Justice Committee

Domestic Abuse (Scotland) Bill

Written submission from Dr Mary Neal

Domestic abuse where the victim is pregnant

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.¹ 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.

1. A SPECIFIC OFFENCE

Suggested draft section creating the new offence:

1A Behaviour contributing to the ending of a partner’s or ex-partner’s pregnancy

(1) A person commits an offence if—

(a) the person (A) contributes, or attempts to contribute, through violence, other abusive behaviour, deception, and/or coercion, to the ending of a partner’s or ex-partner’s pregnancy, and

¹ See, for example, the wide-ranging review and analysis of the literature on abuse during pregnancy by Taillieur and Brownridge, in which they note, “it is clear that a substantial minority (between 3.8% and 40.0%) experience violence for the first time during pregnancy” (22). They note also that “[r]esearch has indicated that between 13% and 71% of women who are abused both before and during pregnancy report an increase in the frequency and/or severity of violence at pregnancy onset…with most studies reporting approximately one in every five victims experienced an increase in violence during pregnancy” (22). (TL Taillieur and DA Brownridge, ‘Violence against pregnant women: Prevalence, patterns, risk factors, theories, and directions for future research’, Aggression and Violent Behavior (2010) 15:14-35.)
(b) either—

(i) A intends the violence, abusive behaviour, deception, and/or coercion to contribute to the end of the pregnancy, or

(ii) A is reckless as to whether the violence, abusive behaviour, deception, and/or coercion contributes to the end of the pregnancy.

(2) Section 2 explains the meaning of ‘abusive behaviour’ for the purposes of subsection (1).

(3) Section 10 explains the meaning of ‘partner’ and ‘ex-partner’ for the purposes of subsection (1).

The offence proposed here would address a gap in Scots criminal law.

In England and Wales, if someone attacks a pregnant woman and causes the loss of a viable foetus, then **over and above any charges relating to the attack itself** (attempted murder, grievous bodily harm, and so on) the person can be charged with ‘child destruction’ under section 1 of the Infant Life Preservation Act 1929 (‘the 1929 Act’). 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 ex-partners. In this way, English law is able to acknowledge and punish the serious and distinctive loss suffered by a woman who loses a wanted pregnancy because of the violent behaviour of someone else.

Scots law, by contrast, currently has no appropriate mechanism for recognising this harm. Charges of assault or attempted murder take no account of the additional and very specific harm caused by pregnancy loss. The common law crime of ‘procuring abortion’ does still exist in Scotland (notwithstanding that lawful abortion is widely available under the Abortion Act 1967), and might theoretically be used to prosecute ex/partners who cause the loss of a pregnancy (at any gestational age) by violence, abuse, deception, or coercion. However there has been no prosecution for procuring abortion in Scotland since the passing of the 1967 Act, and abortion law is in any case now governed by UK law.

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2 After a long period without many reported cases/convictions, there has been a worrying upswing in child destruction cases in the UK in recent decades (and particularly in the last ten years), including the cases of Babur Raja (convicted in 2016 of attempted murder and attempted child destruction); Kevin Wilson (convicted in 2016 of grievous bodily harm and child destruction); Tariq Khan (convicted in 2015 of murder and child destruction); Nicholas Leaning (convicted in 2014 of attempted child destruction and wounding with intent); Tony McLernon (convicted in 2013 of murder and child destruction); Carl Whant (convicted in 2012 of murder, rape, child destruction, and arson; Simon Morris (convicted in 2009 of attempted murder and attempted child destruction); R v Dennis [2006] EWCA Crim. 2429 (defendant convicted of grievous bodily harm with intent and child destruction); Colin McDonald (convicted in 2001 of attempted murder, rape, and child destruction); and Trevor Virgo (convicted in 1988 of grievous bodily harm and child destruction). All involved sickening levels of violence against pregnant partners and ex-partners.
case an inappropriate vehicle for punishing the harm caused to a woman by the loss of a wanted pregnancy.³

Compared with the English offence of ‘child destruction’, the offence proposed here would be **narrower** in some respects and **wider** in others:

(i) It would be **narrower**, because whereas in England, *anyone* suspected of causing the death of a viable foetus can be charged with ‘child destruction’, only the partners or ex-partners of pregnant women or girls could commit the offence proposed here. This is in keeping with the Bill’s specific purpose of tackling *domestic* abuse. It would be possible, of course, to extend the offence to apply to a wider category of persons than partners and ex-partners, if Parliament wished. Clearly, however—and in contrast with the English statute—this offence could not be used to prosecute anyone who terminates a woman’s pregnancy consensually and in the absence of violence, abuse, deception, or coercion. Neither could it be used to criminalise women themselves.

(ii) It would also be **wider**, in three ways.

First, because whereas ‘child destruction’ only applies to the destruction of ‘viable’ foetuses (the 1929 Act sets viability at twenty-eight weeks gestation⁴), the offence proposed here would apply to partners or ex-partners whose abusive behaviour brings about the end of a pregnancy at *any* stage.

Second, because whereas charges of ‘child destruction’ have, in England and Wales, been brought in respect of violent attacks on pregnant women, the offence proposed here could also be constituted by *any* behaviour which amounts to abuse under the Bill, whether physically violent or not. There have been several cases in England in recent years where men have attempted to end their partners’ pregnancies by deception/coercion, and these have been prosecuted (with varying degrees of success) under sections 58 and 59 of the (English) Offences Against the Person Act 1861.⁵ The offence proposed here would cover cases of this sort as well.

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³ In the majority of historical cases involving charges of abortion, the women involved were complicit (but were not charged because their evidence was necessary to convict the abortionists). The solution proposed here offers a way of addressing violence against pregnant women that is separate from the morally and politically controversial issue of abortion.

⁴ Modern estimates place viability at twenty-four weeks, and this modern view of viability is reflected in the twenty-four week limit for certain grounds of abortion under the Abortion Act 1967 (as amended by the Human Fertilisation and Embryology Act 1990). In the context of child destruction, prosecutors in one recent case charged a man with child destruction in respect of a twenty-four week foetus. The man, Aston Robinson, was convicted of murdering his pregnant 16-year-old girlfriend Kayleigh-Anne Palmer, but the charge of child destruction did not succeed. [http://www.bbc.co.uk/news/uk-england-goucestershire-29453565](http://www.bbc.co.uk/news/uk-england-goucestershire-29453565)

⁵ The cases of *R v Fletcher (Matthew)* [2014] EWCA Crim 1876 and *R v Magira (Gil)* [2008] EWCA Crim 1939, and the case of Dr Edward Erin (widely-reported in the media) involved men who obtained abortifacient drugs and/or administered them to their pregnant partners with the intention of inducing miscarriage. Although none of the men succeeded in ending their partners’ pregnancies, all were convicted under s.58 of the 1861 Act. The case of *R v Ahmed (Ajaz)* [2010] EWCA Crim 1949 concerned a man who was charged with ‘procuring a miscarriage’ after taking his non-English-speaking wife to a clinic for an abortion, having deceived her as to the nature of the procedure. When a health professional managed to communicate with the woman and ascertain that she did not
as the sort currently prosecuted in England and Wales under the 1929 Act. Thus, the proposed offence would provide a single framework for prosecuting the spectrum of abuse against pregnant women, under one coherent rationale.

Third, the draft section (‘1A’) above allows the mens rea of the offence to be constituted not only by intentional conduct, but also by recklessness, making it more difficult for an abuser to avoid conviction by claiming that he or she lacked the intention to kill the foetus. The need to prove intention to kill under the 1929 Act has been criticised in the media as an obstacle to conviction, and it been suggested that the law should be changed to allow for prosecution where the conduct was ‘reckless’.

2. PREGNANCY AS AN AGGRAVATING FACTOR IN DOMESTIC ABUSE

Of course, not all abusive behaviour directed toward pregnant women or girls will contribute to the end of the pregnancy, and it is important that the law sends a strong message in these cases too. The law should protect pregnant women from abusive behaviour by treating pregnancy as a factor that aggravates the offence introduced by section 1(1) of the Bill as it currently stands. This could be accomplished by the inclusion of a section within the part of the Bill relating to ‘Evidence, aggravation, and defence’ (current sections 3-5) In addition, Section 8 of the Bill as it currently stands could be redrafted to include penalties for the offence proposed in Section 1A(1).

Summary

At present, Scots Law lacks an offence with which to charge those whose abusive behaviour toward pregnant partners or ex-partners contributes to the loss of the pregnancy. There is evidence of a worrying increase in such behaviour elsewhere in the UK, where the Infant Life Preservation Act 1929 (and an equivalent provision in Northern Ireland) enables prosecution in respect of the specific harm caused to the woman by the loss of the pregnancy. Scotland, alone in the UK, cannot recognise this kind of harm in its criminal law. The common law crime of ‘procuring abortion’ is inappropriate for this purpose for several reasons: not least because it has historically been regarded as punishing harm to the foetus, not the woman. The new offence proposed here would fill this gap. In recognition of the need to provide protection/redress for pregnant women and to deter punish those who would target them, the offence proposed here would go further, making the pregnancy of the victim an aggravating factor in domestic abuse even in cases where the abuse of a pregnant partner/ex-partner did not contribute to the ending of a pregnancy.

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6 The offence of child destruction is also prosecuted in Northern Ireland, under s.25 of the Criminal Justice Act (Northern Ireland) 1945 (R v McDonald (Colin Victor) [1999] N.I. 150).