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# ‘HOW CAN A STATE CONTROL SWALLOWING?’: MEDICAL ABORTION AND THE LAW

*Summary of findings*  
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# 1: ENGLAND, WALES AND SCOTLAND

Abortion in the UK is regulated by an archaic statutory framework, which long predates the development of safe, effective medical abortion. The Offences Against the Person Act (1861) prohibits the 'unlawful procurement of miscarriage' in England, Wales and Northern Ireland, with similar common law prohibitions in force in Scotland. The Abortion Act (1967), which applies in England, Wales and Scotland, provides that no offence is committed where a termination is provided under strict medical control.

Notably, for an abortion to be lawful, a good faith opinion that a termination is justified must be offered by two doctors; treatment must be performed by a doctor; and it must take place on NHS or other approved premises. The Act was intended, first, to broaden the grounds upon which abortions might be lawfully obtained, while permitting only those deemed 'socially acceptable'; and, second, to ensure that abortions were performed safely.

## Key findings:

- 1 While it is generally accepted that implantation (which occurs six-twelve days after fertilisation) marks the legal beginning of a pregnancy, there is no ethical justification for drawing a bright line at this point.** This is problematic given the significance of the consequences that flow from it.
- 2 Current laws may block the development and use of methods of fertility control that operate around the time of implantation or very early in pregnancy.** Such methods potentially offer considerable advantages but would be difficult, if not impossible, to introduce within current UK and Irish law.
- 3 It is lawful for doctors to choose to exercise their legal decision-making responsibilities under the Abortion Act in a way that, in practical terms, results in abortion on request.** This interpretation of the law respects evidence of the relative risks to health of abortion versus ongoing pregnancy; current professional ethical guidance; and broader shifts in public opinion. This evolving context cannot overrule statutory provisions but it appropriately influences interpretation of them.
- 4 The requirement that abortions be performed by doctors has been potentially rendered redundant by the broad judicial interpretation of this provision.** This requires that a doctor retains overall responsibility for the procedure (and not that s/he has a 'hands on' role). Where nurses or midwives provide safe abortion care as part of a multi-disciplinary team that includes a doctor, it is lawful for them to carry out the physical acts that end a pregnancy. Notwithstanding received understandings to the contrary, this means that, under existing law, it is lawful for trained nurses or midwives to perform vacuum aspiration procedures.
- 5 The narrow interpretation given to the requirement that abortions be performed only on NHS or approved premises means that this provision actively cuts against the Abortion Act's purpose of ensuring safety.** As currently interpreted, this provision impedes the delivery of safe and acceptable treatment. Some clinics now offer treatment protocols (including same day or near simultaneous administration of mifepristone and misoprostol) that are known to be clinically less effective but which maximise patient choice in the face of clinically unnecessary legal restrictions on services.
- 6 The Abortion Act now exists in tension with its own policy drivers.** The broad purposes which informed the legislation were operationalized through a set of restrictions that no longer make sense in the context of modern medical practice. If the law is interpreted so as to give effect to these purposes, the restrictions are interpreted so broadly as to become essentially redundant. If the law is interpreted narrowly, the restrictions may impact negatively on best practice.
- 7 These serious tensions in how abortion law should be interpreted cannot be remedied without statutory reform.** Lack of clarity in the law is a particularly egregious failing in the context of legislation which threatens onerous criminal sanctions against professionals who are acting in good faith and providing safe care to women.

## 2: NORTHERN IRELAND AND THE REPUBLIC OF IRELAND

There are marked differences in the cultural, religious and political contexts that affect the regulation of abortion in Northern Ireland and the Republic of Ireland. However, each of the two countries has a highly restrictive law, which provides only very limited access to abortion within domestic health care settings, and which has been repeatedly condemned for failing to respect human rights. For each country, lack of local service provision has resulted in many thousands of women

travelling to end pregnancies in neighbouring countries, particularly England. However, the numbers of women giving Irish and Northern Irish addresses in English clinics have been subject to marked decline over the last fifteen years. This decline reflects in part the ready availability of abortion pills on the internet. Not-for-profit groups, motivated by values of solidarity and social justice, now play an important role in offering advice and support to women, including through the supply of abortion pills.

### Key findings

- 1 There is evidence to suggest that abortion pills are in widespread use in both the Republic and Northern Ireland.** Sources include media and other reports and my own interview data. It is impossible to quantify the extent of this use, however it is likely to represent an important (if by no means the only) reason for the decline in numbers seeking access to abortion services in England.
- 2 Two not-for-profit groups, Women on Web and Women Help Women between them receive around 3,000 requests for help and advice from Irish and Northern Irish women each year, though this number may be inflated by some women contacting both groups.** This represents a substantial need which is not met by domestic services. Each group provides advice and practical support, including – where desired – arranging for shipment of abortion pills. Pills are supplied on prescription, following an online consultation, for use within the first nine weeks of pregnancy.
- 3 An unknown further number of women attempt to access pills from other suppliers.** While Irish Customs successfully block some such attempts, it is impossible to know how many packages successfully evade detection. Little is known regarding the quality of either the pills, or information regarding how to use them, thus supplied. There are some indications of domestic black markets in the pills.
- 4 Home use of abortion pills is likely to increase.** There are limitations to a telemedical abortion service, most notably in that it relies on local provision of any necessary aftercare. However, it can potentially offer a safe, effective, cheap, and convenient option, given the alternatives available. This is particularly true for those women who are unable to travel for financial or other reasons.
- 5 Criminal prohibitions against abortion are rarely enforced.** No woman has been convicted in either country in the last ten years. Charges have been brought against two Northern Irish women in the last year and it is too early to say whether this represents a new trend. However, given the difficulties in detecting and proving use of the pills, it would be impossible to enforce the law in either country in anything more than a highly selective way.
- 6 Uncertainty exists regarding health care professionals' duty (or right) to inform authorities regarding an illegal abortion.** Irish doctors are advised that they are potentially justified in breaching medical confidentiality where disclosure is in the 'public interest'. In Northern Ireland, it has been suggested that there is a duty to report an illegal abortion, under threat of a ten year prison term, unless there is a 'reasonable excuse' for failing to do so. Both tests offer scope for divergent interpretations and, in the face of this uncertainty, it is likely that many women who seek after care will be unwilling to disclose use of pills.
- 7 In Ireland, the Regulation of Information Act (1995) limits the information that women can access from trusted, local agencies.** The Act does not obviously prohibit the provision of objective, evidence based information regarding the safety of abortion pills, how women who use them may seek to keep themselves safe, or service providers who act lawfully in the place in which services are offered. However, given that importing and using the pills is illegal, doctors and counsellors may also risk the charge that they have aided and abetted the commission of a criminal offence. In practice, the chilling effect of the regulatory framework leaves women reliant on information of highly variable quality available on the internet.
- 8 There is a strong argument for relevant domestic agencies and service providers in each country to be encouraged and supported to offer better information regarding abortion pills.** While the Republic, in particular, has already moved some way towards a harm reduction model, this does not extend to the provision of accurate, evidence based information regarding abortion pills. If the political will existed, evidence exists that would allow official advice to move beyond blanket statements regarding the dangers of online purchase and the need for medical supervision.
- 9 Home use of abortion pills in each country clearly indicates that women's reproductive health needs are not adequately met by formal, local health services, raising a compelling argument in favour of liberalising reform.**

Medical abortion (where a pregnancy is ended using medicines) provides a readily available, very safe, highly effective means of procuring a termination, with little need for technical assistance from third parties unless complications arise. Over half of all terminations reported in British clinics are now performed using abortion pills. There are also clear indications that the pills are in home use in the Republic of Ireland, Northern Ireland and, to a lesser extent, in Britain.

This project considered the challenges that this poses for law. It asked:

- What impact is there on how we understand abortion (for example, in blurring perceived boundaries between abortion and contraception)?
- To what extent does medical abortion challenge legal models that liberalised access to abortion under strict medical control, such as the Abortion Act 1967?
- What implications does medical abortion have for the enforcement of criminal prohibitions on abortion? How, after all, can a state control swallowing?
- What broader responsibility does a state have for safeguarding public health, in this context?

The study involved library research and a series of fact-finding interviews with twenty-two key actors (including service providers, government officials, support groups and activists). The close study of the regulatory framework conducted for the project also resulted in some findings that went beyond the project's central focus on medical abortion. Some of the conclusions of the study are noted in this summary. Publications which expand on the findings are available on the project website.

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[www.kent.ac.uk/law/mabal/index.html](http://www.kent.ac.uk/law/mabal/index.html)

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