

Citizen Participation and Public Petitions Committee

5th Meeting, 2023 (Session 6), Wednesday
22 March 2023

PE1996: Take action to prevent discriminatory abortions for disability in Scotland

Petitioner	Calum MacKellar on behalf of the Scottish Council on Human Bioethics
Petition summary	Calling on the Scottish Parliament to urge the Scottish Government to legislate to ensure that abortions cannot take place after 24 weeks in circumstances where the child is likely to have a disability.
Webpage	https://petitions.parliament.scot/petitions/PE1996

Introduction

1. This is a new petition that was lodged on 12 January 2023.
2. A full summary of this petition and its aims can be found at **Annexe A**.
3. A SPICe briefing has been prepared to inform the Committee's consideration of the petition and can be found at **Annexe B**.
4. 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. 2,026 signatures have been received.
5. 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 C** of this paper.
6. Two submissions have been provided by the petitioner. These are included at **Annexe D**.

Action

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

Clerk to the Committee

Annexe A

PE1996: Take action to prevent discriminatory abortions for disability in Scotland

Petitioner

Calum MacKellar on behalf of the Scottish Council on Human Bioethics

Date lodged

12 January 2023

Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to legislate to ensure that abortions cannot take place after 24 weeks in circumstances where the child is likely to have a disability.

Previous action

An MSP was contacted to initiate a Member's Bill on this issue but declined to take the proposal further.

Background information

The Abortion Act 1967, specifically [Section 1\(1\)\(d\)](#), enables a termination up until birth if the foetus has a disorder but restricts abortions to 24 weeks if the foetus has no disability. In other words, a non-disabled foetus is better protected in law from being terminated, which may express a clear discriminatory message that any resulting non-disabled child's life has more value and worth than that of a child with a disability.

Thus, in the same way as discriminatory terminations on the basis of sex are criminalised under [1ZB\(1\) of the UK Human Fertilisation and Embryology Act 1990](#), abortion law in Scotland should not authorise any practice designed to secure that any resulting child will be of one disability/ability rather than another.

Indeed, since disability and sex are both protected characteristics under the UK Equality Act 2010, they should be considered in the same way.

Annexe B

The logo for SPICe, consisting of the letters 'SPICe' in a white, sans-serif font on a dark purple background.The logo for The Information Centre, consisting of the text 'The Information Centre' and 'An t-Ionad Fiosrachaidh' in a white, sans-serif font on a dark blue background.

Briefing for the Citizen Participation and Public Petitions Committee on petition PE1996: ‘Take action to prevent discriminatory abortions for disability in Scotland’, lodged by Calum MacKellar on behalf of the Scottish Council on Human Bioethics

Brief overview of issues raised by the petition

[PE1996](#) calls on the Scottish Parliament to urge the Scottish Government to legislate to ensure that abortions cannot take place after 24 weeks in circumstances where the child is likely to have a disability.

Current status of abortion law in Scotland

Under Section 1(1)(d) of the [Abortion Act 1967](#), which currently applies to Scotland, England, and Wales, an abortion can legally be accessed up to 24 weeks of pregnancy if continuing with a pregnancy would pose a greater risk to the pregnant person’s mental or physical health than accessing an abortion. Beyond 24 weeks’ gestation, abortions can only be conducted if there is a significant risk to the life of the pregnant person, or evidence of foetal abnormality.

Abortion law was devolved to Scotland under the [Scotland Act 2016](#). As such, it is likely that the Scottish Government could introduce legislation to amend the 1967 Act. A Bill would be needed to do this as Ministers do not have a power to change the Act through secondary legislation.

However, the [Human Fertilisation and Embryology Act 1990](#), referenced by the petitioner, is reserved under the [Scotland Act 1998](#), which remains in force. Therefore, the Human Fertilisation and Embryology Act 1990 and its subject matter (i.e. topics not necessarily within the Act but which relate to the subject matter of the Act) would not be within the legislative competence of the Scottish Parliament.

Context of the petition

PE1996 argues that by permitting abortion after 24 weeks' gestation if "there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped", Section 1(1)(d) of the Abortion Act 1967 expresses a discriminatory message that the life of a non-disabled child has more value than that of a child with a disability.

This position is supported by [Disability Rights UK](#), which argued that Section 1(1)(d) of the Abortion Act 1967 undervalues the lives of disabled people. [Don't Screen Us Out](#), an organisation that campaigns against routine screening for Down's syndrome and high rates of termination of fetuses diagnosed with the condition, claims that UK legislation and policy singles out and discriminates against fetuses with Down's syndrome. In 2017, the [United Nations Convention on the Rights of People with Disabilities](#) stated that this section of the Act stigmatises people with disabilities, and recommended that the UK amends its abortion law. The Convention stated that "women's rights to reproductive and sexual autonomy should be respected without legalizing selective abortion on the ground of foetal deficiency."

Marie Stopes UK [published a position paper](#) on disability equality and abortion in the UK in June 2020. The paper argued against introducing an upper gestational limit for abortion due to foetal abnormality, as diagnoses of foetal impairment are often made during the 20-week scan or later in pregnancy. Introducing a 24-week gestational limit for abortion in these circumstances may therefore risk rushing pregnant people and their families into making a difficult decision without time to obtain complete information and access support. This may lead to an increase in the number of abortions being performed under such circumstances, as people may feel less able to take sufficient time to explore their options, and may consequently choose to opt for termination. The position paper stated that the decision to access abortion after a foetal impairment did not represent a devaluing of disabled people, but rather a

difficult individual decision informed by a variety of complex personal factors. [Abortion Rights further highlighted](#) that introducing a 24-week gestational limit for abortions in cases of foetal abnormality would also include cases in which there is no realistic possibility of the baby surviving after birth.

According to [Public Health Scotland's most recent data](#), 0.9% of abortions conducted during 2021 took place at 18 weeks' gestation or later. 73 of the 13,758 abortions conducted in Scotland in 2021 were due to chromosomal conditions such as Down's syndrome, and 39 were due to nervous system conditions such as spina bifida. Public Health Scotland's report notes that multiple conditions can be recorded in relation to the same termination event, meaning that these figures do not necessarily represent individual terminations.

Scottish Government actions

In response to question [S5W-16699](#), lodged on 18 May 2018, the then Minister for Public Health and Sport, Aileen Campbell MSP, stated that the Scottish Government "had no current plans to change the law on abortion."

Scottish Parliament actions

PE1996 states that an MSP was contacted to initiate a Member's Bill on this issue but declined to take the proposal further.

Actions taken in the rest of the UK

In October 2021, two individuals affected by Down's syndrome [brought a case to the High Court](#) against the UK Secretary of State for Health and Social Care. The claimants asked the court to rule that Section 1(1)(d) of the Abortion Act 1967 was incompatible with the European Convention on Human Rights, and that Down's syndrome should not be considered a "serious handicap" under the Act. The High Court [found Section 1\(1\)\(d\) to be lawful](#) in the context of permitting abortion of fetuses with Down's syndrome after 24 weeks. The Court dismissed the argument that this section of the Act perpetuated negative stereotypes of people with disabilities, as it focused on the rights of the pregnant person and their medical treatment. The claimants also contended that this Section

of the Act is incompatible with Articles 2, 3, 8, and 14 of the European Convention on Human Rights (ECHR). The Court rejected this position, as the ECHR has never decided that a foetus is a bearer of ECHR rights. The claimants appealed against this decision, and the case was [dismissed by the Court of Appeal](#) in July 2022.

In November 2021, the UK Parliament's Health and Social Care Committee [proposed a series of amendments to the Health and Care Bill](#), including reducing the gestational limit for abortions from 24 to 22 weeks, and introducing an upper gestational limit for abortion on the grounds of disability. This amendment was [debated in November 2021](#) at the Report Stage of the Health and Care Bill, but has yet to progress further through the House of Commons.

Sarah Swift
Researcher

7 February 2023

The purpose of this briefing is to provide a brief overview of issues raised by the petition. SPICe research specialists are not able to discuss the content of petition briefings with petitioners or other members of the public. However, if you have any comments on any petition briefing you can email us at spice@parliament.scot

Every effort is made to ensure that the information contained in petition briefings is correct at the time of publication. Readers should be aware however that these briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

Published by the Scottish Parliament Information Centre (SPICe), an office of the Scottish Parliamentary Corporate Body, The Scottish Parliament, Edinburgh, EH99 1SP

Annexe C

Scottish Government submission of 16 January 2023

PE1996/A: Take action to prevent discriminatory abortions for disability in Scotland

The petition asks the Scottish Government to amend section 1(1)(d) of The Abortion Act 1967¹ (the 1967 Act). This section allows a termination to be provided if two registered medical practitioners are of the opinion, formed in good faith, that there is a “substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped”².

The Court of Appeal in the recent case of *Crowter -v- Secretary of State for Health and Social care* confirmed that section 1(1)(d) of the Abortion Act 1967 is not discriminatory nor does it interfere with the Article 8 rights of disabled people to a private and family life, as the legislation does not interfere with the living rights of a disabled person nor treat those born with severe disabilities differently from persons born without such disabilities. As highlighted by the Court the focus of the legislation is on the balance to strike between the protection of the rights of women and the protection of the unborn. It is recognised that the balance to be struck in relation to these issues is a sensitive matter.

The Scottish Government recognises that issue of women terminating their pregnancy where a foetus is likely to have severe physical or mental abnormalities, which would make it likely that the child when born would be seriously disabled, is deeply emotive.

The Scottish Government is committed to ensuring that women can access the care and treatment that they need and that women are fully informed of the choices available to them and supported in their decision whatever that may be, without judgement, at what is an extremely difficult and distressing time.

The Scottish Government equally values the contribution of all members of society and opposes any discrimination on the basis of disability. Our

¹ [Abortion Act 1967 \(legislation.gov.uk\)](https://legislation.gov.uk)

² [Abortion Act 1967 \(legislation.gov.uk\)](https://legislation.gov.uk)

commitment to ensuring all members of society can lead a full and fulfilling life is evidenced by our commitment to the reform of social care, via the National Care Service Bill, to ensure that social care is fit for purpose.

I would refer you to the Scottish Government's response to PE1969 of 19 October 2022³. As is noted in the response, the Scottish Government does not have any plans to amend the 1967 Act at this time.

The Scottish Government understands and appreciates the concerns raised with the petition. However, our position remains that we will continue to support women to access abortions as and when they choose to terminate a pregnancy, in line with the current law.

I hope you have found this response useful.

³ https://www.parliament.scot/-/media/files/committees/citizen-participation-and-public-petitions-committee/correspondence/2022/pe1969/pe1969_a.pdf

Annexe D

Petitioner submission of 14 February 2023

PE1996/B: Take action to prevent discriminatory abortions for disability in Scotland

The UK Abortion Act 1967 (as amended) indicates that: ...

1(1) [A] person shall not be guilty of an offence ... when a pregnancy is terminated ... if two registered medical practitioners are of the opinion, formed in good faith ...

*(a) that the pregnancy has not exceeded its twenty-fourth week ...;
or*

(b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or

(c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or

(d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

1(2) In determining whether the continuance of a pregnancy would involve such risk of injury to health as is mentioned in paragraph (a) or (b) of subsection (1) of this section, account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

In November 2022, the Court of Appeal endorsed the 2001 High Court of England and Wales' rejection of the landmark case brought forward by Ms. Heidi Crowter, a 27-year-old woman with Down's syndrome from Coventry, against the *Abortion Act 1967*, as amended. The case was brought because the Act enables a termination up until birth if the foetus has a disorder, even when the procedure is not necessary to prevent grave injury to the pregnant woman or to save her life, but restricts abortions to 24 weeks if the foetus has no disability. In other words, a non-disabled foetus is better protected in law from being terminated,

which arguably expresses a clear discriminatory message that any resulting non-disabled child is seen as having more value and worth in society than a child with a disability.

In rejecting the case, however, the Court of Appeal did recognise that many people with disabilities, including with Down's syndrome, may be upset and offended by certain provisions of the *Abortion Act 1967* and that these may be seen as inferring that their lives are of lesser value. But the Court also ruled that a perception of what the law implies is not, by itself, enough to challenge the provisions of the Act.⁴ Indeed, Lord Justice Underhill argued that the *Abortion Act 1967* was not sending any explicit or overt statement that the life of a disabled child is inferior to that of a non-disabled child.⁵

However, the Court of Appeal did not explain why provision 1(1)(d) is actually present in the Abortion Act. Indeed, if a woman decides to terminate a foetus with a disability because she believes that she would not be able to cope with a disabled child in her actual or reasonably foreseeable environment, this is already addressed under provision 1(2). This focuses on the balance between the protection of the rights of women and the protection of the unborn. Provision 1(2) also enables doctors to take account of the pregnant woman's actual or reasonably foreseeable environment when making a decision about the impact of the continuance of a pregnancy on a woman's health. Moreover, an implicit recognition exists that it is not always possible to separate the mental or physical health effects of abortion from a woman's wider social circumstances – such as her income, her housing situation, and her social support network.⁶

This means that the only reason why provision 1(1)(d) exists is to enable a woman, who can arguably cope with a disabled child, to terminate a foetus with a disability because she believes that having a non-disabled child is preferable to having a disabled child. And if she chooses to have an abortion under this provision, her decision is explicitly and overtly as discriminatory as if she had given the same message vocally or in writing. There is no other way of understanding such a decision. Thus, 1(1)(d) is only present because a clear discriminatory attitude is seen as

⁴ Paragraph 7, Summary: *Crowter and Others v Secretary of State for Health and Social Care* [2022] EWCA Civ 1559, <https://www.judiciary.uk/wp-content/uploads/2022/11/Crowter-v-SSHSC-summary.pdf>

⁵ Paragraph 72: *Crowter and Others v Secretary of State for Health and Social Care* [2022] EWCA Civ 1559, <https://www.judiciary.uk/wp-content/uploads/2022/11/Crowter-v-SSHSC-judgment.pdf>

⁶ British Pregnancy Advisory Service, Britain's abortion law, <https://www.bpas.org/get-involved/campaigns/briefings/abortion-law/> (Accessed on the 24 January 2023)

acceptable which contradicts the UK *Equality Act 2010*, which is not mentioned in the Court of Appeal judgment, and which protects individuals with certain characteristics, such as disability, sex, race, or sexual orientation, from discrimination.

It is also worth noting that the UK *Equality Act 2010* does not indicate that anti-discriminatory measures for certain protected characteristics are more important than for other protected characteristics. Thus, if discriminatory terminations are accepted for the sole reason that the resulting child is disabled, it is possible to ask whether the Scottish Parliament believes that discriminatory terminations for the sole reason that the resulting child would have a certain sex, race, or sexual orientation, would also be acceptable?

Petitioner submission of 7 March 2023

PE1996/C: Take action to prevent discriminatory abortions for disability in Scotland

The Scottish Parliament Information Centre Briefing on Petition PE1996 indicated that Marie Stopes UK had published a position paper on disability equality and abortion in the UK in 2020.⁷ This position paper suggested that an upper gestational limit for abortion on the ground of foetal abnormality should not be introduced. Indeed, since a diagnosis of foetal impairment generally takes place in the first 20 weeks of pregnancy, Marie Stopes UK suggested that a 24-week gestational limit for abortion may pressurise pregnant women into making a difficult decision in a relatively short period of time.⁸ As a result, this may increase the number of abortions since women may feel that they do not have enough time to appropriately explore all their options.

However, the Marie Stopes UK position paper does not develop or emphasise the legal context of the 24-week limit of the *UK Abortion Act 1967* (as amended). Indeed, it is not just a convenient or practical limit before which a prenatal diagnosis should be undertaken. Instead, it is an

⁷ Scottish Parliament Information Centre Briefing for the Citizen Participation and Public Petitions Committee on petition PE1996, page 2.

⁸ <https://www.mschoices.org.uk/media/3346/marie-stopes-uk-position-paper-on-disability-equality-and-abortion-in-the-uk-jun-2020.pdf>

This is confirmed in literature:

<https://www.gov.uk/government/publications/fetal-anomaly-screening-programme-handbook/prenatal-diagnosis>
<https://webpath.med.utah.edu/TUTORIAL/PRENATAL/PRENATAL.html#:~:text=Prenatal%20diagnosis%20employs%20a%20variety,to%2025%25%20of%20perinatal%20deaths>

important legal stage in which a *healthy foetus* is fully protected unless the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated.

Thus, for a *healthy foetus*, two important legal (and moral) stages in UK law exist with their corresponding protective provisions, namely (1) the 24-week limit after which the *healthy foetus* can no longer be terminated, and (2) birth after which it is considered to have full legal status and cannot be killed. This means that even if a woman believes that she is unable to cope with a *healthy child* in her actual or reasonably foreseeable environment, she can still not have a termination after 24 weeks of gestation - even if this healthy child may be considered to be more of a burden than a disabled child.

Thus the 24-week limit reflects an important and meaningful foetal development stage at which the UK Parliament considered a healthy foetus as deserving protection whether or not this foetus may eventually become a burden. This means that since an *infant who is born* with, or without, a disability is protected in law whether or not he or she may become a burden, it is possible to ask why a 24-week foetus with, or without, a disability should not also be protected in law whether or not the resulting child may become a burden.