision to prosecute her, too.

On the indictment, all four defendants faced counts under s 58, either conspiratorially or substantively. L, and L alone, additionally faced a charge of attempted child destruction. On the first day of trial R and L pleaded guilty to their roles in the s58 conspiracy and L to his part in the substantive offence. The trial continued against C, who was later convicted, and W was acquitted after a successful submission of No Case To Answer. That submission shall make up the bulk of this article's examination.

'Miscarriage' & mens rea

At trial there was a large body of evidence to suggest, even on the prosecution case, that W had always wanted baby M and had been emotionally manipulated into ingesting the tablets. An issue therefore arose as to the required mens rea: must W have intended that the ultimate result of her actions was the death of the foetus? In other words, what is meant by the term 'miscarriage'?

As part of the half-time submission defence counsel argued that 'miscarriage' and 'abortion' should be read interchangeably, as is suggested by s6 of the Abortion Act 1967. This must be right as one could not sensibly describe a 'miscarriage' where the foetus or baby survives. Intending an abortion or foetal death must therefore be a necessary element of the offence and, crucially, one which W could not be said to fulfil on the facts of this case.

In response, the Crown submitted that, following the case of *(Smeaton on behalf of SPUC) v Secretary of State for Health (Schering Health Care Ltd and FPA as interested parties)* [2002] EWHC 610 (Admin) 'miscarriage' means exactly that — the ending of the carriage of a pregnancy, not necessarily involving foetal death (in contrast with abortion which does necessitate foetal death).

The prosecution relied on the existence of the Child Destruction offence, which explicitly requires an intent to destroy the life of a child, as evidence that parliament did not require such an intention when drafting s58. Further, the prosecution argued, the word 'miscarriage' was deliberately chosen by Parliament in order to encompass those who merely wished to bring about early labour in the offence. W therefore need not have any intention to 'kill' the foetus and it would be sufficient for her to have taken the tablets in the knowledge that they might end the pregnancy, without any contemplation of how that would affect the health of the foetus. Somewhat uncomfortably this would mean that baby M could be viewed as the "result of a miscarriage" as could, posited Mr Justice Baker, babies born by Caesarean section or by any other way than naturally occurring labour.

Ultimately Mr Justice Baker rejected the Crown's contention that a 'miscarriage' can mean anything but foetal death "the dictionary definition supports the notion that a live birth, even if very premature, is the antithesis of a miscarriage". He went on to endorse defence counsel's interpretation of the 1967 Act that s58 refers to attempted abortions and nothing wider. As to the mens rea then, the only logical conclusion is as follows: "For my part I would say that 'miscarriage' in the antenatal context indeed connotes the loss of the baby and so the outlawing by s.58 of the 1861 Act of certain actions by a pregnant woman or upon a woman (pregnant or otherwise) carried out with intent to procure her miscarriage is confined to actions intended by the actor to bring about the loss of the baby."

As there was no evidence that W at any point intended foetal death, a point ultimately conceded by the prosecution, it was held that there was No Case to Answer for W on either count.

Criminalising victims

The other pitfall of s 58, OAPA 1861 exposed by the case of *W* is that it leaves women who are coerced into an abortion vulnerable to criminal proceedings. Whilst L had never hit or explicitly threatened to harm W, there was evidence of emotional abuse and extreme pressure being put upon her.

Perversely, it appears that being a victim of the attempted abortion may well provide a full defence to any woman charged with conspiracy, if not the substantive offence.

In the second limb of the half-time submission put forward on behalf of W, defence counsel argued that she could not be guilty of the conspiracy count by virtue of 'the victim rule', aka s2(1) of the Criminal Law Act 1977, which prevents the particular classes of people whom the offence was intended to protect from being prosecuted for conspiracy under it. Section 58, it was argued, was intended not only to protect unborn foetuses from illegal abortions but the women subject to the procedure, too.

While there is no binding authority that the 'victim rule' should apply to women charged with a conspiracy to commit an offence under s.58, counsel relied upon the submission of *Archbold* at 19-212 with which Baker J agreed, finding:"Women to whom poisons or other noxious things are administered, or on whom instruments are used, with the guilty intent under s.58, are to my mind the class of persons whom that offence under s.58 is intended to protect, and primarily so, the unborn child only secondarily so (not least because there need not be one at all). By s.2(1) of the Criminal Law Act 1977, therefore, Ms W cannot be guilty of conspiracy to commit that s.58 offence against her".

W being a case at first instance, albeit heard by a High Court judge, the Archbold submission has not been elevated into authority. What is clear however is that no such protection can be said to extend to women charged with the substantive offence. The case of R v Gnango [2011] UKSC 59, 201 confirmed that there is no existence of a 'victim rule' for common law offences.

However, it seems incontrovertible that when legalising abortions Parliament intended, at least in part, to protect pregnant women from the potential harm caused by 'backstreet' abortion attempts such as this one. In its current form s 58 OAPA 1861 is arguably failing to afford this intended protection. We cannot say that legislation in this area will necessarily provide a panacea, but surely parliament ought to consider legislation which provides for a statutory defence for women subject to coercion which may fall short of duress.

Conclusion

The anachronistic wording of s 58 OAPA 1861 renders the mens rea dangerously unclear and, worse still, risks criminalising vulnerable women. To make this legislation fit for purpose in modern society, the language needs updating and a statutory defence for abused women ought to be included.

For now, the future of the "the law relating to abortion" remains uncertain, but what seems clear is that reform is necessary across the UK, not just in Northern Ireland. NLJ

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