



Law Society
of Scotland

Consultation Response

Early medical abortion at home

January 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Health and Medical Law sub-committee welcomes the opportunity to consider and respond to the Scottish Government consultation: Early medical abortion at home.¹ The sub-committee has the following comments to put forward for consideration.

General Comments

We note that this consultation seeks views on whether or not to make permanent the current COVID-19 arrangements allowing for home use of both pills for early medical abortion in Scotland. Health care providers and those who have direct experience of the COVID-19 arrangements will be best placed to comment on the actual or potential practical impacts of these arrangements. We have therefore sought to restrict our comments to those issues arising from a legal perspective which we would suggest should be considered in reaching a decision on whether the current arrangements should be allowed to continue once there is no longer a significant risk of COVID-19 transmission. Our comments below should be read in this context.

We note that the data on the impact of COVID-19 arrangements in Scotland referred to in the consultation document relates only to the period April to June 2020.² We also note that full results of surveys seeking to obtain patient views were not available when the consultation document was prepared.³ Whilst we understand that further data may not have been available when the consultation document was prepared, any decision on permanent change to the arrangements for early medical abortion in Scotland should be informed by sufficient and robust data.

¹ <https://consult.gov.scot/population-health/early-medical-abortion-at-home/>

² Scottish Government "Consultation on Future Arrangements for Early Medical Abortion at Home", <https://www.gov.scot/publications/consultation-future-arrangements-early-medical-abortion-home/pages/0/> at paragraph 16

³ *Ibid*, at paragraph 22

We also note that, whilst some of those seeking access to early medical abortion may prefer to have their abortion at home, there will be those for whom this is not appropriate or who may prefer to access more traditional clinic-based services. It is important that, once there is no-longer a significant risk of COVID-19 transmission, an appropriate range of services are available and that patients are not denied the option of attending clinic. It is also important that those seeking to access early medical abortion are provided with clear and accessible information about the range of abortion services available to them. Those providing abortion services should have clear processes in place to identify cases where early medical abortion at home is not appropriate for whatever reason or where an ultrasound scan is required, and arrangements in place to ensure that those in this position are able to access suitable face- to- face appointments and clinic-based abortion services without delay.

Consultation Questions

1. What impact do you think that the current arrangements for early medical abortion at home (put in place due to COVID-19), have had on women accessing abortion services? Please answer with regards to the following criteria:

- a) **safety**
- b) **accessibility and convenience of services**
- c) **waiting times**

Health care providers and those who have direct experience of the COVID-19 arrangements will be best placed to comment on the impact of these arrangements.

We note that the consultation document highlights statistics for England and Wales which indicate that COVID-19 arrangements may have led to reduced waiting times for abortion services. We also note that NHS Boards in Scotland have reported that those who do require to attend a clinic for an ultrasound following a telemedicine appointment have shorter appointments at the clinic.⁴ We note that swift and timely access to appropriate abortion services may minimise unnecessary distress and additional physiological complications, ultimately with potential benefit both to those accessing abortion services and the NHS.

⁴ Scottish Government "Consultation on Future Arrangements for Early Medical Abortion at Home", <https://www.gov.scot/publications/consultation-future-arrangements-early-medical-abortion-home/pages/0/> at paragraph 16

2. What impact do you think that the current arrangements for early medical abortion at home (put in place due to COVID-19), have had for those involved in delivering abortion services? (For example, this could include impacts on workforce flexibility and service efficiency.)

Health care providers and those who have direct experience of the COVID-19 arrangements will be best placed to comment on the impact of these arrangements.

3. What risks do you consider are associated with the current arrangements for early medical abortion at home (put in place due to COVID-19)? How could these risks be mitigated?

We consider that there are a number of potential risks associated with the current arrangements for early medical abortion at home, and we have set these out below. However, we consider that these risks can be mitigated by appropriate safeguards.

We would suggest that risks associated with the current arrangements for early medical abortions at home may include:

- **Compliance with the Abortion Act 1967 (“the 1967 Act”)**

The legal framework for lawful abortion in Scotland is provided by the Abortion Act 1967. A patient seeking to access early medical abortion at home must fulfil the criteria set out in the 1967 Act.⁵ The Act requires two registered medical practitioners to certify that they are of the opinion that at least one of the grounds under the Act for an abortion have been met.⁶

The ground in section 1(1)(a) of the 1967 Act requires that the pregnancy has not exceeded its twenty-fourth week, however there are exceptions to this in the further grounds set out in sections 1(1)(b)-(d). In the case of early medical abortion at home there may be an increased risk of inaccurate estimation of gestation given the absence of procedures and equipment available at face-to-face appointments, which could result in a breach of the 1967 Act. However, we also note that such a breach may be unlikely as there are yet to be any reported cases in Scotland of women mistakenly being given pills to take at home when they were over 24 week legal limit.⁷ Allowing patients to take both pills at home may also increase the risk of impersonation, or of a patient passing the pills on to someone else.

⁵ Scottish Government “Consultation on Future Arrangements for Early Medical Abortion at Home”, <https://www.gov.scot/publications/consultation-future-arrangements-early-medical-abortion-home/pages/0/> at Appendix B, Inclusion Criteria

⁶ 1967 Act, section 1

⁷ Scottish Government “Consultation on Future Arrangements for Early Medical Abortion at Home”, <https://www.gov.scot/publications/consultation-future-arrangements-early-medical-abortion-home/pages/0/>, at paragraph 19

The consultation does not address or seek to remind those involved that breaches of the 1967 Act can potentially result in criminal prosecution for statutory or common law offences. Accordingly, it is important that providers of abortion services have robust processes in place which include sufficient safeguards to mitigate any increased risk of breach of the 1967 Act arising from the provision of at home services. It may be helpful for guidance to be issued which confirms that the 1967 Act continues to apply, and to remind health care providers and patients that any breach of the Act may amount to a criminal offence and lead to very serious consequences for those involved. It may also be appropriate for guidance to confirm that the provisions of the Abortion (Scotland) Regulations 1991 continue to apply, including the requirement to complete and return mandatory abortion notification forms within 7 days of the termination.⁸

We also note that the Abortion Act 1967 (Place for Treatment for the Termination of Pregnancy) (Approval) (Scotland) 2020 provides that the home of a pregnant woman is a place where treatment for termination of pregnancy may be carried out, for the purposes of section 1(3A) for the 1967 Act.

- **Difficulties in obtaining and recording informed consent**

It is essential that those accessing early medical abortion services are able to give informed consent to their treatment. Informed consent must be based on knowledge of the material risks, and reasonable alternatives associated with the proposed treatment.⁹ This may be more challenging in the context of a telemedicine consultation. It may be more difficult to provide the patient with written information. The patient may find it more difficult to ask questions than they would during a face-to-face interaction, and the healthcare practitioner may find it more difficult to assess whether the patient has understood the information provided due for example to the absence of visual cues, language barriers and potential interruptions in a home environment. If there are unique medical risks, or consequences of early medical abortion at home, patients should be informed of these. For example, where relevant it may be prudent to inform patients of risks associated with lack of access to anti-D prophylaxis (outside of the COVID-19 pandemic).¹⁰ Informed consent should be based on a high-quality discussion between the healthcare practitioner and the patient, tailored to the patient's individual circumstances and specific risks.

In the context of at home treatment it may also be more difficult to identify vulnerable groups, and therefore to ensure informed consent can be obtained. These groups include:

⁸ Abortion (Scotland) Regulations 1991 SI 1991/460, regulation 4. We note that this was addressed, in the context of the COVID-19 arrangements, in the guidance issued by the Chief Medical Officer on 31 March 2020 available at [https://www.sehd.scot.nhs.uk/cmo/CMO\(2020\)09.pdf](https://www.sehd.scot.nhs.uk/cmo/CMO(2020)09.pdf)

⁹ *Birch v UCL* [2008] EWHC 2237 (QB); *Montgomery v Lanarkshire Health Board* [2015] UKSC 11

¹⁰ Scottish Government "Consultation on Future Arrangements for Early Medical Abortion at Home", <https://www.gov.scot/publications/consultation-future-arrangements-early-medical-abortion-home/pages/0/> at, Annex B, paragraph 6

- Those suffering from, or at risk of, domestic or sexual abuse or human trafficking. It may be more difficult for practitioners to identify at risk patients via a telemedicine consultation, particularly a consultation over the phone. Practitioners may not be able to identify situations of coercion which may be more evident in face-to-face settings.
- Patients with mental health issues. It may be more difficult for practitioners to identify and support patients experiencing mental health issues, which may be exacerbated by an at home medical abortion, via a telemedicine consultation.

These risks could be mitigated by suitable training and guidance for practitioners, and the development of clear and accessible information for patients at all stages of the early medical abortion process. In particular, it is essential that detailed and accurate records of telemedicine consultations are made by healthcare practitioners. We note that the 'Early Medical Abortion at Home – Scottish Abortion Care Providers Guidelines: Guidelines for approval of early medical abortion with self-administration of mifepristone and misoprostol in the home setting – COVID-19' annexed to the consultation document state that:

“Staff should complete EMAH paperwork, detailing patient understanding of treatment, the information that has been provided on what to expect at home (including information leaflet) and the 24 hour contact information for advice/concerns or emergency contact. Staff should also document when the patient will conduct the pregnancy test to confirm success of procedure.”¹¹

These processes must be robust in order to ensure compliance with the relevant case law on informed consent.

4. Do you have any views on the potential impacts of continuing the current arrangements for early medical abortion at home (put in place due to COVID-19) on equalities groups (the protected characteristics of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation)?

- Yes

If yes, please outline possible impacts below. Please be as specific as you can and include any resources or references to evidence on this topic that we should consider.

We are not aware of any specific resources or publicly available data which may indicate potential impacts on equalities groups. Individuals with protected characteristics and organisations of and for those with protected characteristics may be better placed to comment. However, we would envisage that there is potential for both positive and adverse impacts on equalities groups. For example, some disabled people

¹¹ Ibid, at Annex B, paragraph 12

may be better able to access services which do not require attendance at a clinic due to accessibility issues, whereas others may find it difficult to participate in a telemedicine appointment without practical support from a third party, thereby negatively impacting on their right to privacy and dignity. A full and thorough equalities impact assessment should be carried out for any permanent changes to the arrangements for early medical abortion at home.

5. Do you have any views on potential impacts of continuing the current arrangements for early medical abortion at home (put in place due to COVID-19) on socio-economic equality?

- Yes

If yes, please outline possible impacts below. Please be as specific as you can and include any resources or references to evidence on this topic that we should consider.

We are not aware of any specific resources or publicly available data which may indicate potential impacts on socio-economic equality. Individuals with experience of socio-economic disadvantage and organisations with experience in this sector may be better placed to comment. However, we would envisage that there is potential for both positive and negative impacts on socio-economic equality. For example, those experiencing socio-economic disadvantage may find it difficult to meet the costs associated with attending face-to-face appointments (including travel and childcare) and therefore be better able to access services which do not require attendance at a clinic. However, some of those experiencing socio-economic disadvantage may also find it more difficult to ensure a quiet space and privacy at home for telemedicine appointments. A full and thorough assessment of the impact on socio-economic equality should be carried out for any permanent changes to the arrangements for early medical abortion at home.

6. Do you have any views on potential impacts of continuing the current arrangements for early medical abortion at home (put in place due to COVID-19) on women living in rural or island communities?

- No

If yes, please outline possible impacts below. Please be as specific as you can and include any resources or references to evidence on this topic that we should consider.

We have no specific comments, although we note research referred to in the consultation document which highlights difficulties for some women in accessing abortion care in remote and rural Scotland.¹²

7. How should early medical abortion be provided in future, when COVID-19 is no longer a significant risk?

As highlighted above, we recognise there are both risks and benefits in allowing the current COVID-19 arrangements to continue once COVID-19 is no-longer a significant risk. At present, it does not appear that the risk of COVID-19 is likely to significantly reduce in short term. It is therefore appropriate that the current arrangements remain in place for the foreseeable future. We would suggest that this may allow time for further data gathering and analysis in respect of the current arrangements, in order that risks can be fully understood and mitigated as far as possible, and impacts on equalities groups and socio-economic equality can be better understood. Whilst we support steps to ensure that those seeking early medical abortion have access to a range of safe and accessible services within the legal framework provided by the 1967 Act, any decision on permanent change to the arrangements for early medical abortion in Scotland should be informed by sufficient and robust data.

¹² Scottish Government "Consultation on Future Arrangements for Early Medical Abortion at Home", <https://www.gov.scot/publications/consultation-future-arrangements-early-medical-abortion-home/pages/0/> at paragraph 24



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