

## **Criminalising obstetric violence: An appropriate response to abuse within the maternity system?**

Dear All,

The Centre for Ethics and Law in the Life Sciences and the Centre for Criminal Law and Criminal Justice are pleased to invite to an online obstetric violence event, *Criminalising obstetric violence: An appropriate response to abuse within the maternity system?*

Obstetric violence and abuse during childbirth is a form of gender-based violence that concerns both personal and structural violence against women and birthing people within the maternity care context. It includes discrimination; physical, verbal and emotional abuse and coercive control; forced or unauthorised procedures; routine provision of procedures not clinically indicated or that lack an evidence base; and system constraints resulting in under-resourced services

In 2019, Dubravka Šimonović, the United Nations Special Rapporteur on violence against women, its causes and consequences published a thematic report on obstetric violence, 'A human rights-based approach to mistreatment and violence against women in reproductive health services with a focus on childbirth and obstetric violence'. Therein, the Special Rapporteur reminded States of their obligations to respect, protect and fulfil women's human rights during the provision of reproductive health care and called on States to prosecute perpetrators of this form of gender-based violence. While the report is a celebrated development, many questions emerge in relation to broader reliance on the criminal law framework and this the webinar will explore some of the complexities of adopting a criminal law approach to obstetric violence.

### **Speakers and abstracts**

Gemma McKenzie, *'Empirical examples of obstetric violence in freebirth narratives: Understanding the complexity of the lived experience and its impact on the criminalisation of obstetric violence'* (PhD Candidate, King's College London)

Pregnant women and people have the right to autonomy and bodily integrity. This means that antenatal care and medical/midwifery support during pregnancy and birth are voluntary and optional. When a person has full mental capacity, any medical intervention can therefore only be carried out on them with informed consent. Notably, pregnant women and people with mental capacity are under no legal obligation to submit to treatment. This is the case even if their decision would result in their death or the death of their unborn child.

From this legal basis stems the right to freebirth. Freebirth occurs when women intentionally give birth without doctors or midwives present in societies where there are maternity services available to assist them. Using narrative interviews, my Economic and Social Research Council funded study explored the experiences of sixteen women who had freebirthed in the UK. What became apparent was that many of these women had previously experienced obstetric violence at the hands of health carers. This included vaginal examinations, rupturing of the membranes and episiotomies without consent. The impact of these abuses was considerable and played a role in women's decision to freebirth in subsequent pregnancies.

There is currently limited empirical data and therefore understanding of obstetric violence, particularly with regards to the way in which it manifests and the consequences for those people who are subjected to it. Using examples of the lived experience from my data, I will present the complexity of this phenomenon. I will argue that any criminalisation of the act requires a clear definition of obstetric violence, concrete parameters regarding which acts are criminal offences and which are not, specific guidance regarding the temporal aspects of the offence and clarity on potential defences. Until a holistic understanding of the phenomenon is determined, I argue that criminalisation will be futile.

Dr Karen Brennan, *“Reflections on Criminalising Obstetric Violence – A Feminist Perspective” – Some Further Reflections’* (Senior Lecturer in Law, Essex Law School)

Four years ago, I wrote “Reflections on Criminalising Obstetric Violence: A Feminist Perspective” in Pickles and Herring (eds), *Childbirth, Vulnerability and Law* (2019) a chapter on the criminalisation of obstetric violence arguing for a woman-centred criminal law which would take account of the gendered harms women experience in this context. My argument was that, assuming criminalisation is an appropriate response, a specific offence of obstetric violence would be needed. However, as someone who generally believes that the criminal law should be restrictively used and who has previously challenged the individualisation of criminal responsibility in other contexts, I had some lingering reservation about whether criminalising medical professionals, particularly in under-resourced public health care settings, is the fairest and most appropriate response to obstetric violence, and whether this would be the most effective outcome for victims. Linked with this is concern about the impact of the fear of potential criminalisation in terms of patient safety, something I have become more mindful of following the Okenden Report. The argument in my chapter was based on the need for a “woman-centred” offence, and another aspect to consider is the importance of taking an inclusive approach.

Since writing this chapter, I have also had my own first experience of childbirth. Having now experienced the complexities of the messy, unpredictable, emotional, painful, natural/normal, and yet potentially dangerous, event of childbirth, and the medical systems and practices which govern it, I am prompted

to reflect further on my previous arguments, in particular the question of whether criminalisation is an appropriate response

Dr Camilla Pickles, *'Reflections on the violence in obstetric violence and the role of the criminal law'* (Assistant Professor, Durham Law School and Visiting Associate Professor, Wits Law School)

This paper is linked to a broader project focused on 'obstetric violence and the law' that seeks to establish where gaps in the law exist and to consider how to bridge those through law reform. To date, the obstetric violence landscape is awash with uncertainty and one issue rests on the meaning of 'violence' in obstetric violence. Some scholars limit 'obstetric violence' to intentional behaviour while others adopt a broader construction of 'violence' to include structural violence and unintentional violations. Consequently, meaningful legal responses, including appropriate criminal law responses, are undermined by the fact that it is not entirely clear what constitutes 'violence' in 'obstetric violence'. This paper attempts to develop a theoretical construction of obstetric violence and uses this construction to offer some reflections on what role the criminal law can/should play.

Carlos Herrera Vacaflor, *'A critical criminological approach to the criminalization of obstetric violence'* (Independent Scholar, Argentina)

States commonly respond to wrongdoing through criminalization. Growing feminist literature argues about the expressive importance of enacting specific crimes of violence against women, such as obstetric violence. It is important to analyse whether such a response is appropriate, effective, or desirable. This paper will present a critical criminology approach that will shed light on the different ways the expressive function of criminal law fails. Correspondingly, it will describe the experience of Mexico, where criminalisation and arbitration co-exist as redress mechanisms for obstetric violence.

International human rights bodies and scholars argue that violence against women, and obstetric violence against birthing persons in particular, should be criminalised because – as a matter of principle – States must recognise and express to society what is socially harmful, and that gender inequality must be prosecuted and punished. The expressive function of criminal law as a theoretical justification for creating a new crime against growing perverse social phenomena is among the main arguments for criminalisation of specific harmful expressions of violence against women. Critical criminology has argued that because there is violence in an intimate or professional relationship does not mean that criminal law should intervene. A critical criminological approach particularly sheds light on how applying criminal law policies fails to properly recognise and address gender and intersectionality in violence against women.

In turn, this paper will present Mexico as a jurisdiction where two mechanisms of redress against obstetric violence coexist: a specific crime of obstetric violence and a medical arbitration process. On the one hand, this study will provide evidence for a critique against the criminalisation turn. On the other hand, it will offer a preliminary research on the benefits and shortcomings of arbitration as a redress mechanism for violence against women.

*Professor Jonathan Herring, 'Violence against women, obstetric violence and the response of the criminal law' (DM Wolfe-Clarendon Fellow in Law, Oxford University)*

This paper will explore the reasons why criminal law has failed in responding effectively to violence against women. It will use this to examine why criminal law struggles to recognise obstetric violence as a criminal wrong. Themes which will be explored will be the “incident model” of criminal law, which focusses on particular moments of violence, rather than looking at the manipulation of relationships; the inadequate understandings of consent that are used in criminal law; and the “glorification of motherhood” which is found throughout the criminal law, holding mothers to higher standards of behaviour than are expected by others.

**Date:** 30 September at 1:30pm

For any questions regarding the event, please contact Camilla Pickles at [camilla.m.pickles@durham.ac.uk](mailto:camilla.m.pickles@durham.ac.uk)