

Citizen Participation and Public Petitions Committee

6th Meeting, 2021 (Session 6), Wednesday 3
November 2021

PE1887: Create an Unborn Victims of Violence Act

Note by the Clerk

Petitioner Nicola Murray

**Petition
summary** Calling on the Scottish Parliament to urge the Scottish Government to create an Unborn Victims of Violence Act, creating a specific offence that enables courts to hand down longer sentences for perpetrators of domestic violence which causes miscarriage.

Webpage <https://petitions.parliament.scot/petitions/PE1887>

Introduction

1. This is a new petition that has been under consideration since 19 August 2021.
2. A SPICe briefing has been prepared to inform the Committee's consideration of the petition and can be found at **Annexe A**.
3. While not a formal requirement, petitioners have the option to collect signatures on their petition. On this occasion, the petitioner elected to collect this information. 35 signatures have been received.
4. The Committee seeks views from the Scottish Government on all new petitions before they are formally considered. A response has been received from the Scottish Government and is included at **Annexe B** of this paper.
5. A submission has been provided by the petitioner. This is included at **Annexe C**.

Background information

6. The SPICe briefing provides details of the current legal framework and explores how various criminal offences may apply to instances of domestic abuse during pregnancy. It is noted that women are at increased risk of physical abuse, and particularly domestic violence, during pregnancy and early maternity.
7. 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 definition of homicide in the Stair Memorial Encyclopaedia (an encyclopaedia of law in Scotland) excludes causing death of an unborn child.
8. The SPICe briefing notes that 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.
9. The briefing highlights that the Scottish Law Commission is currently examining the law of homicide. A paper published in May which looks at the mental element in homicide offences (e.g. intent) notes that legal systems in other countries have offences such as “homicide of an unborn child”. The paper indicates that the creation of such offences in Scots law would require policy decisions taken by the Scottish Government.
10. The Domestic Abuse (Scotland) Act 2018 created a new statutory offence of domestic abuse, which has a maximum custodial sentence of 14 years (where the sentence is imposed in the High Court).
11. The 2018 Act includes a statutory aggravation where the new offence involves a child, but it does not appear to cover an unborn child. The briefing notes, however, that the loss of an unborn child as the result of domestic abuse could still be considered an important factor in sentencing.
12. As the 2018 Act was going through Parliament, recommendations were made to the Justice Committee by [an academic at the University of Strathclyde](#) to create 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 acknowledge the pregnancy of the victim as a factor aggravating the crime of domestic abuse. However, these recommendations were not taken forward in the legislation.

Scottish Government submission

13. The Scottish Government's submission provides further information on the 2018 Act, stating that it enables physical, psychological and controlling behaviours to be prosecuted at once. This include certain forms of psychological abuse and coercive and controlling behaviour which were previously difficult to prosecute.
14. The submission highlights that it is for Police Scotland and the Crown Office and Procurator Fiscal Service to investigate and prosecute cases under the domestic abuse offence including decisions about what conduct may be included in a course of conduct.
15. The Scottish Government also notes that the common law offence of assault may apply in an instance where violent actions of a perpetrator causes the victim to miscarry, or a perpetrator forces a woman to terminate her pregnancy against her will, and that this carries a maximum penalty of up to life imprisonment, limited only by the sentencing powers of the court in which the case is heard.

Petitioner submission

16. The petitioner refers to her proposed legislation as "Brodie's Law", in memory of her lost child and runs a support group, called Brodie's Trust, for women who have experienced pregnancy loss through domestic abuse.
17. In her submission, the petitioner details her experience with domestic abuse:

"In 2009, my then partner subjected me to weeks of coercion, threats of violence and harm to our children and forced me against my will to have a termination of pregnancy. I was unprepared for just how much of an impact being forced against my will had on me. I reported this to the police who said it "wasn't a criminal matter". They didn't understand why I was reporting it and said I should just be grateful for the children I already had. This left me feeling unsupported and therefore back in the clutches of my abuser."
18. The submission goes on to detail an incident in July 2013, as the petitioner's ex-partner hit her with his car, aware that she was 6 weeks pregnant, causing her to miscarry less than 48 hours later due to her injuries. The petitioner explains that he took a plea deal to 'reckless and culpable conduct' with a domestic abuse aggravator. The sentence was a payment of £300 compensation.
19. The petitioner explains the impact of this incident including permanent left side weakness, difficulty walking for long periods/distances, complex PTSD and grief.

20. A study into domestic abuse in pregnancy was conducted by the petitioner in 2018. The study included 40 female domestic abuse survivors, none of which were Brodie's Trust service users. The submission summarised the main findings:

- 95% of respondents had been coerced into having a termination of pregnancy, of that 57.5% experienced this more than once.
- 90% had experienced a pregnancy loss or a still birth caused by domestic violence, of that 60% said this had happened more than once.
- 100% had experienced being attacked or threatened by their partner whilst pregnant.
- 92.5% had experienced sexual assault or rape by their partner whilst pregnant.

Action

21. The Committee is invited to consider what action it wishes to take on this petition.

Clerk to the Committee

PE1887: CREATE AN UNBORN VICTIMS OF VIOLENCE ACT

Petitioner

Nicola Murray

Date Lodged

19 August 2021

Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to create an Unborn Victims of Violence Act, creating a specific offence that enables courts to hand down longer sentences for perpetrators of domestic violence which causes miscarriage.

Previous action

I have previously petitioned the UK government and written to MPs and MSPs on the issue.

Background information

As the law currently stands if a perpetrator of domestic violence causes a miscarriage, still birth or forces a woman to terminate her pregnancy against her will, they cannot be adequately prosecuted, and this leads to lenient sentences being available in court. This Act should not impact on reproductive rights. I have experienced the loss of three babies due to domestic violence and a forced termination. I was absolutely devastated and grief stricken. I felt incredibly let down because in my experience, the law as it currently stands offered no protection or redress. I believe that the current law cannot adequately prosecute perpetrators who cause such loss through their violent actions or coercive control.

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.”

Frazer McCallum
Senior Researcher
17/08/2021

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Scottish Government submission of 23 August 2021

PE1887/A - Create an Unborn Victims of Violence Act

The Petitioner, Nicola Murray, has called on the Scottish Parliament to urge the Scottish Government to create an Unborn Victims of Violence Act, creating a specific offence that enables courts to hand down longer sentences for perpetrators of domestic violence which causes miscarriage.

Ms Murray provides, as background to her petition, that as the law currently stands if a perpetrator of domestic violence causes a miscarriage, still birth or forces a woman to terminate her pregnancy against her will, they cannot be adequately prosecuted, and this leads to lenient sentences being available in court. Ms Murray believes that the current law cannot adequately prosecute perpetrators who cause the loss of an unborn child through their violent actions or coercive control.

The Scottish Government recognises the gravity of offending behaviour which results in miscarriage. No woman should ever have to go through such an experience and if they do, perpetrators should be held to account.

It might be helpful if I set out some relevant laws which may apply where perpetrators cause the loss of an unborn child through their violent actions or coercive control.

The Domestic Abuse (Scotland) Act 2018 ("the Act") came into effect on 1 April 2019 creating a specific "course of conduct" offence for the first time, enabling physical, psychological and controlling behaviour to be prosecuted at once. Sections 1 and 2 of the Act make it a criminal offence for a person to engage in a course of behaviour which is abusive of their partner or ex-partner where the perpetrator either intends to cause their partner or ex-partner to suffer physical or psychological harm or else they are reckless as to whether their course of behaviour is likely to cause such harm. As such, it criminalises not only physical abuse but other forms of psychological abuse and coercive and controlling behaviour that were previously difficult to prosecute.

Section 2 of the Act in particular provides a non-exhaustive definition of what is considered "abusive behaviour" for the operation of the domestic abuse offence, and this includes behaviour that is violent, threatening or intimidating or that has as its purpose or relevant effect the frightening, humiliating, degrading or punishing of a partner or ex-partner. The Act therefore recognises the multi-faceted nature of domestic abuse, which is much more than physical abuse.

The maximum penalty for an offence under section 1 of the Act is imprisonment for a term of up to 14 years or a fine (or both).

Ultimately, it is for Police Scotland and the Crown Office and Procurator Fiscal Service ("COPFS") to investigate and prosecute cases under the domestic abuse offence including decisions about what conduct may be included in a course of conduct. Police Scotland and COPFS are both operationally independent of the Scottish Government.

While decisions in relevant cases are for law enforcement agencies, it is understood that common law and other statutory offences may be used depending on the individual facts and circumstances of each case.

For example, the common law offence of assault may also apply in those instances the Petitioner describes, where violent actions of a perpetrator causes the victim to miscarry, or a perpetrator forces a woman to terminate her pregnancy against her will.

The maximum penalty for the common law offence of assault ranges up to life imprisonment and is limited only by the sentencing powers of the court in which the case is heard. Cases prosecuted on indictment in the Sheriff Court carry a maximum sentence of up to 5 years' imprisonment and/or an unlimited fine. If a sheriff in a solemn case decides that the maximum sentence at the sheriff court level is not high enough, they can send (remit) the case to the High Court for sentence. Cases prosecuted in the High Court carry a maximum sentence of life imprisonment and/or an unlimited fine.

When deciding what action to take in the public interest, prosecutors carry out an independent legal analysis of the case to determine whether the facts and circumstances merit use of, for example, the domestic abuse offence or an alternative offence, such as assault. Prosecutors also give careful consideration to the level of court in which the case should be prosecuted, having regard to, amongst other factors, the nature and gravity of the alleged offence.

Sentencing in any given case is a matter for the independent court who hear all the facts and circumstances of a case.

As the Committee will be aware, the Scottish Government cannot comment on or intervene in individual sentencing decisions of the independent courts. This is to preserve the operational independence of the criminal justice system and keep it free from political interference. Sheriffs/Judges are best placed to decide on an appropriate sentence for each offender before them as they hear all the facts and circumstances of a case before making their sentencing decisions within the overall legal framework provided by Parliament.

However, as part of the checks and balances within our criminal justice system, the independent COPFS can appeal against a sentence if they consider it is unduly lenient. Crown Counsel (who are the most senior lawyers in Crown Office) will give careful consideration as to whether a sentence was unduly lenient or if the sentence imposed is within the range available to the judge in the exercise of their normal judicial discretion. This means there are protections in place to guard against sentences which, as a matter of law, are considered too lenient.

I hope this is helpful information in understanding how existing criminal laws are relevant in the circumstances of the issues raised in the Petition.

Petitioner submission of 24 August 2021

PE1887/B - Create an Unborn Victims of Violence Act

Why is “Brodie’s Law” important?

- Domestic violence has overtaken gestational diabetes and pre-eclampsia as the leading cause of foetal death in the UK.
- Domestic abuse affects an estimated 1.3 million women each year.
- Around 30% of domestic abuse begins during pregnancy.
- 60% of women experiencing domestic abuse are abused during pregnancy.
- 60% of miscarriages can be attributed to domestic violence.
- Forced abortion accounts for around 45% of all terminations - either by coercive control or administration of drugs without consent.

I have experienced the loss of three babies due to domestic violence and forced termination.

In 2009, my then partner subjected me to weeks of coercion, threats of violence and harm to our children and forced me against my will to have a termination of pregnancy. I was unprepared for just how much of an impact being forced against my will had on me. I reported this to the police who said it “wasn’t a criminal matter”. They didn’t understand why I was reporting it and said I should just be grateful for the children I already had. This left me feeling unsupported and therefore back in the clutches of my abuser.

In July 2013 my ex-partner hit me with his car. He was aware that I was 6 weeks pregnant at the time of the incident. I miscarried less than 48 hours later due to my injuries. He dragged out the case for months trying to coerce me into ‘dropping charges’ - eventually he admitted guilt and took a plea deal to ‘reckless and culpable conduct’ with a domestic abuse aggravator. His sentence was to pay me £300 compensation ‘for my loss’. He walked free. I have been left with permanent left side weakness,

difficulty walking for long periods/distances, pain in my back, hip and pelvis and complex PTSD as well as the grief of my loss.

Young members of my family witnessed what happened that night and were traumatised, suffering nightmares and anxiety as a result. I appealed the sentence as unduly lenient but was told my baby never existed in law therefore his sentence was appropriate. This left my family and I feeling extremely let down by the system.

Since 'losing' Brodie in 2017 I have met so many women who had suffered similar experiences to me - we all felt that the system minimised such losses and doesn't recognise the lifelong impact on us as grieving mothers.

I set up Brodie's Trust - a support group for women who've experienced pregnancy loss through domestic violence. I also conducted a study into 'domestic abuse in pregnancy' in 2018 and used a sample group of 40 female domestic abuse survivors including service users of Perthshire Women's Aid. None of the women were Brodie's Trust service users.

Our main findings were:

- 95% of respondents had been coerced into having a termination of pregnancy, of that 57.5% experienced this more than once.
- 90% had experienced a pregnancy loss or a still birth caused by domestic violence, of that 60% said this had happened more than once.
- 100% had experienced being attacked or threatened by their partner whilst pregnant.
- 92.5% had experienced sexual assault or rape by their partner whilst pregnant.

Much like the revenge porn and upskirting specific charges, which were covered by existing laws, a specific act is required on this to adequately deal with perpetrators who are often not even charged or receive unduly lenient sentences.