

RESPONSE LAW COMMISSION: 14TH PROGRAMME OF LAW REFORM

Consultation Question 1: In general terms, what is the problem that requires reform?

The criminal offence of concealment of birth (section 60 of the Offences Against the Person Act 1861: hereafter ‘OAOP’) needs to be reviewed to consider the appropriateness of this offence within the contemporary framework of the criminal law. Categorised as a ‘miscellaneous offences against society’, the offence is committed if a person conceals the dead body of a baby to hide the fact that the baby was ever born. The history of the offence and its application today illustrates that this piece of legislation is predominantly used in the following circumstances:

- When women are suspected of killing newborn children, but there is not enough evidence of live birth or cause of death to support a homicide conviction.
- As a proxy for foetal homicide offences.

The women who are captured under this offence are incredibly vulnerable, experiencing a crisis pregnancy. The offence of concealment of birth is so broad as to allow these vulnerable women to be criminalised in instances where they abandon the dead body of the baby in a panic and out of fear.

I note that the common law offences of preventing a lawful and decent burial and obstructing a coroner are closely linked to arguments I make here about concealment of birth. My colleague Dr Imogen Jones (University of Leeds) has submitted a response about these offences. I therefore do not directly address these offences other than to add my support to her submission and to suggest that the problems that we identify are linked such that they could, and should, form part of the same reform project.

I note that the 13th Programme of Reform included a yet unstated project considering ‘A Modern Framework for Disposing of the Dead’. This project was limited in scope to methods for disposing of human remains and concentrates on updating the regulation of these. The project being suggested here is clearly thematically linked to that project but goes well

beyond it. It could either be actioned by extending the project already rolling over from the 13th Programme of Reform or as an independent project developed for the 14th Programme.

Consultation Question 2: Can you give us an example of what happens in practice?

I have conducted analysis of 15 cases of women prosecuted for offences related to the suspicious death of their child around the time of birth in England and Wales between 2010 and 2019. This is the only empirical research completed in this area, offering a comprehensive assessment of such cases. Out of these 15 cases, 5 women were prosecuted for and convicted of concealment of birth.

All the women experienced a 'crisis' pregnancy: the context surrounding the pregnancy resulted in the woman facing a crisis that she felt she could not address. Consequently, she concealed and/or denied her pregnancy. Women in the cases were living in the context of violence and abuse, in living poverty with limited social support, and a number had experienced multiple pregnancies where they were unable to accept that they were pregnant and respond accordingly. The outcome of a crisis pregnancy is that the woman is surprised by the labour and delivery, giving birth alone. At some point (before, during, or after labour and delivery) the foetus/baby dies. She then abandons or hides the dead body, often in a panic and out of fear, rather than with specific intent to hide further criminality or prevent an investigation into the cause of death of the child.

From analysis of the court transcripts from cases of concealment of birth, I conclude that the offence is used either as a means to criminalise a woman if it is suspected she killed the baby, but there is no evidence to support a homicide conviction, and/or as a proxy for foetal homicide laws.

The history of the offence of concealment of birth demonstrates that it has always been used as an alternative when homicide is suspected but cannot be proven. See my article (Milne, 2019) for analysis of the history of the law, and evidence from contemporary cases that supports this conclusion. Clearly where there is evidence that a woman has acted to end the life of a child then the criminal law should step in to convict for a homicide offence. However, these cases are distinct as a homicide conviction is not possible due to lack of

evidence of the child being born alive and/or no evidence to support the belief that the woman caused the death of the baby.

The principle of the born alive rule means that England and Wales do not have foetal protection laws. However, analysis of discussion from the court hearings of women convicted of concealment of birth indicates that the offence provides a convenient way to criminalise women in instances where it is deemed her conduct put the welfare of the foetus at risk during the pregnancy and/or in labour and delivery.

The women's experiences of pregnancy (as a crisis) are negated during the court hearings. Assessment of the conduct of accused women during their trials and/or sentencing hearings is presented as if she was not, or should not have been, in crisis, and so should have put the needs of her unborn child before her own. It is this 'failure' to prioritise the foetus' needs, and thus to protect it and ensure it is born alive that emerges as a key driver for criminalisation and punishment. In this sense, my research concludes that the offences of concealment of birth is being used as proxies for foetal homicide offences. Thus, the reach of the criminal law is being unofficially extended into the period prior to birth.

Both of these uses of the offence of concealment of birth indicate that the offence is being misapplied and used as a 'catch-all' in cases where a woman (who is almost certainly incredibly vulnerable) does not announce her pregnancy and seek medical assistance with the labour and/or delivery. Such uses of the offence indicates an unjust extension of the law beyond its stated purpose. It also allows for prosecutorial discretion as a means to sanction women for conduct that is not considered criminal in legislation.

Consultation Question 3: To which area(s) of the law does the problem relate?

Criminal Law

Consultation Question 4: We will be looking into the existing law that relates to the problem you have described. Please tell us about any court/tribunal cases, legislation, books or journal articles that relate to this problem. You may be able to tell us the name of the particular Act or case that relates to the problem.

My research is the only empirical work conducted on concealment of birth. There is no other work that considered how the offence is used in contemporary cases today. Key articles to review:

- Milne E (2019) Concealment of Birth: Time to Repeal a 200-Year-Old “Convenient Stop-Gap”? *Feminist Legal Studies*. 27(2): 139-62.
- Milne E (2020) Putting the Fetus First — Legal Regulation, Motherhood, and Pregnancy. *Michigan Journal of Gender & Law*. 27(1): 149-211.

My forthcoming book offers a more comprehensive overview of the way the law is applied in cases of suspicious death of a baby around the time of birth:

- Milne E (2021) *Criminal Justice Responses to Maternal Filicide: Judging the Failed Mother*. Bingley: Emerald Publishing Limited.

Consultation Question 5: Can you give us information about how the problem is approached in other legal systems? You might have some information about how overseas legislatures have responded or how the court or tribunals approach the problem.

Many former British colonies imported the offence of concealment of birth from Britain during the colonial period. Many jurisdictions still have the offence today and, it would appear, use it in similar ways to how it is used in England and Wales. However, as I am the only scholar to have completed work on this form of offence, there is a dearth of data, preventing firm conclusions being drawn.

Consultation Question 6: Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?

Section 60 of the OAOP applies to Northern Ireland, and Scotland has a similar offence. Due to no other scholar conducting research on this offence, it is unknown how the offence works in practice in these jurisdictions.

Consultation Question 7: What do you think needs to be done to resolve the problem?

I advocated for the offence of concealment of birth to be repealed.

I have read Dr Imogen Jones' submission and her proposal for a new offence, 'concealment of a body', to replace the common law offence of preventing a burial and obstructing a coroner. I support this proposed new offence. It is, however, important to stress that any new offence must have a specific intent element, focused on intent to either:

- obstruct a coronial investigation; or,
- to facilitate another criminal offence.

One of the greatest challenges of concealment of birth and how it is applied to cases today is that the intent element of the crime is so broad as to be able to be applied in cases where women have abandoned a baby's body in a panic (no intent to hide criminality or prevent an investigation into the death of the child). A new offence needs to be structured in a way so that it cannot be used as a 'catch-all' for women who cannot be proven to have committed any other offence and/or are deemed to have failed to protect the foetus.

Consultation Question 8: What is the scale of the problem?

Police recorded crime would indicate an average of 7 recorded cases of concealment of birth each year:

1999/00	4
2000/01	9
2001/02	4
2002/03	7
2003/04	6
2004/05	6
2005/06	8
2006/07	4
2007/08	8

2008/09	8
2009/10	6
2010/11	9
2011/12	5
2012/13	2
2013/14	2
2014/15	5
2015/16	4
2016/17	9
2017/18	12
2018/19	19
2019/21	8
Yearly average	7

However, as the offence can be broadly applied, I would advocate that it offers a risk to all women of reproductive age. As I have argued in my publications (listed above), women who find themselves in the situation where they are giving birth alone, resulting in the death of the baby at some point around the time of birth, are incredibly vulnerable. They have experienced a pregnancy that has caused them a crisis and have acted in a panic and out of fear throughout their pregnancy and in the post-partum period. The breadth of the offence of concealment of birth allows prosecutors to apply the law across all these cases. There is a wider question that is beyond the scope of the Law Commission: whether this is an appropriate use of the criminal law. What is in the scope of the Commission is whether the continued existence of the offence of concealment of birth is appropriate considering the way the law has been misapplied to cases.

Consultation Question 9: What would be the positive impacts of reform? Benefits derived from law reform can include:

Replacing concealment of birth and the offences of preventing a lawful and decent burial and obstructing the coroner with Dr Imogen Jones' proposed offence of 'concealment of a body' would have the benefit of making the law fairer. Fairness to people accused of concealment of birth (most often vulnerable women who experience crisis pregnancies) requires that the law clearly outlines the wrong that an offence is criminalising. As outlined above, concealment of birth is currently used as a 'catch-all' if other offences are suspected but cannot be proven, and to get around the born alive rule if it is deemed a woman has not acted in the best interests of her foetus. The continued existence of a criminal offence that allows prosecutors to apply it broadly to any woman who is deemed to have not acted as pregnant women are expected (to announce their pregnancy and seek assistance with the labour and delivery) results in unjust outcomes for women.

Consultation Question 10

N/A

Consultation Question 11: Does the problem adversely impact equality, diversity and inclusion by affecting certain groups in society, or particular areas of the country, more than others? If so, what are those groups or areas?

As noted, the broadness of the offence of concealment puts all women of reproductive age at risk for overcriminalisation. The vulnerability that those convicted of this offence experience are specific to women due to their ability to become pregnant. Thus, this offence demonstrates a sex-based discrimination against women.

Consultation Question 12: In your view, why is the independent, non-political, Law Commission the appropriate body to undertake this work, as opposed to, for example, a Government department, Parliamentary committee, or a non-Governmental organisation?

This area of law – concealment of birth, preventing a lawful and decent burial and obstructing the coroner – needs considered reform based on an objective assessment of the evidence. This requires research and recommendations of the type to which the Law Commission is

best suited. It is not something that ought to be dealt with by an interest group precisely because it should be the subject of objective review.

Consultation Question 13:

N/A

Consultation Question 14: Is any other organisation such as the Government or a non-Governmental group currently considering this problem? Have they considered it recently? If so, please give us the details of their investigation on this issue, and why you think the Law Commission should also look into the problem.

A Private Members' Bill (Starting in the House of Lords), sponsored by Baroness Barker, HL Bill 31: A Bill to decriminalise the consensual termination of a pregnancy which has not exceeded its twenty-fourth week and in other prescribed circumstances; and to create a criminal offence for non-consensual termination of pregnancy, included a proposal to repeal section 60 of the OAOP. Currently the Bill is awaiting a second reading.

<https://services.parliament.uk/bills/2019-21/abortion.html>