SCOTLAND AND THE ABORTION ACT 1967: HISTORIC FLAWS, CONTEMPORARY PROBLEMS

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INTRODUCTION

The law relating to abortion in Scotland, England and Wales is ostensibly governed by a single Act: the Abortion Act 1967.[2] This legislation was created to remove the dangers of the "back-alley abortionist with her knitting needles"[3] – as it has broadly succeeding in doing so,[4] most commentators regard the Act as a success.[5]

With that said, the 1967 Act has been described as a "curious"[6] piece of legislation due to the fact that it does not grant any rights to women that seek to terminate pregnancy. Instead, it simply confers a privilege upon doctors who carry out abortion procedures.[7] In addition, though many think otherwise,[8] the 1967 Act neither confirmed nor created a uniform legal approach towards abortion in the United Kingdom. Prior to 1967 abortion was a wholly common law matter in Scotland[9] and there were recognised, if nebulous,[10] defences to the crime. Conversely, in England, the issue of abortion – its status as a social and criminal concern – has been determined by statute since 1861, with the passing of the Offences against the Person Act.[11]

Due to these fundamental differences in legal governance, the wording of the Act and the Act's reliance on English statute, the Scottish legal position remains

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[2] c.87 – henceforth referred to as 'the 1967 Act'. The Act does not extend to Northern Ireland: See s.7

[3] See Davis, *The Legalisation of Therapeutic Abortion,* [1968] S.L.T 205

[4] Davis, *The Legalisation of Therapeutic Abortion,* [1968] S.L.T 205, though there are, of course, some unfortunate exceptions; see *R v Catt* [2013] EWCA Crim 1187

[5] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48

[6] G Gordon, *Criminal Law,* (3rd Edition, SULI, 2001) Volume II Chapter 28, para.28.05

[7] G Gordon, *Criminal Law,* (3rd Edition, SULI, 2001) Volume II Chapter 28, para.28.05

[8] As exemplified by the incorrect assumption made by Kerry Petersen in chapter five of her book *Abortion Regimes,* in which she incorrectly states that the Offences Against the Person Act 1861 applies in Scotland, despite the fact that s.78 of the Act expressly states that it does not – see Petersen, *Abortion Regimes,* (Dartmouth: Medico-Legal Series, 1993)

[9] See K. Norrie, *Family Planning Practice and the Law,* (Dartmouth: Medico-Legal Series, 1991) Chapter 3 p.30

[10] See – G Gordon, *Criminal Law,* (3rd Edition, SULI, 2001) Volume II Chapter 28, para.28.01

[11] c.100

entirely distinct from that of England and Wales at present.[12] The fact that the Act wholly ignores the previous Scottish position means that the law may be interpreted very differently in Scotland than in England[13] and, *prima facie*, it appears that two of the best known hallmarks of the 1967 Act – the 24 week term limit (introduced by amendments made by the Human Fertilisation and Embryology Act 1990) and the two-physician requirement – may be subverted by applying the still-operational Scottish common law.

The purpose of this paper is to critically examine the Scottish legal position prior to the passage of the 1967 Act, ascertain exactly what changes, if any, have been effected by the legislation and evaluate the level of awareness that Scottish physicians, and members of the public, held regarding the unique Scottish law prior to, and post, 1967. The question of whether or not legislation was required, or the common law position simply required better publicity, is posed and answered; as is the question of whether or not Westminster has, in this instance, legislated for Scotland with an overly Anglo-centric view.

In order to achieve these listed objectives, a full study of the historic, pre-1967 common law has been undertaken alongside a comprehensive analysis of contemporary case law. A number of reported and unreported cases are given detailed consideration, the practices of the Aberdonian physician Sir Dugald Baird and his Glaswegian counterpart, Doctor Ian Donald are noted and the impact that the attitudes of these eminent physicians had on historic public opinion towards abortion in Scotland is evaluated.

Ultimately, this paper concludes by reiterating the substantive argument that the

[12] K. Norrie, *Abortion in Great Britain: One Act Two Laws,* [1985] Crim. L.R 475

[13] See the Stair Memorial Encyclopaedia, Volume VII, *Criminal Law Reissue/9* Abortion and Concealment of Pregnancy, (updated 2014) para.281

1967 Act is a flawed piece of legislation which is more akin to a convention than a formal piece of law.

THE LAW PRIOR TO 1967

The first reported instance of abortion being charged as a crime in its own right, in Scotland, occurred in the case of *John Fenton,*[14] though the earlier case of *Patrick Robertson and Marion Kempt*[15] may have seen an instance of induced miscarriage tried as murder. In spite of the fact that abortion was a well-established crime known to Scots law, however, Sir Dugald Baird nevertheless claimed that abortion had *"long been legal in Scotland"* in a 1975 academic article.[16]

This statement was made as the result of his thirty years of practical experience as a gynaecologist,[17] during the course of which he provided "social" abortions[18] for a number of women. In 1963, 2% of women in Aberdeen were provided with lawful abortions by the National Health Service[19] and, though the position in Glasgow was slightly more conservative, with only 1 woman in 3,750 receiving such treatment,[20] termination operations were nevertheless carried out by NHS professionals in that city.[21] According to the Stair Memorial Encyclopaedia's most recent updated reissue, "medically-indicated abortion was fairly readily available to a high proportion of

[14] (1761) – Reported in Burnett's *A Treatise on the various branches of the Criminal law of Scotland,* (1811) at p. 6
[15] (1627) Hume, I, 186
[16] See D. Baird, *Induced Abortion: Epidemiological Aspects,* [1975] Journal of Medical Ethics I, 122-126
[17] See D. Baird, *Induced Abortion: Epidemiological Aspects,* [1975] Journal of Medical Ethics I, 122-126
[18] See – G. Davis, *The Great Divide: The Policy and Practice of Abortion in 1960's Scotland,* [2004] The Sibbald Library Archives
[19] Discussed in G. Davis, *The Great Divide: The Policy and Practice of Abortion in 1960's Scotland,* [2004] The Sibbald Library Archives and in the Stair Memorial Encyclopaedia, Volume VII, *Criminal Law to Customs and Excise*, (1995) para.283
[20] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48; p.37
[21] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48; p.37

Scottish women" even before the passage of the Act.[22]

This state of affairs was not regarded as criminal because Scots law recognised the legitimacy of therapeutic termination. Abortion was treated, primarily, as a medical matter and the dearth of Scottish case law concerning abortion[23] may be attributed to the fact that the legal profession was reluctant to interfere with decisions made by doctors.[24] In the third edition of Angus' *Dictionary of Crimes and Offences,* the authors note that 'the causing of abortion by a medical practitioner acting in good faith would not be punishable.'[25] The Crown Office would not bring a prosecution unless the provider clearly displayed "criminal intent".[26]

According to the common law, a Scottish medical practitioner could defend a charge of abortion by claiming that the procedure was a "necessary medical operation"[27] and, on the rare occasion in which a complaint was lodged against a doctor, the case would be closed if the investigators were satisfied that the operating physician had carried out the termination in good faith, and in the proper manner.[28] Ultimately, a successful prosecution could only occur if "wicked and felonious"[29] intent was proven.

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[22] Stair Memorial Encyclopaedia, Volume VII, *Criminal Law Reissue/9* Abortion and Concealment of Pregnancy, (updated 2014) para.280

[23] National Archives of Scotland (hereafter NAS), AD63/759/1, House of Commons question, 19 July 1966

[24] G. Bhatia, *Social Obstetrics, Maternal Health Care Policies and Reproductive Rights: The Role of Dugald Baird in Great Britain, 1937-65*, M.Phil. (University of Oxford, 1996), p. 59.

[25] C.A MacPherson and J. Mill, *A Dictionary of Crimes and Offences According to the Law of Scotland,* (3rd Edition) (W. Green and Son, 1936)

[26] C.A MacPherson and J. Mill, *A Dictionary of Crimes and Offences According to the Law of Scotland,* (3rd Edition) (W. Green and Son, 1936)

[27]Though the defence to the charge was regarded as 'ill defined' in Gordon's *Criminal Law,* (3rd Edition) Volume II Chapter 28, para.28.01 it is certain that the defence was 'well settled' – K. Norrie, *Abortion in Great Britain: One Act Two Laws*, [1985] Crim. L.R 475, and Mason McCall Smith, *Law and Medical Ethics*, (9th Edition, Oxford University Press, 2013), chapter 9, para.9.57

[28] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975*, [2006] Medical History 50: 29-48; p.31

[29] See *H.M Advocate v Graham* (1892) 2 Adam 412, 415 and the discussion in G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975*, [2006] Medical History 50: 29-48; p.31

While Lady Smith stated, in the 2012 case of *Doogan v Greater Glasgow and Clyde Health Board,*[30] that abortion was illegal in Scotland prior to the 1967 Act,[31] even if the termination was provided by a registered medical professional,[32] this statement can be shown to be incorrect by reference to earlier authority. In *H.M.A v Graham,*[33] the Court accepted that abortion would not be criminal if carried out in a medical context and in the case of *H.M.A v Ross,*[34] which remains the sole case in which a Scottish medical practitioner was prosecuted, the central issue was the fact that the termination occurred in the patient's home; in the absence of professional medical guidance.[35]

It is to be noted, further, that the prosecution of Doctor Ross in 1967 did not result in a *conviction* for criminal abortion, but rather a plea of guilty.[36] The court, therefore, did not establish any precedent to affirm that Ross's actions were criminal; rather, Ross merely unwisely, and perhaps erroneously, accepted criminal liability for his actions. Indeed, the primary argument adopted by the Crown Agent in that case was that an honest medical practitioner had nothing to fear from the law and that Doctor Ross would not have pleaded guilty had his actions not been on the borderline between criminal and therapeutic.[37]

The case, even then, was regarded as "unique" by Counsel[38] and it appears that, had the accused not intimated a guilty plea, the possibility of an acquittal on a point of law was distinctly present[39] (though not certain). It is therefore submitted that had Ross

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[30] 2012 S.L.T. 1041
[31] *Doogan v Greater Glasgow and Clyde Health Board* (2012) S.L.T. 1041Para. 42
[32] *Doogan v Greater Glasgow and Clyde Health Board* (2012) S.L.T. 1041Para. 42
[33] (1892) 2 Adam 412
[34] NAS, JC26/1967/117, High Court of Edinburgh trial papers, 24 Jan. 1967
[35] NAS, AD63/759/2, Note by Crown Agent, Feb. 1967
[36] NAS, AD63/759/2, Note by Crown Agent, Feb. 1967
[37] NAS, AD63/759/2, Note by Crown Agent, Feb. 1967
[38] Mr A. Bell – G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48; p.31
[39] Counsel for the accused argued that the doctor was a respected medical practitioner who had provided the abortion after the two girls had come to him in a state of "complete agitation and desperation" - NAS,

pled his innocence[40] the prosecution would have been difficult to maintain as a Scottish prosecutor had to prove beyond reasonable doubt that the doctor did not believe, for whatever reason, that the procedure was required.[41]

Accordingly, it is submitted that the view expressed by Lady Smith, that '*prior to the passing of the 1967 Act, if a doctor performed a surgical termination on a pregnant woman or administered abortifacient drugs to her, or instructed someone else to do so, he would have been guilty of an offence*',[42] must be regarded as erroneous and that it was legally possible for a Scottish physician to carry out abortion prior to the passage of the 1967 Act. Indeed, the top prosecutors of the day in Scotland regarded the legislation as mechanically unnecessary;[43] in 1978, then-Lord Advocate Ronald Murray claimed that the legislation was either unduly restrictive, or utterly ineffective.[44]

For his part, Sir Dugald Baird was particularly frustrated that legislative intervention was regarded as necessary,[45] stating: "*One hears talk about modernising abortion laws. Certainly the law should be clarified and spelt out in words of one syllable. But the work has been done for 20 years, it has all been documented and I haven't gone outside the law.*"[46]

While there is evidence to suggest that the law was known to at least some Scottish physicians prior to 1967,[47] in spite of the fact that Glaister and Rentoul's

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HH41/1820, John Hobson, MP, to Bruce Millan, Scottish Office, 20 Feb. 1967.

[40] It is not known why Ross pled guilty – G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48; p.31

[41] This suggests that the prosecution's argument regarding the method utilised by Ross was not correct in law. In England, the method employed by the physician in *R v Smith* [1973] 1 W.L.R 1510 , was regarded as a relevant consideration, though the relevance of this case to Scotland may be doubted given general legal differences.

[42] *Doogan v Greater Glasgow and Clyde Health Board* (2012) S.L.T. 1041 para.42

[43] NAS, AD101/13, P Layden to Lord Advocate, 17 July 1978

[44] NAS, AD101/13, P Layden to Lord Advocate, 17 July 1978

[45] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48 p.35

[46] Quoted in the *Observer,* 30th January 1966

[47] Wellcome, SA/FPA/A17/129, *'Aberdeen shows way on abortion', Med. News*, 18 July 1969

"medico-legal bible"[48] failed to differentiate the law of Scotland and England regarding abortion, it is nevertheless clear that the permissibility of abortion under Scots law was not commonly known at the time.[49] Indeed, given the fact that Kerry Petersen erroneously reported in her text, *Abortion Regimes*, that the Offences against the Person Act 1861 applies to Scotland,[50] and the fact that Lady Smith incorrectly stated that physician sanctioned abortion was illegal in Scotland prior to 1967, it may be concluded that the pre-1967 permissibility of abortion is *still* not commonly known.

Thus, though the pre-1967 law is far from clear, it is obvious that the crime of abortion in Scotland was a common law offence, rather than a breach of strict statutory regulation. Though abortion was a crime known to the law of Scotland, there were circumstances in which termination of pregnancy were not regarded as criminal. As physician-sanctioned abortion was permitted by the law, eminent legal practitioners and physicians regarded a mechanical change in the law as unnecessary; indeed, when the 1967 Act was brought into force, at least one former Lord Advocate regarded it as either unduly restrictive or utterly ineffective. Indeed, one West coast doctor noted that *"the Act might as well not have been passed as far as [his] patients [were] concerned"* as the legislation did nothing to change medical practice.[51]

Accordingly, this paper shall presently examine the provisions of the 1967 Act in detail, in order to ascertain the contemporary legal position, and critically analyse exactly what the legal, if not practical, impact of the 1967 Act has been.

THE LAW POST-1967

[48] J Glaister and E Rentoul, *Medical jurisprudence and toxicology,* (12th ed, Edinburgh and London, E & S Livingstone, 1966), pp. 363–366 – termed as such by Davis and Davidson.

[49] Indeed, Sir Dugald only learned about the legal permissibility of abortion after discussion the issue with the Dean of Aberdeen University's law faculty; see G. Bhatia, *Social Obstetrics, Maternal Health Care Policies and Reproductive Rights: The Role of Dugald Baird in Great Britain, 1937-65*, M.Phil. (University of Oxford, 1996)

[50] See K. Petersen, *Abortion Regimes,* (Dartmouth: Medico-Legal Series, 1993)

[51] G. Davis and R. Davidson, *The Sexual State: Sexuality and Scottish Governance, 1950-1980,* (Oxford University Press, 2012) Chapter 5

Section 1 of the 1967 Act, as amended by the Human Fertilisation and Embryology Act 1990,[52] provides that medical termination of pregnancy is permissible where two doctors opine, in good faith, that it is necessary for one of four distinct reasons.[53] Section 5(2) of the Act explicitly states that anything which is done in order to procure a miscarriage is unlawful, unless authorised by s.1 of the Act.

When considering the 1967 Act in a specifically Scottish context, one must consider the fact that the Act does not actually change the legal status of abortion in Scotland. The defences spelled out in ss.1 (a)-(d) are, essentially, a codification of the previous Scottish legal position[54] and, as stated in the introduction, the legislation does not abrogate the crime of abortion. In the words of Professor Kenneth Norrie, the Act "exists parasitically (or perhaps symbiotically) on the previously existing law."[55]

The passage of the Act was "fundamentally underpinned" by the idea that family planning should be an area regulated by medical expertise.[56] Indeed, several years after the passage of the Act the Scottish Home and Health Department (SHHD), when meeting with representatives of the Scottish General Services Committee, firmly stated that decisions regarding termination of pregnancy were to be made by medical professionals alone, and that "the department would not wish to interfere with the judgement of any doctor."[57]

This does not appear to be too different from the pre-1967 Scottish legal and practical position,[58] in which medical professionals were able to carry out therapeutic

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[52] c.37 – henceforth, "The 1990 Act"

[53] See ss.1(a)-(d)

[54] K. Norrie, *Family Planning Practice and the Law,* (Dartmouth: Medico-Legal Series, 1991) p.30

[55] K. Norrie, *Family Planning Practice and the Law,* (Dartmouth: Medico-Legal Series, 1991) p.30

[56] For a discussion of Baird's activity in relation to abortion, see G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48; p.37

[57] National Archives of Scotland, HH102/1232, Notes of the Meeting between SHHD and Representatives of the Scottish General Medical Services Committee, 24 Sept. 1974

[58] It has been stated that '*[D]octors and wome*n in Scotland *enjoy the protection of the Abortion Act1967, but the*

abortion for whatever was, in their view, "good and sufficient reason."[59]

With that said, the addition of the 'two physician' requirement (introduced by the 1967 Act), and the inclusion of a 24 week term limit in s.1 (1) (a) (introduced by the 1990 Act), appear, *prima facie*, to be legitimate changes brought about by the legislation. While it was regarded as good medical practice to obtain a second signature prior to 1967[60] there was nothing in law that strictly forbade a single Scottish physician from performing or authorising abortion.[61] Accordingly a better understanding of the term 'unlawful', as used in s.5 of the 1967 Act, is required.

The provision made by s.5 (2) is not problematic in England and Wales due to the statutory regime which exists in this jurisdiction. While English law was liberalised, somewhat, by the case of *R v Bourne*,[62] and the British Medical Association Committee had previously sought to interpret the relevant legislation as permissive in a therapeutic context,[63] the governing pieces of legislation – the Offences Against the Person Act 1861 and the Infant Life Preservation Act 1929[64] – make no distinction between criminal and therapeutic abortion.[65] Accordingly, the word 'unlawful' can be read, and understood, plainly: the act of procuring miscarriage is illegal, and therefore criminal, unless authorised by s.1 of the Act.

In Scotland, however, the situation is rather different and, unless the 1967 Act created a new statutory offence,[66] the word 'unlawful' must be read in its full legal

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statute has added little to the position at common law.' – Meyers, *The Human Body and the Law,* (Second Edition, Stanford University Press, 1990), p.45

[59] Davis, *The Legalisation of Therapeutic Abortion,* [1968] S.L.T 205

[60] See Taylor, *The Principles and Practice of Medical Jurisprudence,* (5th Edition, J&A Churchill, London, 1905) p.154

[61] Davis, *The Legalisation of Therapeutic Abortion,* [1968] S.L.T 205

[62] [1939] 1 KB 687

[63] K. Petersen, *Abortion Regimes,* (Dartmouth: Medico-Legal Series Publication, 1993) – p.56

[64] c.34

[65] See Mason McCall Smith, *Law and Medical Ethics*, (9th Edition, Oxford University Press, 2013), chapter 9, para.9.54

[66] Which is extremely unlikely – see K. Norrie, *Abortion in Great Britain: One Act Two Laws,* [1985] Crim. L.R

context: An unlawful action is not necessarily a criminal action. If one has a valid defence which excuses unlawful conduct, criminal liability does not attach.

Section 1 of the Act provides that "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 [that]" one of the four nominate reasons apply to the woman's situation.[67]

Section 6 of the Act – the interpretation section – provides that '"the law relating to abortion" means sections 58 and 59 of the Offences against the Person Act 1861 and any rule of law relating to the procurement of abortion".[68]

The 1861 Act does not apply in Scotland.[69] The law relating to abortion therefore means, tautologically, the law relating to abortion. Accordingly, the 1967 Act provides that, in Scotland, a physician who has formed the opinion that a termination of pregnancy is required, and carries out an abortion for a legitimate reason (with a second opinion), will not be guilty of an offence according to a rule of law which already provides that these actions are permissible. As this provision clearly adds nothing to the law, and does not, of itself, prohibit any conduct,[70] one may suggest that, as a result of the wording of s.5, s.1 of the 1967 Act, it is "*strictly speaking possible in Scotland for a doctor to perform an abortion that would be legal under the existing common law, even if this was outside the terms of the Abortion Act 1967".*[71]

With that said; Lord MacKay, Lord McEwan and Lady Dorian authoritatively stated, *per curiam,* that there remains no "residual ability at common law to carry out

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475, at p. 481

[67] The 1967 Act, s.1

[68] The 1967 Act, s.6

[69] See s.78 of the 1861 Act. The 1929 Act does not extend to Scotland either – see s.3 (2) of the 1929 Act.

[70] It has been stated that *'[D]octors and wome*n *in Scotland enjoy the protection of the Abortion Act1967, but the statute has added little to the position at common law.'* – Meyers, *The Human Body and the Law,* (Second Edition (1990) Stanford University Press, p.45

[71] Stair Memorial Encyclopaedia, Volume VII, *Criminal Law Reissue/9* Abortion and Concealment of Pregnancy, (updated 2014) para.281

an abortion where the circumstances may be such as existed in *R v Bourne"*.[72] Though this opinion is merely *obiter,* it is supported by the *per curiam* judgement of the Supreme Court delivered by Lady Hale[73] and it would nevertheless appear to suggest that a prosecution could occur if a single physician authorised a termination for a legitimate reason, or if one (or even two) physicians opined that a termination should occur after the expiry of the 24 week limit, in spite of the fact that the 'law relating to abortion' does not prohibit this.

This suggestion may be challenged as the opinion of the Inner House fails to address a number of fundamental problems with the law as it stands and highlights the key issues inherent in the 1967 Act. The short statement of the court does not suggest under what grounds, or even how, criminal liability would be incurred by a physician that authorises termination in a manner permitted by the common law, but not expressly authorised by s.1 of the Act. As observed by Professor Norrie, in Scotland "there is a general presumption that the common law should not be altered by statute unless this is an explicit and inevitable result of the words used in the statute".[74] As Parliament clearly did not intend to create a new crime, or widen the existing scope of the old crime of abortion, it is submitted that, so long as a Scottish doctor acts within the common law, a prosecution cannot be brought under the auspices of the 1967 Act, even if they fail to adhere to the proscribed requirements of s.1.[75] Parliament did not intend this Act to be used as a vehicle for prosecution.[76]

Furthermore, it is submitted that there is no other method by which a Scottish doctor may be prosecuted. The common law did not forbid physician-sanctioned

[72] *Doogan v Greater Glasgow and Clyde Health Board* [2013] S.L.T. 517, para.31
[73] *Doogan v Greater Glasgow and Clyde Health Board* [2014] UKSC 68, para.1
[74] see K. Norrie, *Abortion in Great Britain: One Act Two Laws,* [1985] Crim. L.R 475 p. 481
[75] Stair Memorial Encyclopaedia, Volume VII, *Criminal Law Reissue/9* Abortion and Concealment of Pregnancy, (updated 2014) para.281
[76] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48; p.31

abortion and no part of the common law was abrogated by the 1967 Act.[77] The declaratory power of the High Court has been fallen out of favour as a result of the European Convention on Human Rights[78] and, as such, it is commonly thought that the courts should no longer, without solid legal reason, retroactively alter the common law.[79]

Thus, even if a prosecution can be brought under the 1967 Act, there exists no law that would allow for the indictment of a physician who unilaterally authorised a termination procedure for an otherwise permissible reason. While this submission clearly runs against the current of contemporary judicial thought, given the *per curiam* comments of the Inner House and the Supreme Court,[80] to suggest that the 1967 Act has had a restrictive effect is to ignore the purpose of the legislation.[81]

Of course, though that is the case, it is mechanically possible for the High Court to use the declaratory power to widen the scope of the crime of abortion.[82] Though the declaratory power has been criticised by a number of practitioners and academics, it is nevertheless thought that, at present, the courts may make use of this mechanism to hold factual events to be unlawful, in spite of no explicit, prior prohibition.[83]

Regardless of the present state of the declaratory power in Scotland, however, the *per curiam* statement of the Inner House in *Doogan* remains fallacious for a number of other reasons; the most noteworthy of which being the fact that *R v Bourne* was not a

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[77] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48; p.31

[78] See I. D. Willock, *The Declaratory Power -- Still Indefensible*, [1996] Jur Rev 97, at p 97.

[79] See A. Cadoppi, *Nulla Poena Sine Lege* and Scots Criminal Law: a Continental Perspective, [1998] Jur Rev 73

[80] *Doogan v Greater Glasgow and Clyde Health Board* [2013] S.L.T. 517; *Doogan v Greater Glasgow and Clyde Health Board* [2014] UKSC 68

[81] Though such an interpretation is indeed possible; see NAS, AD63/759/2, Note by Crown Agent, Feb. 1967

[82] K. Norrie, *Family Planning Practice and the Law,* (Dartmouth: Medico-Legal Series, 1991) p.40

[83] See R. S. Shiels, *The Declaratory Power And The Abolition Of The Syllogism,* [2010] S.C.L. Jan, 1-13

Scottish case and its decision did not have any bearing on Scots law.[84]

In addition to this, the post-1967 law clearly permits termination in circumstances akin to *R v Bourne* as s.1 (1) (b) of the 1967 Act is, essentially, a liberal codification of the *Bourne* ruling. This section provides that if two physicians opine (in good faith) that *"the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman"* then the abortion is legally permissible. No term time limit is placed on this section. Though doing so may be poor medical practice,[85] a termination on grounds of s.1 (1) (b) could legally occur the day before, or of, delivery. Therefore the only way in which a Scottish physician could carry out a termination in circumstances akin to that in Bourne in contravention of the 1967 Act, would be if they proceeded without a second opinion.

This application of the opinion is clearly far narrower than the Inner House intended in their *obiter* judgement; however this interpretation is nevertheless legally sound. Thus, it must be concluded that the Scottish law relating to abortion post-1967 is, if nothing else, as unclear as it was before 1967. Though current judicial thought appears to favour a restrictive interpretation of the 1967 Act, and the judiciary technically has the power to enforce this through the use of the declaratory power of the High Court, this interpretation clearly goes against the intentions of Parliament.[86] The fact that abortion was already in the hands of the Scottish medical profession before 1967, and the fact that the explicit purpose of the 1967 Act was to medicalise the issue

[84] Indeed, Gordon makes no mention of the case at all in his chapter on abortion – see G Gordon, *Criminal Law,* (3rd Edition, SULI, 2001) Volume II Chapter 28; in addition, see G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48; p.2

[85] For reasons of maternal safety, among other considerations - see Sprang and Neerhoff, *Rationale for Banning Abortions Late in Pregnancy,* [1998] JMA Vol.208, Issue 8 744-747

[86] It may, of course, be argued that the intent behind the amendments to the 1967 Act made by the Human Fertilisation and Embryology Act 1990 was to restrict the law by lowering the time limit proscribed by s.1(1)(a) of the 1967 Act; however one may nevertheless contend that the effectiveness of this attempt was limited by a lack of understanding of the unique Scots law – see Stair Memorial Encyclopaedia, Volume VII, *Criminal Law Reissue/9* Abortion and Concealment of Pregnancy, (updated 2014) para.281

throughout the whole of Britain,[87] suggests that the legal effect 1967 Act has not been as great as the practical changes effected by it may appear to suggest. Thus, whatever the practical state of the law may be, it must be concluded that the 1967 Act is a fundamentally flawed piece of legislation; it takes no account of the unique Scottish law, fails to liberalise the *law* of Scotland, as it had intended, and keeps the subjective opinion of individual physicians at the forefront of abortion law.

Accordingly, as the physician's opinion remains pertinent to the law as it stands,[88] it may be suggested that a patient's request for termination may be handled differently according to the individual opinions of the physician that is approached.[89] It was common for a patient to receive two different responses from two different doctors prior to 1967[90] and, as the 1967 Act merely reflects previous Scottish practice, this may remain the case at present. As such, this paper shall presently discuss the issues inherent in the pre- and post-1967 Scottish law, assess the likelihood of a patient receiving different responses from different doctors' post-1967 and examine both historic and contemporary public and professional opinions concerning the issue of abortion.

ISSUES INHERENT IN THE LAW

Though contemporary clinical practice may be regarded as "evidence based"[91] and decisions relating to medical treatment are generally made based on presented medical evidence, rather than a physician's ethical view,[92] there are certainly many areas of

[87] Excluding Ireland.
[88] G. Davis and R. Davidson, *The Sexual State: Sexuality and Scottish Governance, 1950-1980,* (Oxford University Press, 2012) Chapter 5
[89] G. Davis, *The Great Divide: The Policy and Practice of Abortion in 1960's Scotland,* [2004] The Sibbald Library Archives
[90] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48; p.45
[91] See Gray, *Evidence-based healthcare: how to make health policy and management decisions,* (1997, London: Churchill Livingstone.)
[92] G. Davis, *The Great Divide: The Policy and Practice of Abortion in 1960's Scotland,* [2004] The Sibbald Library Archives

practice in which a doctor's moral discretion may be lawfully exercised.[93]

The 1967 Act is a prime example of such an occasion as the defence proscribed by s.1 of the 1967 Act relies solely on the physician's opinion and good faith,[94] just as the pre-1967 common law did.[95] The scope afforded by the grounds in Section 1[96] are open to very wide interpretation – one may consider the suggestion that the risks of abortion, carried out within the first twelve weeks of gestation, are *always* less than the risks involved in carrying a pregnancy to term.[97]

Therefore, it is entirely up to individual medical professionals to determine whether or not they are convinced that a termination can be lawfully carried out in any situation, not for the courts to inform a course of action.[98]

It has been suggested that this medical approach towards regulation of abortion poses insurmountable challenges to prosecutors as it is all but impossible to argue that a physician's subjective opinion has been formed in bad faith. This suggestion is substantiated by the fact that there remains a dearth of Scottish case law on this matter even after 1967: No prosecutions were brought against Scottish doctors between 1945 and 1966,[99] no prosecutions have been recorded, in Scotland, after the 1967 Act came into force[100] and there remains only one known case in which a Scottish doctor was

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[93] G. Davis, *The Great Divide: The Policy and Practice of Abortion in 1960's Scotland,* [2004] The Sibbald Library Archives

[94] Just as the pre-1967 law did

[95] See G Davis and R Davidson, *"Big white chief", "Pontius Pilate" and the "plumber": the impact of the 1967 Abortion Act on the Scottish medical community, c.1967–80'*, [2005] Soc. Hist. Med., 18: 283–306

[96] Not to mention the common law grounds.

[97] P.H. Tooley, *If All Abortions Are Legal, Which Are Desirable?,* (1969)The Medical Protection Society, *The Abortion Act 1967, Proceedings of a Symposium held by The Medical Protection Society in Collaboration with the Royal College of General Practitioners, London 7th February 1969* Pitman Publishers p.9

[98] See Jenny Bristow, *British Abortion Law: Challenging Current Myths and Misconceptions,* [2012] Abortion Review

[99] National Archives of Scotland (hereafter NAS), AD63/759/1, House of Commons question, 19 July 1966

[100] G. Davis and R. Davidson, *The Sexual State: Sexuality and Scottish Governance, 1950-1980,* (Oxford University Press, 2012)

tried for providing abortion.[101]

Another notable issue with the common law position was the fact that, because access to abortion was determined by the opinions of individual physicians,[102] abortion was readily available in some parts of the country, such as Aberdeen,[103] yet very difficult to obtain in other parts of the country such as Glasgow.[104] Given that the 1967 Act has either restricted or not affected the Scottish legal position, and the 1967 Act continues to leave the application of the law in the hands of the medical profession, it is submitted that this problem may continue to the present day. Indeed, Gleeson, Forde, Bates et al found, in a 2008 study, that 62% of medical students regarded themselves as pro-choice.[105] This raises the question of what happens when the remaining 38% of future doctors come into contact with patients who are seeking therapeutic abortion.

Prior to 1967, there was a level of deep set hostility towards abortion in Glasgow present in both public and professional attitudes. While general public opinion towards abortion in the United Kingdom had softened as a result of the thalidomide tragedies of 1960's[106] this change was not observed in Glasgow[107] and Glasgow retained the lowest abortion rate in Scotland.[108]

Sir Dugald Baird regarded the presence of a large Roman Catholic minority as

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[101] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48 – As suggested, this case may be regarded as an anomaly as the Crown agent noted that the practice adopted by Doctor Ross was more akin to that which would be used by a back street abortionist than a respected medical practitioner - NAS, AD63/759/2, Note by Crown Agent, Feb. 1967.

[102] G. Davis and R. Davidson, *The Sexual State: Sexuality and Scottish Governance, 1950-1980,* (Oxford University Press, 2012)

[103] Stair Memorial Encyclopaedia, Volume VII, *Criminal Law Reissue/9* Abortion and Concealment of Pregnancy, (updated 2014)

[104] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48

[105] *Medical Students' Attitudes Towards Abortion: A U.K Study,* (2008) 34 J Med Ethics 783

[106] *Daily Mail,* 25 July 1962.

[107] G. Davis, *The Great Divide: The Policy and Practice of Abortion in 1960's Scotland,* [2004] The Sibbald Library Archives

[108] *Scotsman,* 23 Dec. 1966.

the primary factor that contributed to the low availability of abortion in the city. Priests would often pay pastoral visits to women in order to dissuade them from their chosen course of action[109] and, even in 1973, the then-Medical Officer of Health for Glasgow – Doctor Thomas Wilson – firmly stated that abortion should be prevented whenever possible.[110]

Throughout his time in practice, the Glaswegian physician Doctor Ian Donald developed the practice of showing women who requested abortion an ultrasound scan of the unborn foetus,[111] in order to dissuade them.[112] This method was routinely employed at the Queen Mother's Hospital[113] and it is almost certain that it further contributed to the relatively low rate of abortion in the city.[114]

It is trite to say that morality does not change overnight and consequently this state of affairs did not change until quite some time after the passage of the Abortion Act. Indeed, the earliest, and loudest, criticisms of the 1967 Act largely originated from the West of Scotland.[115]

Glasgow remained so hostile to the 1967 Act that for a number of years after 1967, a significant number of Scottish women travelled to England in order to procure terminations as their own doctors refused to carry out the procedure.[116] Recorded

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[109] G. Davis, *The Great Divide: The Policy and Practice of Abortion in 1960's Scotland,* [2004] The Sibbald Library Archives

[110] Interview in *the Scotsman,* 16th January 1973

[111] M. Nicolson, *Ian Donald – Diagnostician and Moralist,* Online Publication for the University of Glasgow – The Sibbald Library

[112] Although current research indicates that women's reactions to viewing ultrasound images before terminations varies considerable (see Katrina Kimport, Ushma Upadhyaya , Diana Foster, Mary Gatter and Tracy A. Weitz, *Patient viewing of the ultrasound image prior to abortion,* [2014] Obstet Gynecol vol.123 81-7), Doctor Donald's *intention* was clearly to dissuade the women: See M. Nicolson, *Ian Donald – Diagnostician and Moralist,* Online Publication for the University of Glasgow – The Sibbald Library

[113] M. Nicolson, *Ian Donald – Diagnostician and Moralist,* Online Publication for the University of Glasgow – The Sibbald Library

[114] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48; p.37

[115] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48; p.37

[116] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community*

figures show that as many as 1,000 women did this in 1972[117] and, accordingly, the Glasgow-Liverpool train attained the colloquial nickname of 'the Abortion Express' at the time.[118]

It was this strong Catholic influence, and the prevailing negative attitude towards abortion which permeated Glaswegian medical practice, that caused Sir Dugald to leave the city and relocate to a more liberal location.[119] Sir Dugald ultimately chose Aberdeen[120] as, though the prevailing social conditions of the time were broadly similar to those in Glasgow,[121] the medical practitioners in this city were not nearly as hostile towards the notion of abortion.[122]

Faced with similar social problems to those he had encountered in Glasgow,[123] Sir Dugald took advantage of the situation in the city, and the unique Scottish law, to adopt and promote a generally permissive policy regarding therapeutic abortion for both medical and social reasons.[124] As there was only one teaching hospital present in the north-east, in contrast to the situation in the West where there were far more, Baird was able to comprehensively widen access to abortion in Aberdeen by his introduction of liberal policies.[125] This influence was so great that, when the 1967 Act was brought into force, a number of Aberdonian physicians practically ignored the passage of the

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and Abortion Law Reform in Scotland, c.1960-1975, [2006] Medical History 50: 29-48; p.45

[117] H Homans, *The Sexual Politics of Reproduction,* (1985, Aldershot, Gower) pp.84-85

[118] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48; p.46

[119] Wellcome, SA/ALR/C.115, Note by Sir Dugald Baird

[120] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48

[121] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48; p.37

[122] G. Davis, *The Great Divide: The Policy and Practice of Abortion in 1960's Scotland,* [2004] The Sibbald Library Archives

[123] G. Davis, *The Great Divide: The Policy and Practice of Abortion in 1960's Scotland,* [2004] The Sibbald Library Archives

[124] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48

[125] See D Baird, *An area maternity service, Lancet,* 1969, **i:** 515–19, p. 516.

Act, as its provisions already reflected their professional medical practice.[126]

On his arrival in the city, Sir Dugald had sought and gained the advice of Professor Thomas Smith[127] regarding the Scottish legal position on abortion. Professor Smith provided an assurance that the act was lawful in Scotland, so long as it was carried out in a proper medical environment.[128] This advice was given with the support of the local police, who regarded their sole concern in relation to the issue as being the prevention of abortion carried out with "criminal intent".[129]

As such, it is submitted that the medical professions' understanding[130] of the law determined the availability of lawful abortion throughout Scotland. Before the 1967 Act was passed, the Scottish medical profession, generally, presumed that the English law regarding abortion applied to Scotland[131] and, as the prosecution of an English doctor for abortion would be "open and shut" in any situation that was not analogous to the *Bourne* case,[132] it may therefore be argued that this lack of understanding significantly contributed to the pre-1967 probability of receiving different answers from different doctors, as the majority of Scottish physicians of the time were simply not aware of the true legal position.[133]

Though there may be some merit in this argument, however, and the number of

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[126] The *Observer,* 30th January 1966

[127] Dean of the Faculty of Law at Aberdeen University

[128] G Bhatia, '*Social obstetrics, maternal health care policies and reproductive rights: the role of Dugald Baird in Great Britain, 1937–65',* MPhil thesis, University of Oxford, 1996, p. 59

[129] See comments made by Chief Constable William Smith in an interview with the Turiff and District Advertiser - 11 Feb. 1966.

[130] Or rather, lack of understanding – see G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48

[131] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48

[132] *Bourne* itself was an anomaly; a case which held little legal weight, but was granted legitimacy through common practice: British Medical Association, *Report of Committee on Medical Aspects of Abortion,* (1936) para.19

[133]G. Davis, *The Great Divide: The Policy and Practice of Abortion in 1960's Scotland,* [2004] The Sibbald Library Archives and G. Davis and R. Davidson, *The Sexual State: Sexuality and Scottish Governance, 1950-1980,* (Oxford University Press, 2012) Chapter 5.

lawfully obtained terminations did increase in the wake of the 1967 Act,[134] numerous sources indicate that access to abortion remained a geographical lottery,[135] dependent on one's doctor and location, even after the legislation was passed.[136] The fact that the number of lawful terminations carried out increased after the passage of the Act can be ascribed to the publicity that the Act enjoyed and the public perception that it was an Act that would 'legalise' abortion.[137] It is submitted that Scottish women could obtain lawful abortions prior to 1967 under the common law, had they known that they could request them. Whether they or not the physician acceded to their request would depend upon that doctor's own personal opinions and prejudices, but the possibility of attaining a lawful abortion was present and distinct even prior to the passage of the Act.

Furthermore, it may be concluded that the Act does not negate the possibility of severe geographic inconsistencies in access to abortion arising as individual medical professionals' still control practical access to abortion, just as they did according to the pre-1967 Scottish common law. As the present legal position, throughout Scotland, England and Wales, so closely resembles the pre-1967 Scottish position, it is submitted that the problems that were present under that regime remain inherent in the law today.

It is further submitted that an increased public and professional awareness of legal abortion, combined with the liberalisation of social attitudes,[138] did more to

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[134] G. Davis, *The Great Divide: The Policy and Practice of Abortion in 1960's Scotland,* [2004] The Sibbald Library Archives and G. Davis and R. Davidson, *The Sexual State: Sexuality and Scottish Governance, 1950-1980,* (Oxford University Press, 2012) Chapter 5

[135] *Scottish Daily Record*, 16 May 1973

[136] G. Davis and R. Davidson, *The Sexual State: Sexuality and Scottish Governance, 1950-1980,* (Oxford University Press, 2012)

[137] See Davis and Davidson G Davis and R Davidson, *"Big white chief", "Pontius Pilate" and the "plumber": the impact of the 1967 Abortion Act on the Scottish medical community, c.1967–80',* [2005] Soc. Hist. Med., 18: 283–306

[138] Francome and Freeman's 2000 study, *British General Practitioners' Attitudes Toward Abortion,* [2000] Fam Plann Perspect 32:189–91, found that 82% of General Practitioners (the 'gatekeepers' of access to abortion) described themselves as 'broadly pro-choice'. In a repeat study seven years later, they found that the situation had not changed much: 80.4% of GP's described themselves as such: Francome, Bury and Kerridge, *General Practitioners: Attitudes To Abortion,* [2007] Marie Stopes International Publication

increase the availability of terminations than any mechanical change in the law. Alternatively, or perhaps additionally, one may suggest that the availability of abortion increased because, as some in the profession feared,[139] fewer doctors with negative attitudes towards abortion have entered the field of gynaecology since the passage of this Act. There is not, however, any real reliable evidence to support this assertion[140] due to a lack of impartial commentary resulting from the controversy surrounding the issue.[141] While the conscience clause, introduced by s.4 of the Act, is not perfect,[142] there is no doubt that the concept is a welcome addition to the law which may protect the interests of the conscientious professionals.

Ultimately, it is clear that the 1967 Act is a flawed piece of legislation within the Scottish context and it is evident that even if the legislation had a restrictive effect on Scots *law*, the legislation was ineffective in the practical context as physicians retained all of the power that they already had.[143]

With these flaws in mind, this paper shall presently consider why the 1967 Act took the form that it did, critically examine the reasons why Scotland was included in the Act's provisions, in spite of the already-liberal law and seek to determine if the allegations that the 1967 Act is an overly Anglo-centric piece of legislation[144] are well-founded.

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[139] National Archives Scotland, HH102/1232, Professor E McGirr, University of Glasgow, to Miss M Macdonald, SHHD, 1974.

[140] Drs Adrian and Josephine Treloar, Doctor Anne Marie Williams and Doctor Peter Au-Yeung claim, in their article *Abortion and the Catholic Doctor,* (1995) World Federation of the Catholic Medical Associations (WFCMA), that '[*E]ven within the first few years of passing the law, obstacles were placed in the path of those who wished to progress in Obstetrics and Gynaecology'* – however this source is, by its very nature, too biased to be fully relied upon.

[141] As stated, the publications of the WFCMA are inherently, and unfortunately, biased though nevertheless informative. Other publications in this area stem from associations such as the Christian Medical Fellowship (see, particularly, Jacky Engel, *Abortion Law Reform,* 2004 CMF) which, again, paint a coloured picture of the issue.

[142] See – Social Services Committee, *Abortion Act 1967 'Conscience Clause'*, (10th Report, 1990)

[143] G Davis and R Davidson, *"Big white chief", "Pontius Pilate" and the "plumber": the impact of the 1967 Abortion Act on the Scottish medical community, c.1967–80'*, [2005] Soc. Hist. Med., 18: 283–306

[144] See NAS, AD63/759/2, D Cowperthwaite to R Lawrie, 2 Oct. 1967

THE 1967 ACT – ANGLO-CENTRIC LEGISLATION?

Though the 1967 Act was introduced to Parliament by a Scottish MP,[145] it is clear that the legislation was not drafted with the intricacies of Scots law in mind.[146] The Act is overly reliant on English statute[147] and – in spite of the liberal intentions of the legislature – the Act has either been restrictive or ineffective in Scotland.[148]

This state of affairs appears to have led contemporary politicians to falsely assume that the legislation has had the same effect both in Scotland and in England.[149] Accordingly, one may assert that the 1967 Act is the result of Westminster legislating for Scotland with an Anglo-centric view.

In order to determine the validity of this claim, it is necessary to consider the manner in which the Act was drafted and the background to the legislation itself: The 1967 Act was introduced as a private members bill, in 1966,[150] by David Steel MP and its introduction was supported by the government of the day.[151] Three previous attempts to introduce similar bills failed between 1951 and 1965.[152]

Due to governmental support, a joint British Medical Association-Royal College of Obstetricians and Gynaecologists committee was formed and Sir John Peel was appointed to the chair of a medical advisory committee in charge of analysing the relevant social, medical and moral issues surrounding the 1966 Bill.[153] It is notable that Sir John was a noted opponent of abortion law reform,[154] though the committee

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[145] David Steel MP – see Kandiah and Staerck, *The Abortion Act 1967,* (2002, Institute of British History)
[146] Social Services Committee, *Abortion Act 1967 'Conscience Clause',* (10th Report, 1990)
[147] Particularly the Infant Life Preservation Act 1929 (Henceforth, the 1929 Act) and the Offences Against the Person Act 1861 (Henceforth, the 1861 Act)
[148] NAS, AD63/759/2, D Cowperthwaite to R Lawrie, 2 Oct. 1967
[149] A. Lansley, *Health practitioners must not think they know better than the law,* [2012] The Telegraph
[150] See Social Services Committee, *Abortion Act 1967 'Conscience Clause',* (10th Report, 1990)
[151] http://www.telegraph.co.uk/news/obituaries/1506770/Sir-John-Peel.html
[152] Social Services Committee, *Abortion Act 1967 'Conscience Clause',* (10th Report, 1990)
[153] Social Services Committee, *Abortion Act 1967 'Conscience Clause',* (10th Report, 1990)
[154] Simms, *The Great Foetus Mystery,* (1970) New Scientist, December 31st 1970, p.592

nevertheless came out in support of the Bill.[155]

When introducing the Medical Termination of Pregnancy Bill 1966,[156] Mr Steel regarded a discussion he had engaged in with Sir Dugald Baird[157] as more influential than similar dialogues with government ministers, religious groups and the Abortion Law Reform Association (ALRA).[158] It was Sir Dugald's input which caused Mr Steel to consider the introduction of a 'social' clause which was not distinctly separated from medical concerns;[159] however, as the BMA, and many others in the medical profession, strongly opposed the introduction of this provision, Steel was ultimately forced to remove it from the Bill.[160] 'Social' abortions became regarded as legally permissible in England and Wales (as asserted, they were already lawful in Scotland[161]) due to the interpretation, by some doctors, of 'health' as referring to a "state of physical, mental and *social*[162] wellbeing".[163]

Given that the 1966 Bill was introduced by a Scottish MP who was heavily influenced by a Scottish doctor – not just any Scottish doctor, but one who, even more than most, was acutely aware of the more liberal Scottish law – one may wonder exactly how the 1967 Act may be regarded as Anglo-centric. Indeed these factors, combined with the fact that some of the notable problems in the drafting of the Act, such as the possibility of a woman receiving different answers from different doctors,

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[155] Simms, *The Great Foetus Mystery,* (1970) New Scientist, December 31st 1970, p.592
[156] Later termed 'The Abortion Bill 1966' and henceforth, 'the 1966 Bill'
[157] See G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48
[158] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48
[159] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48
[160] See Hindell and Simms, *Abortion Law Reformed,* (1971) London: Peter Owen Publication, pp.168-169
[161] G. Davis, *The Great Divide: The Policy and Practice of Abortion in 1960's Scotland,* [2004] The Sibbald Library Archives
[162] Author's italics
[163] Social Services Committee, *Abortion Act 1967 'Conscience Clause',* (10th Report, 1990)

appear to affect England and Wales as well as Scotland,[164] suggest that the 1967 Act was not passed with an overly Anglo-centric view.

Further supporting this is the fact that it was Sir Dugald himself who encouraged Steel to extend the provision of the Act to Scotland, in spite of the more liberal Scottish law[165] and his own personal frustration that legislation was seen as necessary at all.[166] Sir Dugald convinced Steel that the protections of the Act should apply to Scotland as, while the Scottish law was easier to understand,[167] Sir Dugald himself was "the only one taking advantage of it".[168] As such, the historic context and the attitude taken by the progenitors of the 1966 Bill would appear to suggest that it is too easy to label the 1967 Act as purely Anglo-centric.

With that said however, there is evidence to suggest that the attitudes of the English draftsmen at the time are indicative of a lack of concern for the unique Scottish law.[169] Indeed, soon after the passage of the 1967 Act, the Assistant Secretary of the SHHD expressed his dissatisfaction with the parliamentary draftsmen who framed the legislation by criticising, what he viewed as, a blatant disregard of the 'previous' Scottish legal position.[170]

The Assistant Secretary stated that the general unwillingness of English departments to alter drafts which met English requirements, but not Scottish needs, was such that problems would be, and later were, caused for the Scots.[171] Most notable

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[164] Francome and Freeman's 2000 study, *British General Practitioners' Attitudes Toward Abortion,* [2000] Fam Plann Perspect 32:189–91

[165] Social Services Committee, *Abortion Act 1967 'Conscience Clause',* (10th Report, 1990)

[166] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48

[167] Social Services Committee, *Abortion Act 1967 'Conscience Clause',* (10th Report, 1990)

[168] Social Services Committee, *Abortion Act 1967 'Conscience Clause',* (10th Report, 1990) – an overstatement, but one which is true in principle.

[169] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48

[170] NAS, AD63/759/2, D Cowperthwaite to R Lawrie, 2 Oct. 1967

[171] NAS, AD63/759/2, D Cowperthwaite to R Lawrie, 2 Oct. 1967

among these problems is the fact that the time limit which the legislation sought to introduce was initially absolutely inapplicable in Scotland,[172] due to the fact that the Infant Life Preservation Act 1929, which the 1967 Act expressly relied upon to determine the concept of 'viability' prior to the Human Fertilisation and Embryology Act 1990,[173] extends to England and Wales only.[174]

For these reasons it is clear to see why there were attempts to exclude Scotland from the provisions of the Act[175] and why one may be tempted to say that the 1967 Act was passed with an Anglo-centric view. However, on balance it would appear that while the Act may have been drafted in a manner which catered more towards the codified English law, it was not passed in Parliament without due consideration for the unique Scottish law.[176] While, with the benefit of hindsight, one may suggest that it would have been best to tackle the issue of abortion in Scotland, England and Wales with separate pieces of legislation, this suggestion is wholly impractical; it is, ultimately, fortunate that even *one* Abortion Act passed through Parliament at the time; trying to pass a second Act simultaneously would be tempting fate.[177] Indeed, between 1968 and 1989, the pro-life lobby made sixteen attempts to alter or repeal the 1967 Act.[178]

With that said, as the 1967 Act has widely been regarded as a success, but is wholly flawed within the Scottish context, one must consider why the Act has not been

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[172] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48

[173] See The Medical Protection Society, *The Abortion Act 1967, Proceedings of a Symposium held by The Medical Protection Society in Collaboration with the Royal College of General Practitioners,* London 7th February (1969, Pitman Publishers)

[174] Infant Life Preservation Act s.3(2)

[175] G. Davis and R. Davidson, *"A Fifth Freedom" or "Hideous Atheistic Expediency"? The Medical Community and Abortion Law Reform in Scotland, c.1960-1975,* [2006] Medical History 50: 29-48

[176] Social Services Committee, *Abortion Act 1967 'Conscience Clause',* (10th Report, 1990)

[177] U.K Health Centre, *Abortion Controversy: Pro Choice and Pro Life,* (2012) Online Publication

[178] See HC Deb 27 July 1989 vol 157 cc1371-90 (Abortion) – for a discussion of later attempts, see the Private Members Bills introduced by Nadine Dorries in 2006 and 2008; BBC News, *MP's Back 24 Week Abortion Limit,* (2008) BBC News

amended to better reflect Scots law, especially in light of the Scotland Act 1998[179] and the creation of the Scottish Parliament.

This question raises the ultimate issue concerning abortion law in Scotland: The ability to legislate on the issue is reserved to Westminster,[180] despite the fact that abortion is a medico-criminal matter and issues of healthcare and the criminal law are devolved to Holyrood.[181] It is therefore small wonder that the perception of a unified Scottish, English and Welsh abortion law has developed and been perpetuated; although the legislators that created and framed the 1967 Act were clearly aware that the different countries within the United Kingdom had different needs in relation to abortion, as the Act was not extended to Northern Ireland,[182] they nevertheless chose to frame the law in such a way that addressed the needs of English and Welsh law, but caused problems for the Scots.[183]

Accordingly, one may conclude that, while the 1967 Act is not an Anglo-centric piece of legislation,[184] the Parliamentary draftsmen that composed the Act clearly took no account of the unique Scottish law.[185] The fact that the UK Parliament has reserved its right to legislate on this matter is illogical and therefore problematic. This approach takes no account of the subtle, and not so subtle, differences between Scottish and English law and is blatantly out of step with the rest of the Scotland Act; as such, it is submitted that, as the 2014 Independence referendum resulted in a 'No' vote,[186] with

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[179] c.46

[180] See part II, Head J of the Scotland Act 1998

[181] See D. Stockley, *The increasingly strange case of abortion: Scots criminal law and devolution*, [1998] Edin. L.R. Volume 2, 330-337

[182] Abortion Act 1967, s.7

[183] NAS, AD63/759/2, D Cowperthwaite to R Lawrie, 2 Oct. 1967

[184] NAS, AD63/759/2, D Cowperthwaite to R Lawrie, 2 Oct. 1967

[185] D. Stockley, *The increasingly strange case of abortion: Scots criminal law and devolution*, [1998] Edin. L.R. Volume 2, 330-337

[186] See http://www.bbc.co.uk/news/uk-scotland-29270441

the promise of new powers for the Scottish Parliament,[187] the issue of abortion should be devolved to Holyrood in order to ensure that any legislative review of the topic is given thorough legal consideration that takes into account the nuances of Scots law.

CONCLUSION

After a detailed consideration of relevant case law and statute it is clear that the 1967 Act is a flawed piece of legislation within the Scottish context. The gradual liberalisation of ethical opinions concerning abortion has done more to widen access to safe abortion than the 'changes' made to the law by the Act; indeed, even in spite of recent comments made by the Inner House, one may doubt that any mechanical changes were actually brought about by the Act at all.

It remains distinctly possible for different women to receive different answers dependent on which physician they approach with their request and, from that point of view, whether or not the 1967 Act was legally restrictive or ineffective is moot: The tenets of the pre-1967 Scottish common law are codified by statute and accordingly the practical problems of the common law position are brought to bear.

Although it is evident that the 1967 Act was not passed with an overly Anglo-centric view, the fact that Westminster has reserved the right to legislate on abortion is both curious and illogical. Consequently, it is clear that the Scottish Parliament should be given control of this area of law, particularly as it already lies within the remit of two devolved areas – criminal law and healthcare.

With all of this in mind, however, one must ultimately consider the comments made by Mr Geoffrey Howe QC shortly after the Act was passed. In a 1969 article, Mr Howe plainly stated that the 1967 Act would only ever be altered if public opinion

[187] See http://www.theguardian.com/politics/2014/sep/16/cameron-miliband-clegg-pledge-daily-record

turned solidly against it.[188] As public opinion towards abortion has only softened in the decades since, and the legislation has remained all but unchanged in spite of numerous flaws, one may conclude that he was right.

[188] The Lancet, Vol.293, No. 7590, February 15th 1969, p.355