

Dr Mary Neal submission of 30 November 2022

PE1887/J: Create an Unborn Victims of Violence Act

A. Introduction

In England and Wales and in Northern Ireland there are statutory provisions currently in force that can be used to prosecute those (in practice, almost exclusively male partners and ex-partners) who violently cause the loss of an advanced pregnancy. The relevant crime of 'child destruction' is contained in s1 of the Infant Life Preservation Act 1929 (England and Wales), and s25 of the Criminal Justice Act (Northern Ireland) 1945 as amended by the Abortion (Northern Ireland) (No. 2) Regulations 2020 (SI 2020/503), reg 13(3).

These crimes were originally created for a very different purpose than the one they now serve: there was a gap in the criminal law whereby someone who used substances or instruments to induce miscarriage or stillbirth could be charged with procuring abortion under s58 of the Offences Against the Person Act 1961, and someone could be charged with infanticide if they caused the death of a born child, but if someone waited until labour occurred spontaneously and killed the child before it breathed independently, neither crime would apply. The crimes in the 1929 Act (and later the 1945 Act) were originally designed to close this gap.

B. Shortcomings

The disconnect between original purpose and modern application means there are three key shortcomings in the UK laws which we should aim to design out of a new Scottish crime:

1. *They criminalise only the killing of 'a child capable of being born alive'.*

This was presumed in 1929 to be after 28 weeks' gestation, but in 1991 a civil court held that the presumption operated from 26 weeks.¹ Although in practice it will be more difficult to establish causation earlier in pregnancy, and most convictions may end up being for losses caused late in gestation, nevertheless it seems wise for any Scottish law to apply throughout pregnancy, allowing for prosecution where causation *can* be established: the serious harm to women of losing wanted pregnancies through abuse/violence does not emerge at 26 weeks. The 'aggravation' provision I included in my proposed new clause of the then-Domestic Abuse Bill would also ensure that where causation cannot be proven, the pregnancy of a victim would still be formally acknowledged as an aggravating factor in domestic abuse.²

*2. They criminalise only the intentional killing of the foetus.*³

In practice, it can be difficult to prove that an offender *intended* to cause miscarriage unless he admits this, or can be shown to have indicated it at the time of the offence. Scotland should provide for the offence to be constituted alternatively by recklessness, to avoid abusers benefiting from this difficulty.

3. Both crimes could, for many years, be used to criminalise a pregnant woman who caused her own late abortion.

This is still true in England and Wales under the 1929 Act, though it almost never occurs – however there was a conviction in 2007 and there is a charge currently outstanding in England. It is no longer true in Northern Ireland since s25 of the 1945 Act was amended in 2020 specifically to exclude this possibility.

C. Contrast with Scotland

Deficiencies notwithstanding, these laws mean that in England, Wales, and NI, where a partner or ex-partner deliberately causes the death of a late-term foetus through violence, they can be charged with that over and above charges of assault, attempted murder or grievous bodily

¹ *Rance v Mid-Downs Health Authority* [1991] 1 Q.B. 587

² M Neal, 'Domestic Abuse (Scotland) Bill – Written submission from Dr Mary Neal' (Justice Committee, 1 May 2017) (See Appendix 1)

³ The language of both Acts requires '*intent to destroy the life of a child capable of being born alive*' (emphasis added)

harm, and they *have* been, in numerous distressing cases, both reported and unreported.⁴ Thus, the criminal law is able *to some extent* to acknowledge and address the very distinctive and serious kind of harm caused to a woman who loses a pregnancy in such circumstances.

In similarly distressing cases in Scotland,⁵ by contrast, there is no specific charge dealing directly with the loss of the pregnancy. Scotland has a common law crime of ‘procuring abortion’ which could *theoretically* be used in this way, but in practice it never has been. The entanglement of child destruction with abortion law has been problematic in the rest of the UK, and the crime has (albeit rarely) been used to charge women themselves. The cognate legal framework for dealing with these cases is clearly domestic abuse law, not the law of abortion.

However, the existing Domestic Abuse (Scotland) Act 2018 punishes a ‘course of conduct’, whereas the action that actually ends the pregnancy is frequently a single attack (even where the context may be an abusive relationship), so the Act will require amendment in order to deal with these cases. In any case, it is desirable that Scots criminal law is seen to take this very distinctive kind of harm to women seriously, and provide for it directly – ideally, by amending the Domestic Abuse (Scotland) Act 2018 – rather than hoping to make do with unsuited existing laws.

⁴ Including, recently, the case of Asa Davison: <https://www.cps.gov.uk/wessex/news/updated-sentence-violent-abuser-guilty-causing-death-unborn-baby>

⁵ For example, the case of 35-year old Stephen Ramsay, who stabbed, punched, and throttled his pregnant partner in Glenrothes in 2019 causing her a spinal cord injury, brain damage, extensive bruising and numerous other injuries. She had been 32 weeks pregnant with twins, both of whom died as a result. Ramsay received five years in prison for attempted murder. Elsewhere in the UK he could have received a life sentence for child destruction.