

Concealment of Birth: A Case for Repeal



Concealment of birth should be removed from the criminal law

The offence of concealment of birth criminalises the secret disposal of the dead body of an infant to conceal knowledge of that child's birth. The legislation was enacted in 1861 (Offences Against the Person Act, s60), at a time when women lacked legal parity with men. While concealment of birth can be committed by anyone, the defendant is most often the woman who birthed the child. Research, by Durham University, into contemporary cases, indicates that the offence is being used to obtain convictions in cases where women are suspected of causing the death of an infant, before or after birth, but a conviction for murder or for the crime of child destruction cannot be obtained due to lack of evidence. Application of the offence in these cases indicates a misuse of the criminal law.

While the conduct of concealing the dead body of a newly born child has the potential to cause harm – notably due to public health concerns and by preventing an investigation into the cause of the child's death – other offences exist that more appropriately and accurately label the corresponding wrongful act. Consequently, the offence of concealment of birth is no longer needed. Furthermore, application of the offence to capture other suspected, but unproven crimes is resulting in injustices for vulnerable women who experience “crisis pregnancies”.

We recommend:

Section 60 of the Offences Against the Person Act 1861 is repealed to remove the offence of concealment of birth from the criminal law.



The Creation of a “convenient stop-gap”

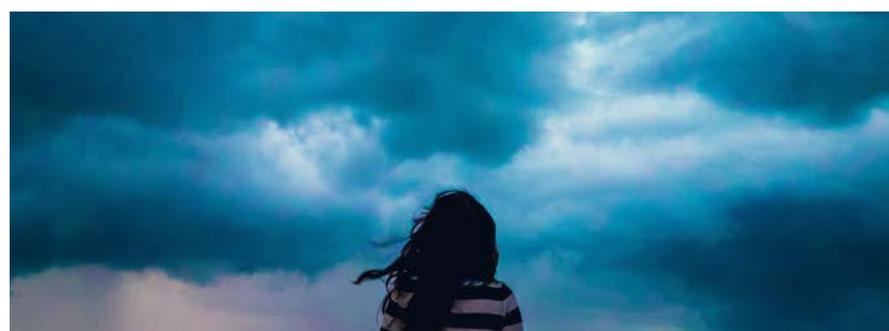
The offence of concealment of birth first came into force in 1803, and was a crime that only unmarried women could commit. The crime was created to allow for the prosecution of women who were suspected to have killed their illegitimate children, but who could not be proven to have committed murder due to lack of evidence of either the live birth of the child, or that the woman had taken steps to end the baby’s life after birth. Consequently, historically, the offence has been seen as a “convenient stop-gap”, to allow women to have been convicted of an offence in instances where there would otherwise have been none committed. [1]

Concealment of birth today

Since 1861, the offence can be committed by anyone. However, the defendant has most often been the pregnant woman who birthed the child. Over the last decade, the police have conducted 91 investigations into suspected cases of concealment of birth. [2] Analysis by [Dr Emma Milne](#), Durham University, illustrates that today the offence continues to act as a “convenient stop-gap”, allowing the prosecution of women when it is believed that they have committed an offence of greater seriousness. [3] Concealment of birth is still being used to criminalise a woman if it is suspected, but cannot be proven, that she took steps to end the child’s life. If proof of homicide is available, then a homicide conviction will be sought; thus, concealment of birth is reserved for those cases where evidence of any other criminal wrongdoing is lacking.

Even more concerning, there is evidence from recent criminal cases that the offence can also be used if it is believed that a woman has harmed her foetus. [4] English and Welsh criminal law offers limited legal protection for the foetus. The Infant Life (Preservation) Act, s1, makes it an offence to intentionally end the life of a “child capable of being born alive”: the crime of child destruction. As this is a crime that requires proof of the criminal intent of the defendant to end the life of the foetus, it is incredibly difficult to prove. Concealment of birth, on the other hand, is easy to prove, as the only evidence required is that an infant’s body was hidden to prevent others from discovering the birth of that child. It is irrelevant whether the child was stillborn or born alive; nor does it matter what caused the death of the infant. Consequently, concealment of birth can be used to punish a woman for her behaviour while pregnant – deemed to have fallen below expectations society holds for pregnant women – if she later hides the body. The outcome is that concealment of birth is being used as a proxy for foetal homicide laws. [4]

The conduct of a woman, such as Sally, while pregnant should be irrelevant to the offence of concealment of birth. The implication of the judge’s remarks is that Sally is considered culpable for the death of her babies prior to their birth. Such comments suggest that, whilst Sally has technically been criminalised for the conduct of concealing the babies’ bodies, in reality, it is her “failure” to prevent the infants from living that is seen as her wrongful conduct, and, arguably, her *true* “crime”.



Sally*

Sally was living in poverty, raising three children alone, and abusing drugs and alcohol. Over a 10-year period, she became pregnant on four further occasions. Each time she was unable to recognise the symptoms of pregnancy and so sought no antenatal care. Sally stated she had no knowledge that she was pregnant prior to the birth of each child. She laboured and delivered the infants alone, claiming each was stillborn. Following the births, Sally hid the babies’ bodies in her bedroom, telling no one about the infants. The bodies were discovered years later, and Sally pleaded guilty to four counts of concealment of birth.

The Crown Prosecution Service accepted that all four babies had been stillborn. Consequently, Sally was neither charged with, nor convicted of any offence relating to causing harm to, or killing the infants, either before or after they were born. And yet, in sentencing Sally, the judge said the following: “... whilst the circumstances and reasons for the stillborn births will never fully be able to be established, your chaotic lifestyle choices, including alcohol abuse and promiscuity at the time of your pregnancies was such as to put the good health of any unborn child at risk”. [4]

*Pseudonym.

Injustice for women

The offence of concealment of birth needs to be removed from the criminal law to prevent its misuse, as is evident in analysis of recent cases. An important aspect of the criminal law is that it appropriately labels the wrongdoing of the defendant. While a more serious conduct may be suspected – a homicide offence or causing harm to the foetus – a conviction for concealment of birth is not an appropriate substitute for two reasons. First, the offence of concealment of birth is classified as a miscellaneous crime against society, and so a conviction for this crime cannot correctly label the suspected wrongdoing of causing the death of a person. Second, if there is insufficient evidence to convict a woman of a homicide offence, or of the offence of child destruction, then concealment of birth should not be used as a substitute crime. [3]

Current use of the offence, as outlined in this briefing, is resulting in injustices for women. The injustice is greater when the experiences of convicted women are considered. Research into such cases by Dr Emma Milne concludes that women convicted of concealment of birth are incredibly vulnerable, and that they have experienced a “crisis pregnancy”. The crisis has caused them to keep their pregnancy a secret from the wider world. They also frequently deny their pregnancy to themselves, resulting in them giving birth alone and then disposing of the body of the infant, often in a panic. [4]

“Crisis pregnancy” is the term that Dr Emma Milne has developed to characterise women’s experiences of pregnancy which cause them a crisis, and so paralysed and unable to act.

Protecting foetuses?

Whether we, as a society, should criminalise women who harm their foetuses (intentionally or unintentionally) is a complex issue, and one that is ultimately for Parliament to decide. Evidence from the United States of America, where foetal protection laws have been implemented in most states, indicates that criminalising women for conduct during pregnancy has had disastrous outcomes for foetuses and babies as well as women. For further details of the impact of foetal protection laws, see briefing, ***Foetal Protection Laws: A Dangerous Future for British Women***.

Improper disposal of a baby’s body: criminalising wrongful conduct

There are many reasons why improper disposal of a baby’s body should result in criminal sanction, notably:

- the inappropriate disposal of a dead body could lead to health hazards and public health concerns.
- failure to register a birth or stillbirth.
- concealing the body may prevent law enforcement agencies from investigating whether serious offending has occurred; for example, the child may be a victim of homicide.

However, the offence of concealment of birth is not needed to criminalise these wrongful and harmful behaviours. [3] The inappropriate disposal of a dead body is governed by numerous provisions, statutory and otherwise. For example, local authorities have the power to prevent contact with a dead body for public health reasons, [5] and if a registrar learns that a body has not been properly disposed of, then he/she must report the matter to the officer responsible for environmental health for the district. [6]

There is good reason to require registration of live and stillborn infants. Failure to register a live birth will result in citizens not being accounted for in relation to all aspects of life; for example health, education, and for property and taxation purposes. The registration of stillbirths has allowed for the development of records of foetal mortality, benefitting public health. [7] However, failure to register a birth or stillbirth are offences under the Births and Deaths Registration Act 1953, ss1-2 and 36, punishable by a fine of up to £200. Thus, concealment is not needed to criminalise such failures to act.

Concealing the body of a newborn child, or any person, prevents an investigation into the cause of their death, and so potentially conceals criminal activity. Such concealment is clearly a serious issue and one the criminal law should deter. However, two common law offences exist which more appropriately label the conduct: disposal of a corpse with intent to obstruct or prevent a coroner’s inquest when there is a duty to hold one, [8] and perverting the course of justice. [9] Both offences have a maximum penalty of life imprisonment. Whilst concealment of birth may be easier for prosecutors to prove, these common law offences more accurately label the wrongdoing if a person hides a body to prevent discovery that they have caused that person’s death. It is an important facet of criminal law that the crime for which a person is convicted correctly labels the wrongful conduct that is being sanctioned.

Some may argue that improper disposal of a person’s body fails to afford them dignity. However, after a person has died, they cease to exist in the eyes of the criminal law. Consequently, they are no longer here and are no longer capable of being the direct recipient of either harm or benefit. [10] Thus, arguably, the dead person should not be the reason for criminal intervention and regulation.

About the research

Briefing based on research findings published in ***Criminal Justice Responses to Maternal Filicide: Judging the Failed Mother*** (Emerald Publishing, 2021). The research analysed court transcripts from 15 criminal cases of women heard in England and Wales between 2010 and 2019. These represent almost a complete sample of cases from the period. In each case, the woman's foetus/newborn child died in suspicious circumstances, and the mother of the child was convicted of an offence connected to its death. Cases were assessed to evaluate the nature of the death and the women's experiences.

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References

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- [3] Milne E (2019) Concealment of Birth: Time to Repeal a 200-Year-Old "Convenient Stop-Gap"? *Feminist Legal Studies*. 27(2): 139-62.
- [4] Milne E (2021) *Criminal Justice Responses to Maternal Filicide: Judging the Failed Mother*. Bingley: Emerald Publishing Limited.
- [5] Health Protection (Local Authority Powers) Regulations 2010 SI 2010/657, paras 9(5), 10(6).
- [6] The Registration of Births and Deaths Regulations 1987, s51(2).
- [7] Davis G (2009) Stillbirth Registration and Perceptions of Infant Death, 1900-60: The Scottish Case in National Context. *Economic History Review*. 62(3): 629-54.
- [8] *R v Purcy* [1934] 24 Cr. App. R. 70.
- [9] *R v Williams* [1991] 92 Cr App R 158.
- [10] Jones I and Quigley M (2016) Preventing Lawful and Decent Burial: Resurrecting Dead Offences. *Legal Studies*. 36(2): 354-74.

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CRIMINAL JUSTICE RESPONSES TO MATERNAL FILICIDE

Judging the Failed Mother



This project is funded by:



Help and support

If you are pregnant and you need help and support, including advice about abortion, contact the British Pregnancy Advisory Service (www.bpas.org) or MSI Reproductive Choices UK (www.msichoice.org.uk).



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