

## **Briefing for the Citizen Participation and Public Petitions Committee on petition PE1887: Create an unborn victims of violence act, lodged by Nicola Murray**

### **Background**

The petition seeks the creation of a specific criminal offence enabling the courts to impose longer sentences for perpetrators of domestic abuse which causes the loss of an unborn child (e.g. due to miscarriage or forced termination). The petitioner refers to personal experience of losing three babies in such circumstances.

The rest of this paper provides information on:

- criminal offences
- sentencing
- domestic abuse during pregnancy.

### **Homicide**

Causing the death of another person may be prosecuted in Scotland under the law of homicide, using the common law offences of murder and culpable homicide. There are also statutory offences such as causing death by dangerous driving.

The [Stair Memorial Encyclopaedia](#) states:

“The law of homicide protects human life against destruction by others. Human life for these purposes is limited to ‘self-existent’ human life and does not include the foetus in utero. The destruction of the foetus, except when legally authorised, is the non-homicide crime of abortion.” (criminal law para 212)

This definition excludes causing the death of an unborn child from the law of homicide in Scotland. The situation may be different where an infant dies of injuries caused prior to birth. The Stair Memorial Encyclopaedia notes that:

“Other than one road traffic case, there is no reported Scottish case in which a child born alive has subsequently died from wounds received while in utero. In *McCluskey v HM Advocate*, the accused was convicted of the statutory offence of causing death by reckless driving in respect of injuries sustained by a child who was born prematurely as a result of the accident and died as a result of intra-uterine injuries. In this case the legislation was interpreted so as to allow a conviction, but the same result might be achieved on principle where the charge is one of homicide.” (criminal law para 212)

The Scottish Law Commission is [currently examining the law of homicide](#). In May 2021 it published a [discussion paper focusing on the mental element in homicide offences](#) (e.g. intention or wicked recklessness for murder under Scots law). However, the paper also notes that some legal systems have offences such as “homicide of an unborn child” (para 1.22). It indicates that the creation of such offences in Scots law would require policy decisions taken by the Scottish Parliament.

The Scottish Law Commission has also published a comparative paper looking at [homicide laws in other jurisdictions](#). Again, the focus of the paper is the mental element of homicide offences. It does, however, highlight some examples of homicide covering unborn children, such as the New York Penal Code which provides the following general definition of homicide:

“Homicide means conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four weeks under circumstances constituting murder, manslaughter in the first degree, manslaughter in the second degree, criminally negligent homicide, abortion in the first degree or self-abortion in the first degree.” (para 5.2)

## **Abortion**

Abortion is a common law offence under Scots law. The offence is subject to the exception made for medical terminations of pregnancy carried out in accordance with the provisions of the Abortion Act 1967.

Commenting on the common law offence, the Stair Memorial Encyclopaedia highlights that it requires ‘intention’:

“The essence of abortion is the intent to destroy the life of the foetus. It is not the criminal offence of abortion to bring on the premature delivery of a foetus if there is no intention to cause the destruction of that foetus.” (criminal law, para 241)

It also notes that there are “relatively few reported cases of prosecution, and none in recent times”. The current law relating to abortion would, therefore, appear to have limited (if any) relevance in practice to situations where the loss of an unborn child is caused by violence against the mother.

### **Assault and domestic abuse**

The common law offence of assault may be used to prosecute an attack on a person. This could include cases where an attack on a pregnant woman causes the loss of her unborn child.

Assaults can range from relatively minor attacks to extremely serious ones. Where appropriate, a charge of assault can highlight various aggravating factors to indicate the seriousness of the offence (e.g. assault to severe injury). Such factors may increase the sentence imposed by a court.

The Domestic Abuse (Scotland) Act 2018 created a new statutory offence of domestic abuse. It sets out three conditions, all of which must be proven for a conviction:

- the accused engaged in a course of behaviour which was abusive of the accused’s partner or ex-partner
- a reasonable person would consider the course of behaviour to be likely to cause the partner/ex-partner to suffer physical or psychological harm
- the accused either intended the course of behaviour to cause such harm or was reckless as to whether it would.

This new offence is intended to cover behaviour which was already criminal as well as abuse which might not have been captured by existing offences such as assault. Those other offences may still be used where a case of abuse is not covered by the new offence (e.g. where a single incident rather than a course of behaviour is being prosecuted).

The Domestic Abuse (Scotland) Act 2018 includes a statutory aggravation where the new offence involves a child. This does not

appear to cover an unborn child. However, the fact that a victim of domestic abuse was pregnant and lost her unborn child because of the abuse could still be important factors in sentencing. Although potential aggravating circumstances can be set out in legislation this is not necessary. So, for example, pregnancy and loss of the unborn child might be considered aggravating due to the potential vulnerability of the victim and the level of harm caused.

## **Sentencing**

The common law offence of murder carries a mandatory sentence of life imprisonment. The length of time actually spent in custody varies depending on the circumstances of the murder and the ongoing risks presented by the offender.

In relation to other common law offences, the maximum sentence which may be imposed depends on the sentencing powers of the court dealing with the case. Where this is the High Court, this can mean life imprisonment, although in practice lesser sentences are likely to be imposed.

For statutory offences, maximum sentencing powers are set out in relevant legislation. For example, the statutory offence of domestic abuse has a maximum custodial sentence of 14 years (this would be where the High Court imposes sentence).

[Information about the process of sentencing](#) is available on the Scottish Sentencing Council's website.

## **Domestic abuse during pregnancy**

In 2013, the Scottish Government published a [review of evidence on a range of issues affecting pregnancy and maternity](#). In relation to women being victims of crime, it noted that:

“Research highlights an increase in physical abuse, and particularly domestic violence, during pregnancy and early maternity.” (para 9.1)

The issue of domestic abuse where the victim is pregnant was raised during parliamentary consideration of the bill which became the Domestic Abuse (Scotland) Act 2018. Written evidence received by the Justice Committee included a [submission from an academic at the University of Strathclyde](#) seeking further reform:

“In providing for a new offence of ‘domestic abuse’, it will be important not to neglect the particular problem of abuse directed against pregnant women and girls. Pregnancy can prompt an intensification of abuse in already-abusive relationships, and it can trigger the onset of abuse in relationships that have not previously been abusive. Pregnant women who experience abuse are vulnerable to all of the same harms as non-pregnant women, but also to additional harms associated with risks to the foetus (including the risk of pregnancy loss). Therefore, the Domestic Abuse (Scotland) Bill should address the problem of violence against pregnant women and girls specifically, and should include measures designed to deter or punish partners and ex-partners who might target them.

I recommend that this be done in both of the following ways:

1. By creating a specific offence of ‘contributing or attempting to contribute, through violence, abusive behaviour, deception, and/or coercion, to the ending of a partner’s or ex-partner’s pregnancy’, and
2. By acknowledging the pregnancy of the victim as a factor aggravating the crime of domestic abuse.”

The recommendations were not taken forward in the Domestic Abuse (Scotland) Act 2018.

The academic’s submission also highlights legislation applying in England and Wales (the Infant Life (Preservation) Act 1929) which may be used to prosecute someone who attacks a pregnant woman and causes the loss of her unborn child:

“This statute, originally enacted to close a loophole in abortion law, is now used predominantly to charge men who violently attack their pregnant partners or expartners.”

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17/08/2021

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