



Scottish Police Federation

5 Woodside Place Glasgow G3 7QF

JCC Circular 14 of 2015

Ref: CS/LS

9 April 2015

Dear Colleague

Equally Safe – Reforming the Criminal Law to Address Domestic Abuse and Sexual Offences – Consultation

I refer to the above and attach herewith the consultation papers for your perusal.

Please submit any comments/observations you may have to your local federation office by **22 May 2015**.

Yours sincerely

Calum Steele
General Secretary

Equally Safe – Reforming the criminal law to address domestic abuse and sexual offences

Scottish Government Consultation Paper

March 2015

Equally Safe - Reforming the criminal law to address domestic abuse and sexual offences

Scottish Government Consultation Paper

FOREWORD BY THE CABINET SECRETARY FOR JUSTICE



Domestic abuse and sexual offending are appalling crimes that can shatter the lives of their victims and constitute a grave violation of trust. There is no excuse and no place for such crimes. Unfortunately, they remain far too prevalent in our society.

When the Scottish Government published *Equally Safe: Scotland's strategy for preventing and eradicating violence against women and girls* last year, we committed to a 'whole systems' review of the approach taken to these issues within the justice system and that this review would include consideration of the criminal law relating to sexual offences and domestic abuse.

In outlining the Scottish Government's Programme for Government in November 2014, the First Minister committed to consult on whether a specific criminal offence of domestic abuse would make the prosecution of domestic abuse more effective and better reflect the true nature of this crime.

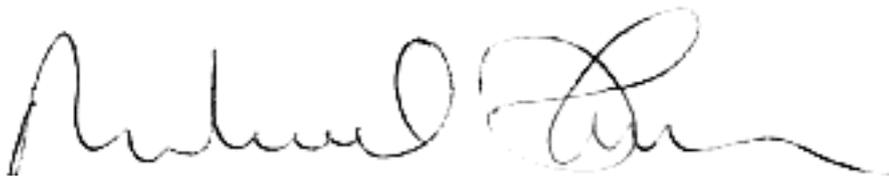
While it is widely understood that domestic abuse does not always involve physical violence, it is not clear that the criminal law is as effective as it could be in dealing with psychological abuse, and controlling and coercive behaviour. This is a complex area of law and we are keen to hear the views of victims and those who work in this area to understand how we can best ensure that the criminal law provides effective protection to victims of domestic abuse.

The consultation also seeks views on a proposal to create a specific criminal offence to address the problem of the non-consensual sharing or distribution of private, intimate images, often by ex-partners. This is a form of abuse which has been made easier by the internet and the fact that our smart-phones and tablet devices all contain cameras. We are interested to hear your views on what the scope of this offence should be.

We are also seeking views on three other specific reforms which are intended to improve how the justice system addresses crimes of domestic abuse and sexual offending:

- introducing statutory jury directions for sexual offence cases
- allowing cases of sexual offences against children committed elsewhere in the UK to be prosecuted in Scotland; and
- expanding the disposals available to the court to protect victims from harassment where the court is satisfied that a person did commit an offence, but they are unfit to stand trial by reason of a mental or physical condition.

I look forward to hearing your views on the proposals contained in this paper.

A handwritten signature in black ink, appearing to read 'Michael Matheson', with a long horizontal flourish extending to the right.

Michael Matheson MSP
Cabinet Secretary for Justice

RESPONDING TO THE CONSULTATION

The Government welcomes responses to this consultation document by **Friday 19 June**.

Please send your response with the completed Respondent Information Form (see ‘Handling your response’ below) to:

reformingcriminallaw@scotland.gsi.gov.uk

or:

Patrick Down
Criminal Law & Sentencing Team
GWR St Andrew’s House
Edinburgh
EH1 3DG

If you have any queries, contact Patrick Down on 0131 244 4210

We welcome responses to some or all of the questions. If you are only interested in parts of the consultation, please indicate clearly in your response which questions or parts of the consultation paper you are responding to, as this will aid our analysis of the responses received.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at <http://www.gov.scot/Consultations/>

The Scottish Government now has an email alert system for consultations (SEconsult: <http://www.gov.scot/Consultations/seConsult>). This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). SEconsult complements, but in no way replaced, SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form** as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential and we will treat it accordingly. A copy Respondent Information Form is available on the Scottish Government website alongside a **Consultation Questionnaire** designed to assist consultees in responding. The use of the questionnaire is entirely optional and responses on any relevant issue in any format are welcome.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and will therefore consider any request made to it for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, responses will be made available to the public in the Scottish Government Library (see the attached Respondent Information Form). You can make arrangements to view responses by contacting the SG Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to:

Patrick Down
Criminal Law & Sentencing Team
GWR St Andrew's House
Edinburgh
EH1 3DG
Or e-mail reformingcriminallaw@scotland.gsi.gov.uk

Note: this consultation is a working document. Text may be modified as a result of responses to the consultation exercise, so they should not be taken to reflect the final position.

Equally Safe: Reforming the criminal law to address domestic abuse and sexual offences

Introduction

On 25 June 2014, the Scottish Government published *Equally Safe: Scotland's Strategy for Preventing and Eradicating Violence Against Women and Girls*. The strategy was co-produced with COSLA and sets out our ambition to create a strong and flourishing Scotland where all individuals are equally safe and respected and where women and girls live free from abuse and the attitudes that help to perpetuate it.

Equally Safe identified four key priorities to achieve this aim:

1. Scottish society embraces equality and mutual respect, and rejects all forms of violence against women and girls;
2. Women and girls thrive as equal citizens: socially, culturally, economically and politically;
3. Interventions are early and effective, preventing violence and maximising the safety and wellbeing of women and girls;
4. Men desist from all forms of violence against women and girls and perpetrators of such violence receive a robust and effective response

Equally Safe notes that the justice system has a key part to play in addressing priorities three and four above, by keeping women and girls safe from violence and abuse and supporting their recovery when such violence and abuse takes place. The justice system is also central to how we respond to perpetrators of sexual and domestic violence.

A commitment was given to a 'whole systems' review of the approach taken to these issues within the justice system. This review includes consideration of the criminal law relating to sexual offences and domestic abuse; the support available for victims; the time taken to complete cases through the justice system and the impact of justice interventions in changing perpetrator behaviour and wider public attitudes.

This consultation is concerned specifically with issues relating to the aspects of the current criminal law and criminal procedure, which apply both to female and male victims and perpetrators of sexual offences and domestic abuse. However, it is clear that the specific policies contained within this consultation relate to issues of criminal law and procedure concerning sexual offences and domestic abuse, and we know that women and, to a lesser extent children, are much more likely to be victims of these crimes.

Our consideration of the criminal law and criminal procedure in discussion with stakeholders has raised five specific issues which we are seeking views on at this time:

- The question of whether the current criminal law reflects the true experience of victims of long-term domestic abuse, including coercive control, and whether a specific domestic abuse offence would improve the ability of people to access justice through effective prosecution of domestic abuse;

- The need for a specific new criminal offence to address the sharing of private intimate images without permission from the subject of the images (often referred to as 'revenge porn');
- The need for jury directions in sexual offence cases to provide guidance on how juries should consider:
 - The fact that a significant period of time elapsed between the time the offence occurred and the reporting of the offence to the police
 - the absence of the use of physical force by the alleged attacker or the absence of use of physical resistance on the part of the alleged victim;
- Changes to the disposals available to a court where a person is found unfit to stand trial due to a mental or physical condition but an examination of facts finds that they did commit acts constituting an offence; and
- Extension to the extra-territorial effect of the law concerning sexual offences against children to include offences committed elsewhere in the United Kingdom.

PART ONE: AN OFFENCE OF 'DOMESTIC ABUSE'

Background

1.1 It is an intolerable reality that domestic abuse blights the lives of too many people in Scotland. It is, by its nature, a largely hidden crime, typically occurring behind closed doors and in private. However, it remains widespread throughout society. In 2013-14, 58,976 domestic abuse incidents were reported to the police¹ and one or more crimes or offences were recorded in 56.7% of those domestic abuse incidents. The Scottish Crime and Justice Survey's Partner Abuse Module for 2012/13 found that 14% of adults (17% of women and 10% of men)² report having experienced physical or psychological partner abuse since the age of 16, and 3% report having experienced partner abuse in the previous 12 months. The Chief Constable of Police Scotland, Sir Stephen House, has stated that more than 20% of all police operational time was spent dealing with domestic incidents³.

1.2 The Scottish Government is firmly committed to tackling all forms of violence against women, including domestic abuse. In 2015-16 the Scottish Government will invest £11.8 million from its equality budget on a range of projects to tackle violence against women and front line services to support those affected by violence and abuse.

1.3 The Justice system and justice agencies have responded to the particular challenges of this type of crime in a number of ways.

1.4 For example, the Crown Office have appointed a specialist National Prosecutor for Domestic Abuse, responsible for co-ordinating the prosecution service's response to domestic abuse cases from across Scotland. In addition to oversight of cases across Scotland, the role involves the on-going review of prosecution policy with regard to crimes of domestic abuse, further engagement with stakeholders to strengthen the collective response to domestic abuse cases, and working to raise awareness among prosecutors and the police.

1.5 Since it was established in 2013, Police Scotland has set up a National Domestic Abuse Task Force to strengthen the police's response to these crimes and target the most serious and prolific offenders. They have also established specialist domestic abuse investigation units in every local policing division across Scotland. On 25 November 2014, they launched their pilot Disclosure Scheme for Domestic Abuse, also known as 'Clare's Law' in Ayrshire and Aberdeen for six months. This scheme allows people to seek information as to whether their partner has a history of offending relating to domestic abuse, with the decision on whether to disclose information made on a case by case basis.

¹ <http://www.scotland.police.uk/assets/pdf/138327/232757/management-information-year-end-2013-14>

² <http://www.scotland.gov.uk/Publications/2014/06/5943>

³ <http://www.scotland.police.uk/whats-happening/news/2014/october/festive-campaign-to-target-domestic-abusers>

1.6 The Scottish Parliament has recently passed the Victims and Witnesses (Scotland) Act 2014, which will give victims of domestic abuse access to special measures, such as screens and video links, when giving evidence. In some areas, specialist courts have been introduced for domestic abuse cases.

1.7 Speaking at the Crown Office and Procurator Fiscal Service's (COPFS) Domestic Abuse Conference in May 2014, the Solicitor General, Lesley Thomson QC, called on the Scottish Parliament to consider the creation of a 'bespoke' offence of 'domestic abuse'. She stated that, in her experience of prosecuting domestic violence, the existing law does not always reflect the experience of victims of long-term domestic abuse because it focuses on specific instances of e.g. assault or threatening or abusive behaviour, **rather than the long-term, repeated nature of much domestic abuse.**

1.8 The Solicitor General also considered that a specific offence would provide recognition of the impact and consequences of all types of abusive behaviours, including non-violent tactics of control and abuse, and would make clear to the public and to law enforcement that such conduct is not acceptable.

1.9 In setting out the Scottish Government's Programme for Government in November 2014, the First Minister announced that the Scottish Government would seek views on whether a specific offence of domestic abuse would better reflect the true nature of much domestic abuse, including on-going controlling and coercive behaviour by perpetrators and make the prosecution of this kind of crime more effective, allow more people access to justice and, ultimately, reduce incidents of abuse.

Current Legal Framework

1.10 In Scotland there is no statutory criminal offence of 'domestic abuse' or statutory definition of what constitutes domestic abuse. However, in 2003, the then Scottish Executive's Strategy to Address Domestic Abuse defined it as:

“—Domestic abuse (as gender-based abuse), can be perpetrated by partners or ex-partners and can include

- physical abuse (assault and physical attack involving a range of behaviour);
- sexual abuse (acts which degrade and humiliate women and are perpetrated against their will, including rape) and mental and emotional abuse (such as threats, verbal abuse, racial abuse);
- withholding money and other types of controlling behaviour such as isolation from family or friends).”

1.11 Police Scotland and the COPFS work to a nationally agreed definition of domestic abuse for the purpose of investigating and prosecuting such conduct. This definition, which is contained within their published Joint Protocol entitled 'In partnership challenging domestic abuse' defines domestic abuse as:

“Any form of physical, sexual or mental and emotional abuse which might amount to criminal conduct and which takes place within the context of a relationship.

“The relationship will be between partners (married, co-habiting, civil partnership or otherwise) or ex-partners. The abuse can be committed in the home or elsewhere.”

1.12 While there is no specific statutory offence of ‘domestic abuse’ in Scots law, a range of existing common law and statutory offences can be used to prosecute many of the elements of the spectrum of offending behaviours set out in the definitions of domestic abuse noted above.

1.13 Where prosecution of an offence is taken forward and it is considered that it should be classed as an incident of domestic abuse, e.g. an assault by a person carried out on their partner or ex-partner, a ‘domestic abuse identifier’ attaches to the offence. In the event of conviction, this identifier will appear on the person’s criminal record to show that the offence for which they were convicted was one involving domestic abuse.

1.14 Figures produced by COPFS in June 2014 showed that in the year 2013/14, a total of 36,552⁴ charges relating to domestic abuse were reported to them by Police Scotland for consideration of prosecution.

1.15 Violence between people who are in or have been in a relationship is clearly criminal just as it is when violence is perpetrated by a person against a stranger or acquaintance. Offences such as common law assault, sexual assault and rape apply regardless of the relationship between the perpetrator and the victim, and whether or not the conduct occurs in a domestic setting. Figures compiled by COPFS in June 2014 showed that 12,680 charges of common assault, 554 charges of serious assault and attempted murder, 430 charges of rape and attempted rape and 164 charges of sexual assault which were reported to them by Police Scotland related to domestic abuse.

1.16 Common law assault can extend to some circumstances where there is a threat of imminent violence, even where no physical assault takes place, such as making a threatening gesture or presenting or brandishing a weapon at the victim. More generally, there are a number of offences which can be used to prosecute domestic abuse where the conduct constituting domestic abuse does not involve overt physical violence.

1.17 Depending on the facts and circumstances of the particular case, non-violent abusive behaviour can be prosecuted using the offence of ‘threatening or abusive behaviour’ at section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (“the 2010 Act”). This makes it a criminal offence to behave in a threatening or abusive manner which would be likely to cause a reasonable person to feel fear or

⁴ <http://www.copfs.gov.uk/images/Documents/Statistics/DA%20Final%20Table.pdf>

alarm, where the perpetrator either intends to cause such fear or alarm or is reckless as to whether their behaviour would cause fear or alarm.

1.18 The effect of the introduction of this offence in 2010 was to ensure that behaviour which could previously have been prosecuted using the common law offence of 'breach of the peace' could continue to be prosecuted without the need for a 'public element' (which was, following a court judgement, required to convict an offender of a breach of the peace).

1.19 The offence of 'stalking' at section 39 of the 2010 Act may also be used to prosecute non-violent abusive behaviour. The offence provides that a person (A) stalks another person (B) where A engages in a course of conduct (involving conduct on at least two separate occasions) which causes B to feel fear or alarm, where A either acts with the intention of causing B to feel fear or alarm or where A knew or ought to have known that engaging in the course of conduct would be likely to cause B to feel fear or alarm. Conduct is defined in section 39 as encompassing a wide spectrum of activities.

1.20 More generally, statistics collected by the police and COPFS show that a range of other offences are committed in the context of domestic abuse, including vandalism, theft, and offensive weapons offences. Figures compiled by COPFS in June 2014 showed that in the year 2013/14, 14,600 charges in the 'breach of the peace etc.' category (which includes the threatening or abusive behaviour offence), 1,651 charges of vandalism, 451 offences of theft (including of a motor vehicle) and 114 offences of handling offensive weapons which were reported to them by Police Scotland related to domestic abuse.

Should there be a specific offence of domestic abuse?

1.21 As noted above, there is at present no specific offence of domestic abuse. It is clear that violent behaviour occurring in an intimate relationship is criminal, just as it would be in any other context. A range of other offending behaviour which occurs in the context of an abusive relationship, including threatening or abusive behaviour, theft and damage to property can be dealt with using the existing law.

1.22 However, it is perhaps much less clear whether the existing criminal law covers *all* forms of non-violent behaviour that constitutes domestic abuse as defined by the police and COPFS' working definition.

1.23 Some forms of emotional and mental abuse may fall within the scope of existing criminal offences. For example, the offence of 'threatening or abusive behaviour' criminalises behaviour which is threatening or abusive, provided that it would be likely to cause a reasonable person to feel fear or alarm. This would enable COPFS to prosecute in a case where, for example, a person makes threats or is overtly verbally abusive towards their partner.

1.24 However, it is less clear if this offence can be used to prosecute more subtle forms of controlling or coercive behaviour, such as preventing a person from seeing friends and acquaintances, or exerting control over a person's financial affairs or movements in such a way as to ensure their dependence on the abuser.

1.25 In some cases, there may be a history of past violence or threatening behaviour committed by the abuser against the victim, such that the fear instilled in the victim enables the abuser to exert this control without using overtly threatening behaviour or the physical violence. The threshold set out in the offence of ‘threatening or abusive behaviour’ that the behaviour would be likely to cause a reasonable person to feel fear or alarm may not be met.

1.26 A consequence of this is that even victims whose cases are successfully prosecuted can be left thinking that their experience as a victim of domestic abuse has not been fully recognised by the courts.

1.27 In such cases, a long term pattern of abuse is prosecuted as discrete incidents of, for example, assault or threatening behaviour. Significant aspects of the abuse, which could be described as ‘coercive and controlling behaviour’ or emotional or financial abuse, may not clearly fall within the scope of any existing criminal offence. Behaviour like preventing the victim from having contact with friends or family or exerting undue control over the victim’s financial affairs can limit their scope for independent action and undermine their autonomy.

1.28 The severity of the specific incidents of violence or threatening behaviour for which the abuser is prosecuted can only be fully understood against the background of on-going psychological abuse and controlling behaviour. However, at present, it is not formally recognised by the courts and judges and sheriffs must sentence the offender on the basis of the offences which were proven in that particular case.

1.29 We consider that there is a case for creating a specific offence of ‘domestic abuse’ which would criminalise the kind of on-going coercive and controlling behaviour in a relationship which is not covered by existing criminal offences such as threatening or abusive behaviour. A single specific offence of ‘domestic abuse’ which used a definition of domestic abuse, based, for example, on the working definitions used by the police and COPFS, would enable a court to consider the whole context of an abusive relationship – both the incidents of threats and violence and acts of emotional abuse and psychological control, when prosecuting an alleged offender.

1.30 In this regard, it is perhaps worth considering the parallel with the existing law of ‘stalking’ at section 39 of the Criminal Justice and Licensing (Scotland) Act 2009. This enables a course of conduct constituting ‘stalking’, which may consist of many separate acts, not all of which would necessarily be considered to be criminal if considered in isolation, to be prosecuted as a single charge of ‘stalking’.

1.31 However, we consider it is important to ensure that any new offence is defined in such a way as to draw a clear distinction between, on the one hand, emotionally abusive, controlling and coercive behaviour which is often motivated by a desire to humiliate a person and undermine their autonomy, and, on the other hand, ordinary arguments and friction that can occur in almost any relationship and which should not be regarded as constituting a criminal offence, unless they involve threatening behaviour or violence.

1.32 In February of this year, the UK Parliament passed the Serious Crime Act 2015. Section 76⁵ of that Act provides for an offence of ‘controlling or coercive behaviour in an intimate or family relationship’. This makes it an offence for a person to repeatedly or continuously engage in behaviour which is controlling or coercive towards a partner or family member, where that behaviour has a serious effect on the partner or family member and the accused person knew or ought to have known that it would have a serious effect.

1.33 If domestic abuse is to be prosecuted effectively, it is vital that the police, the courts and the public are clear about what constitutes criminally abusive behaviour within an intimate relationship. With this in mind, we would welcome views on whether a specific offence would be of assistance in prosecuting domestic abuse and whether it would provide greater clarity for the public regarding the criminality of different forms of abuse within a relationship.

1.34 The existing definition of ‘domestic abuse’ used by the Police and COPFS is concerned with people who are or were in a relationship with each other. We are aware, however, that the UK Government’s cross-government definition of domestic abuse extends to cover family members who are not partners:

“any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are, or have been, intimate partners or family members regardless of gender or sexuality. The abuse can encompass, but is not limited to:

- psychological
- physical
- sexual
- financial
- emotional”

1.35 We recognise that abuse can be committed by family members. However, we know that such abuse can have a different dynamic to abuse that occurs between partners or ex-partners. With this in mind, we would welcome views on whether any specific offence of domestic abuse should be restricted to abuse committed by a person against their partner or ex-partner, or whether there would be merit in adopting a definition which includes abuse committed by any family member. It is worth noting that the definition used by the UK Government is restricted to those over the age of 16, presumably because it is not considered helpful to conflate domestic abuse and child abuse.

Questions

1. Does the existing criminal law provide the police and prosecutors with sufficient powers to investigate and prosecute perpetrators of domestic abuse? Yes; No (if No, please specify how the existing law should be strengthened)

⁵ <http://www.legislation.gov.uk/ukpga/2015/9/section/76/enacted>

2. One of the ways in which it has been proposed the law could be strengthened is through the creation of a specific criminal offence concerning domestic abuse. Do you agree that this would improve the way the justice system responds to domestic abuse? Yes; No.

3. What behaviours which are not currently criminalised should be included within the scope of a specific offence?

4. Should any specific offence of ‘domestic abuse’ be restricted to people who are partners or ex-partners, or should it cover other familial relationships?

5. Are there any other comments you wish to make about the creation of a specific offence of domestic abuse?

A Domestic Abuse Aggravator

1.36 We would also welcome views on whether the introduction of a statutory aggravation available for any offence that occurred against a background of domestic abuse would assist the prosecution of domestic abuse cases.

1.37 Statutory aggravations exist to assist in the identification and prosecution of a number of different types of crime. For example, the Offences (Aggravation by Prejudice) (Scotland) Act 2009 provides for statutory aggravations for any crimes committed through a motivation of malice or ill-will towards an individual based on their sexual orientation, transgender identity or disability. This could, for example, be an assault motivated by ill-will towards a disabled person. Where offences are proven to be as a result of such malice or ill-will, the court must take that into account when determining sentence. Evidence from a single source is sufficient to establish the aggravation.

1.38 Section 74 of the Criminal Justice (Scotland) Act 2003 makes similar provision for offences aggravated by religious prejudice and section 96 of the Crime and Disorder Act 1998 provides for a statutory aggravation that an offence was motivated by malice and ill-will towards the victim based on their membership (or presumed membership) of a racial group.

1.39 The Human Trafficking and Exploitation (Scotland) Bill will, if passed by Parliament, establish a statutory aggravation that an offence was committed against a background of human trafficking. This recognises that many cases involving other offences, for example, producing false documents, immigration offences, brothel keeping and drugs offences, are committed in the context of human trafficking, even though there may be insufficient evidence to raise proceedings for a specific human trafficking offence.

1.40 A statutory aggravation that an offence or offences were committed as part of a course of conduct that amounted to domestic abuse may provide an alternative means of ensuring that the courts recognise the victim’s experience. In a domestic abuse context it would be helpful that the aggravation can be proved by evidence from a single source. By placing a statutory duty on the courts to take into account

domestic abuse when sentencing the offender, as they are required to do by existing legislation concerning offences aggravated by prejudice, victims can have greater confidence that the sentencing decisions of the courts in, for example, assault or breach of the peace cases, reflect the fact that the offence occurred as part of an abusive relationship. A statutory aggravation for domestic abuse could be considered either as an alternative to a specific offence, or, as is the case with the human trafficking aggravation, in addition to it.

Questions

- 6. Do you think that there should be a statutory aggravation that a criminal offence was committed against a background of domestic abuse being perpetrated by the accused? Yes/No if no, please give reasons for your answer**

- 7. If you think that there should be a statutory aggravation of this kind, do you think this should be in addition to, or instead of, a specific statutory offence of 'domestic abuse'? Give reasons**

PART TWO: NON-CONSENSUAL SHARING OF PRIVATE, INTIMATE IMAGES

Background

2.1 Recent technological developments mean that it is easier than ever before to take and share pictures with friends, family and the wider world. Unfortunately, a small number of people have used this technology to threaten, harass and abuse other people. This can take many forms, but one which has received particular attention in recent years has been the non-consensual sharing of intimate images, typically of partners or former partners, often referred to as 'revenge porn'.

2.2 This type of activity often involves images which were meant to be private being shared on the internet, often on websites specifically set up for this purpose. There have been cases in which the names and contact details of victims have been posted with the pictures, which can leave the victim fearful for their safety and scared to go out in public. In other cases, threats to publish such photos on the internet have been used by abusive partners or ex-partners to control victims, often as part of a campaign of intimidation or blackmail. As such, this type of activity is often characterised by a motivation to humiliate and can be seen as a form of domestic abuse.

2.3 Depending on the facts and circumstances of the particular case, there are a number of criminal offences which can be used to prosecute people who publish or share private, intimate images of a partner or former partner without their consent. These include blackmail, breach of the peace, threatening or abusive behaviour, stalking and improper use of a public electronic communications network.

2.4 However, there is an argument that, in the absence of an offence specifically concerned with the sharing of intimate, private images, the exact scope of the law in this area remains unclear. Furthermore, victims of this kind of behaviour may not be aware that a criminal offence has been committed against them. Even when a successful prosecution has taken place, a person may consider that prosecution of the perpetrator for an offence such as threatening or abusive behaviour does not fully reflect their specific experience.

Proposal to create a specific offence

2.5 A number of jurisdictions have legislated to criminalise the sharing of certain kinds of private or intimate images of other people without their consent.

2.6 For example, in South Australia, there is an offence of 'distribution of an invasive image knowing or having reason to believe that the other person does not consent to its distribution'⁶. In Queensland, Australia, there is an offence of 'distributing a 'prohibited visual recording' without consent'⁷.

⁶ Section 26C, Part 5A, Summary Offences Act 1953:

http://www.austlii.edu.au/au/legis/sa/consol_act/soa1953189/s26c.html

⁷ Section 227B, Criminal Code Act 1899:

<https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/C/CriminCode.pdf>

2.7 In Germany, the offence of ‘violation of intimate privacy by taking photographs’ prohibits unlawfully and knowingly making available to third parties a picture that was created with the consent of another person located in a dwelling or room especially protected from view and thereby violating that person’s intimate privacy⁸.

2.8 Several US States, including Arizona⁹, Delaware¹⁰ and New Jersey¹¹ have also legislated to criminalise the sharing of nude or sexual images without the permission of the person or people featured in them.

2.9 In England and Wales, section 33 of the Criminal Justice and Courts Act 2015 provides for an offence of ‘Disclosing private sexual photographs and films with intent to cause distress.’¹²

2.10 The Scottish Government considers that there is a compelling case for creating a specific new criminal offence to deal with this emerging form of offending. Last year, the Lord Advocate commented that:

“...we can and do prosecute this crime robustly using existing legislation. However, it is a growing problem and specific legislation would send a signal to those who do this that they face jail. Without a specific offence, there is a risk that victims will not come forward because they are unaware that what has happened to them is a crime.”

2.11 We consider that a specific criminal offence will send a clear message both to victims of this kind of behaviour and to people who might otherwise be tempted to share intimate images of a partner or former partner without their consent that this behaviour is criminal. A specific offence would also ensure that the person affected has the satisfaction of knowing their own specific experience is reflected in the offence which the perpetrator is convicted of.

Question

8. Do you agree that it should be a specific criminal offence to share private, intimate images of another person without their consent? If no, give reasons

Images covered by the offence

2.12. Jurisdictions which have created offences of this kind have taken different approaches to the kinds of images to which the offence applies, though in all the examples we are aware of, the offence extends only to images which are in some way ‘private’. For the avoidance of doubt, where the term ‘image’ is used in this consultation, we consider this applies equally to video and still images.

⁸ http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1697

⁹ http://www.womenslaw.org/statutes_detail.php?statute_id=7608#statute-top

¹⁰ <http://www.delcode.delaware.gov/title11/c005/sc07/index.shtml>

¹¹ <http://law.onecle.com/new-jersey/2c-the-new-jersey-code-of-criminal-justice/14-9.html>

¹² <http://www.legislation.gov.uk/ukpga/2015/2/section/33/enacted>

2.13 While an offence could be created which criminalised the sharing of *any* image of a person without their consent, such an approach would have the effect of criminalising much activity which would not typically be thought of as criminal, including news reporting and much routine sharing of images on social networking sites.

2.14 While it is possible to envisage circumstances in which photographs or video files of a person which are not obviously 'private' may be shared with the intention of causing alarm or distress to the person, or indeed where sound files or private written communications are shared for this purpose, it is important to remember that where 'non-private' images, sound files or e-mails, letters or private messages are shared for the purpose of harassing or intimidating the person featured in them, a prosecution using other laws (for example, stalking or 'threatening or abusive behaviour') could be taken, if the facts and circumstances of the case merit it.

2.15 We therefore propose that, as is the case in other jurisdictions which have enacted legislation to address this problem, any specific offence should be restricted to the sharing of images which would be considered to be 'private' or 'intimate'.

2.16 There are of course differing understandings of what might constitute a 'private, intimate image'. However, in practice, where such images have been published or shared with the intent of causing humiliation to the person featured in them, they have typically involved private **sexual** images – hence the use of the term 'revenge porn' to describe this kind of offending behaviour.

2.17 Section 9 of the Sexual Offences (Scotland) Act 2009 provides for an offence of 'voyeurism', which criminalises a person who observes or records another person doing a 'private act' without consent and without any reasonable belief in consent, in circumstances where that other person would have a reasonable expectation of privacy. Section 10 of that Act defines a 'private act' as one in which :

The person is in a place which in the circumstances would reasonably be expected to provide privacy, and—

- (a) the person's genitals, buttocks or breasts are exposed or covered only with underwear,
- (b) the person is using a lavatory, or
- (c) the person is doing a sexual act that is not of a kind ordinarily done in public.

2.18 We consider that defining the kinds of intimate, private images to be covered by the proposed offence in broadly the same way as that used in the offence of 'voyeurism' would have the advantage of making clear to police, courts, prosecutors and victims exactly what kinds of images are covered by the offence.

2.19 An alternative would be to provide that the offence covers 'private and intimate images' without defining in legislation exactly what kinds of images are covered by the term. Instead, an image would be 'private and intimate' if the subject

of the image and the person sharing or distributing that image both knew or ought to have known that it was considered to be so.

2.20 This would have the advantage of ensuring that the law is flexible enough to cover different understandings of what might constitute a 'private, intimate image'. Images that may be private and intimate may not always be 'sexual' images. For example, a Muslim woman might consider a photograph in which she is not wearing a headscarf to be private and intimate.

2.21 However, the potential disadvantage may be that there would be less certainty in law concerning exactly what images are or are not covered by the offence. It may not be immediately obvious to the police, prosecutors and the courts whether any particular image fell within the scope of the offence without investigating the particular context of the individuals involved, although it should be acknowledged that this requirement to consider the backgrounds of the people involved is something that the police have to do at present, for example, when investigating a report of a stalking offence.

Questions

9. Do you agree with the proposal that the offence should be restricted to images?

10. Should the types of images that should be covered by the offence should be based on the definition of a 'private act' contained at section 10 of the Sexual Offences (Scotland) Act 2009? Or do you think a definition which defines an image as 'private and intimate' if the person featured in the image and the person sharing the image understand it to be such would be more appropriate?

Circumstances in which the offence is committed – *mens rea* for the offence

2.22. We have given consideration to the question of the extent to which the intention of a person posting images of another person should be relevant in determining whether an offence is committed.

2.23 The offence concerning disclosing private sexual photographs covering England and Wales, at section 33 of the Criminal Justice and Courts Act 2015, provides that, for an offence to be committed, as well as disclosing the images without consent, the accused must have intended to cause distress to the subject of the images. It is further provided that the intent to cause distress is not proven merely because it was a natural and probable consequence of disclosure.

2.24 We consider that adopting such an approach in Scotland may risk making it difficult to prosecute such behaviour as it would place the burden on the Crown to *prove* the motivation of the accused person in sharing the images. Moreover, as a matter of principle, where an accused person knew, or ought to have known, that the subject of the image did not consent to its being shared, and that its disclosure would be likely to cause distress, we consider it would be wrong that the offence would not

be committed solely because the accused's motivation in sharing the image was not to cause distress.

2.25 On the other hand we think that an offence which criminalised any sharing of a relevant image by a person without the explicit consent of the subject of the image would be too widely drawn. The effect of such a provision would be to criminalise the sharing or disclosure by a person of images of complete strangers, in circumstances where this was done without any intention of causing distress to the subject of those images, and who might have had no reason to believe that the subject of the image had not consented to its being shared. Insofar as such behaviour may constitute a criminal offence, it might be more appropriate to use the offence of 'improper use of a public electronic communications network' at section 127 of the Communications Act 2003.

2.26 We therefore propose that the offence shall be committed where a person shares or discloses a relevant image in circumstances where they know or ought reasonably to have known that the subject of the image would be caused alarm or distress by its distribution or sharing.

2.27 As the offender's intent, in sharing such images, is very often to cause their victim to suffer humiliation or distress, it is possible that they may achieve the same aim simply by threatening to share such images. We are aware of individual cases in which this has occurred within the context of an abusive relationship where an offender uses the threat to share such images to silence the victim and deter them from reporting abuse.

2.28 In certain circumstances, it may be possible to use the existing common-law offence of blackmail to prosecute such behaviour. However, this may depend on the facts and circumstances of the particular case. We therefore propose that it should also be an offence to *threaten* to share private intimate images without the consent of the person featured in those images.

Questions

11. Do you agree that the offence should be framed so that a person commits an offence where they share a private image of another person and they knew or ought to have known that its sharing/distribution would be likely to cause that person alarm or distress

12. Do you agree that it should be an offence to threaten to share private, intimate images of another person without their consent?

Penalties

2.29 As noted above, at present, people sharing intimate and private images without consent, and with the intention of causing humiliation, alarm or distress, may be prosecuted using, for example, the offence of 'misuse of a public communications network' at section 127 of the Communications Act 2003 ("the 2003 Act"), the maximum penalty for which is 6 months imprisonment or a fine or both, on summary conviction, or the offence of 'threatening or abusive behaviour' at section 38 of the

Criminal Justice and Licensing (Scotland) Act 2010 (“the 2010 Act”), the maximum penalty for which is 5 years imprisonment or a fine, or both, on conviction on indictment.

2.30 We consider that the sharing of intimate and private images is of a greater seriousness than the kind of conduct which the offence at section 127 of the 2003 Act is primarily concerned with, as it is not a feature of that offence that the material being communicated is private or that its disclosure would be likely to cause alarm or distress.

2.31 On the other hand, there is an argument that the offence of ‘threatening or abusive behaviour’ at section 38 of the 2010 Act which can be used to prosecute very serious offending, which might involve a continuing campaign of serious threats and abuse, potentially captures more serious offending behaviour. Therefore we consider that the maximum penalty for the offence of sharing intimate, private images of a person without their consent should be set somewhere in the range of 6 months to 5 years and we welcome your views on this.

Question

13. What level of maximum penalty do you think should apply for the new offence? Do you have any other comments regarding the penalties for the new offence?

Defences

2.32 We would welcome views on whether there is a need to provide for statutory defences to an offence of sharing intimate, private images. We note that the equivalent offence in England and Wales at section 33 of the Criminal Justice and Courts Act 2015 provides for three statutory defences:

- That the person disclosing the image reasonably believed it was necessary for the purposes of preventing, detecting or investigating crime;
- That the person disclosing the image reasonably believed that it had previously been disclosed for reward, and that this disclosure for reward had not been done without the consent of the person who appears in the image;
- That the disclosure was made in the course of, or with a view to, the publication of journalistic material, and the person making the disclosure reasonably believed that in the particular circumstances, the publication of the journalistic material was or would be in the public interest.

2.33 The defence that an image had previously been disclosed for reward appears to be intended to ensure that images which are already, in a sense, in the public domain, are not covered by the offence. The defence that the image was disclosed in the course of, or with a view to the publication of, journalistic material appears to be intended to protect legitimate journalistic investigations. We anticipate that it is only in very limited circumstances that legitimate journalism in the public interest would involve the publication of intimate private images without the subject’s consent.

Questions

14. Do you think that there should be statutory defences to the proposed offence of disclosing a private, intimate image?

15. If so, what defences do you think should be provided and why do you think they are needed?

PART 3: JURY DIRECTIONS IN SEXUAL OFFENCE CASES – HOW A JURY SHOULD APPROACH CONSIDERATION OF THE TIME TAKEN IN REPORTING A CRIME BY THE VICTIM, THE ABSENCE OF RESISTANCE BY THE VICTIM AND THE ABSENCE OF THE USE OF FORCE BY THE PERPETRATOR

Background

3.1 There is concern that some ill-founded preconceptions held by members of the public, who make up juries, about the nature of sexual violence, make the understanding of victims' responses to such crimes more difficult.

3.2 It is thought that some members of the public have a belief that a sexual assault is almost always violent, and that if assaulted, a victim would almost always respond by offering physical resistance.

3.3 Equally, there is some concern that jurors may regard a significant period of time occurring between the time an alleged crime takes place and a report being made to the police about a rape or sexual assault as evidence that the allegation is false, despite the fact that we know that there are many reasons that a victim may not report a sexual offence committed against them immediately.

3.4 In individual cases, COPFS can and do lead expert evidence on the question of the different ways in which people respond to sexual assault, and the fact that there can be good reasons a victim may not report the crime to the police for some time after it has happened.

3.5 However, the Scottish Government considers that there is a strong case for ensuring that, where relevant, directions are given to juries on these matters without the need to lead expert evidence in every case.

3.6 In recent years, there has been a significant increase in the number of cases in which sexual offences have been reported to the police some years after they were alleged to have been committed, possibly as the result of the media attention given to cases involving high-profile sex offenders. As a consequence, juries are being asked to consider an increased number of cases in which a significant period of time has elapsed between the time an offence is alleged to have been committed and its being reported to the police.

3.7 At the end of a trial the judge directs the jury on what it must consider when deliberating before reaching its verdict. A statutory jury direction is a provision that requires that, in the circumstances set out in the statutory provision, the trial judge must or may direct a jury about the matter set out in the provision.

3.8 At present, there are no statutory jury directions in place in Scots law, either specifically relating to sexual offences, or more generally. The Scottish Jury Manual¹³, produced by the Judicial Institute for Scotland, provides information and guidance to judges who have the responsibility of charging juries in serious criminal trials, but it does not specifically address the question of how the judge should direct

¹³ <http://www.scotland-judiciary.org.uk/Upload/Documents/JURYMANUALFeb12.pdf>

the jury on what account to take of any significant period of time elapsing between incident taking place and it being reported, or concerning any suggestion by the defence that an apparent lack of resistance on the part of the alleged victim or a lack of force being used by the alleged perpetrator, might indicate that the allegation is false.

3.9 The Scottish Government recognises the vital importance of the principle of judicial independence within Scotland's justice system and the responsibility of the judge or sheriff in each case to advise the jury on relevant matters. As noted above, at present, there are no statutory jury directions in place in Scots law. However, a number of jurisdictions around the world have been able to respect and maintain judicial independence and address these issues either through non-statutory guidance and advice prepared by and for members of the judiciary or through statutory jury directions. This consultation seeks views on how to ensure that juries are given appropriate direction on these matters.

Significant period of time between a sexual offence being committed and being reported to the police

3.10 A number of jurisdictions have mechanisms in place, whether statutory or based on case law, to enable a judge to caution a jury not to dismiss an allegation of rape or sexual assault simply because the complainer did not report the crime for some time after it was alleged to have taken place and to bring to a jury's attention the reasons why a victim may not report a sexual offence at the time it took place.

3.11 A number of Australian States have made provision in statute for directions to be given to a jury regarding what account they should take of any significant time elapsing between an alleged sexual assault taking place and it being reported by the victim.

3.12 In New South Wales, Australia, there is provision¹⁴ that if evidence is given or a question asked of a witness which tends to suggest delay by the person making the complaint, the judge:

- (a) must warn the jury that the absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false,
- (b) must inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault, and
- (c) must not warn the jury that delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify such a warning.

Similar provision is made at section 4(5)(b) of the Sexual Offences (Evidence and Procedure) Act 1983¹⁵, in the Northern Territory, Australia.

¹⁴ http://www.austlii.edu.au/au/legis/nsw/consol_act/cpa1986188/s294.html

¹⁵ http://www.austlii.edu.au/au/legis/nt/consol_act/soapa333/s4.html

3.13 In New Zealand, section 127 of the Evidence Act 2006¹⁶ provides that judges can direct a jury that there may be good reasons why the victim of a sexual offence may take some time before making a complaint (or not report the offence at all), though, in contrast with the position in the Northern Territories and New South Wales, Australia, any such direction is made at the discretion of the judge.

3.14 In a number of other jurisdictions where there is no statutory provision, case law has developed in such a way that directions are routinely given to juries on the issue of delayed reporting of sexual crime.

3.15 In Canada, the Supreme Court has held that, in relevant cases, the trial judge should inform the jury that

“...there is no inviolable rule on how people who are victims of trauma like a sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge. In assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant.”¹⁷

3.16 In England and Wales, guidance is provided to judges in the “Bench Book on Directing the Jury”, produced by the Judicial Studies Board. While the contents of the Bench Book do not have legal authority (excepting circumstances where the Court of Appeal has held that it does), Chapter 17 of the Bench Book provides guidance on a number of issues that may arise in the context of sexual offence trials. The Bench Book sets out an illustrative example of how the trial judge might direct the jury when questions arise about delayed reporting by the complainant:

“It has been said on behalf of the defendant that the fact that the complainant did not report what had happened to her (him) as soon as possible makes it less likely that the complaint she (he) eventually made was true. Whether that is so in this particular case is a matter for you to consider and resolve. However, it would be wrong to assume that every person who has been the victim of a sexual assault will report it as soon as possible.

The experience of the courts is that victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain or go to authority for some time. It takes a while for self-confidence to reassert itself. There is, in other words, no classic or typical response. A late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true

¹⁶ <http://www.legislation.govt.nz/act/public/2006/0069/latest/DLM393966.html>

¹⁷ *R v. D.D* [2000] 2 S.C.R. 275
(http://www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/hearings/exhibits/Wendy_Harvey/pdf/51_DD.pdf)

complaint. It is a matter for you to determine whether, in the case of this particular complainant, the lateness of the complaint, such as it is, assists you at all and, if so, what weight you attach to it.

You need to consider what the complainant herself said about her experience and her reaction to it. On this issue, the evidence she gave was....¹⁸

A Statutory Jury Direction

3.17 We are seeking views on a proposal to introduce a statutory jury direction which requires that, in sexual offence cases where there was a significant period of time between an offence being committed and the victim reporting the alleged assault, the judge must:

- caution the jury that this does not necessarily indicate that the allegation is false, and
- inform the jury that there may be good reasons why a victim of a sexual offence may not have reported the offence at the time it was committed.

3.18 We note that other jurisdictions which have introduced statutory jury directions of this kind do not prescribe the *exact* form that such a direction must take in any particular case. We consider that it is appropriate to leave the wording of any direction to the jury to the trial judge, who will be best placed to direct the jury in a manner appropriate to the facts and circumstances of the particular case.

3.19 We therefore are seeking views on a proposal to legislate to introduce a provision placing a statutory requirement on the trial judge to direct the jury on the question of delayed reporting where it arises, similar to that used in New South Wales and the Northern Territory, Australia. Subject to the views raised, any actions arising from this part of the consultation would need to be discussed with the judiciary.

Questions

16. Do you agree that there should be statutory jury directions which require the trial judge to make the jury aware that there may be good reasons why a victim of a sexual offence may not report that offence until some time after it has been committed and that this does not, in and of itself, indicate that the allegation is more likely to be false?

17. Do you consider that the terms of the jury direction used in New South Wales, Australia, requiring the judge to warn the jury that the absence of complaint or delay in complaining does not necessarily mean an allegation is false and that there may be good reasons why a victim of a sexual assault may hesitate in making, or refrain from making a complaint about the assault, is an appropriate model for a similar direction in Scots law?

¹⁸ https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Training/benchbook_criminal_2010.pdf

Absence of physical force used by the assailant and/or lack of resistance by a victim in sexual offence cases

3.20 There is some concern that juries may be unduly reluctant to convict in cases where the complainer in a sexual offence case did not physically resist their attacker, or where there the accused did not use physical force to overpower the complainer in committing a sexual assault.

3.21 Under Scots law, a sexual offence is committed when a person engages in sexual activity without another person's consent. There is no requirement that the offender must use physical force to overcome the will of their victim or that the complainer must attempt to physically resist their assailant in order for a sexual offence to be committed.

3.22 There are of course many reasons why the victim of a rape or other sexual assault may not physically resist their attacker. They might fear that physical resistance may cause the attacker to retaliate, or the shock of the assault may cause the victim to freeze and simply wish for the horrific experience to be over as soon as possible.

3.23 However, it is an unfortunate misconception that many people may wrongly believe that a person who was sexually assaulted or raped would be likely to attempt to physically resist their attacker and that an absence of physical resistance could be indicative that an allegation is false.

3.24 We are not aware of any jurisdiction that has legislated to provide for statutory jury directions concerning what weight, if any, to place on the fact that there was a lack of resistance on the part of the complainer in a sexual offence case.

3.25 However, many jurisdictions have, in recent decades, revised their laws on rape and sexual assault so as to make clear that the prosecution need not prove that the victim cried out or physically resisted the assailant. In Scotland, in the Lord Advocate's Reference (no 1 of 2001), the High Court held that the crime of rape was defined as a man having sexual intercourse with a woman without her consent. The Court ruled that it was not a requirement that the man forcibly overcame the will of the woman. The Sexual Offences (Scotland) Act 2009 subsequently reformed Scots law on sexual offences, providing a statutory definition of consent which confirms that physical resistance by a victim is not required for an offence to be committed.

3.26 The Crown Court Bench Book for England and Wales provides 'example' jury directions for judges to use where this issue arises in individual cases, which are intended to make clear to a jury that there is no single classic or typical response to non-consensual sexual activity and that it should not be assumed that a victim will necessarily physically resist or loudly protest¹⁹.

¹⁹ http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Training/benchbook_criminal_2010.pdf - See Page 359.

3.27 In a number of jurisdictions, the issue of what account to take of whether force is used by the accused or the complainer physically resists their attacker is addressed indirectly through judicial directions concerning consent. For example, in the Australian state of Victoria, the Judge is required to direct the jury that:

“a person is not to regard a person as having freely agreed to a sexual act just because (i) she or he did not protest or physically resist; or (ii) she or he did not sustain physical injury.”²⁰

A similar provision in the Northern Territory of Australia provides that a judge

“shall direct the jury that a person is not to be regarded as having consented to sexual intercourse or to an act of gross indecency only because the person: (a) did not protest or physically resist; or (b) did not sustain physical injury.”²¹

3.28. However, these statutory jury directions are addressing a slightly different issue in that they are concerned with impressing upon a jury that physical resistance (or verbal protest) on the part of the victim is not required for the crime of rape to be committed.

3.29 These statutory jury directions are essentially equivalent to the High Court’s ruling in response to the Lord Advocate’s Reference of 2001 in that they do not directly address the question of what weight, if any, a jury should give to the fact that the complainer did not physically resist the accused in determining whether, in fact, a rape or sexual assault was committed, only that it is not a requirement that the complainer must resist their attacker for the offence to be committed.

3.30 We consider that there would be value in placing a requirement on the trial judge to caution juries not only that the use of force or violence is not required for the offence to be committed, but that the absence of resistance on the part of a complainer, or the absence of the use of physical force on the part of an accused, is not of itself reason to doubt that an allegation is true and that there are good reasons why a victim of a sexual assault may not physically resist their attacker.

3.31 As with the proposed jury direction concerning delay in reporting, we do not intend to prescribe the form of words to be used by the trial judge in directing the jury on this matter.

3.32 We are therefore seeking views on a proposal to legislate to introduce a provision placing a statutory requirement on the trial judge to direct the jury on the question of the use of physical force in sexual assault cases so that where evidence is given which suggests that the complainer did not physically resist their assailant, or that the accused did not use physical force against the complainer, the judge must:

- warn the jury that the fact that the complainer did not physically resist the accused, or sustain physical injury, or that it is not alleged that the accused

²⁰ Section 37AAA of the Crimes Act 1958 (as amended) (Victoria, Australia).

²¹ Section 192A of Schedule 1 of the Criminal Code Act (as amended) (Northern Territory, Australia) http://www.austlii.edu.au/au/legis/nt/consol_act/cca115/sch1.html

used physical force against the complainer, does not of itself mean that the allegation that the offence was committed is false; and

- inform the jury that people react differently to non-consensual sexual activity and it should not be assumed that a victim will necessarily physically resist or loudly protest, and may be as likely to freeze or offer no resistance, and that the attacker may not use physical force to commit the offence.

3.33 As with the proposed jury direction concerning the time between the alleged commission of an offence and its being reported, we consider that it is appropriate to leave the wording of any direction to the jury to the trial judge, who will be best placed to direct the jury in a manner appropriate to the facts and circumstances of the particular case. Subject to the views raised, any actions arising from this part of the consultation would need to be discussed with the judiciary.

Questions

18. Do you agree that there should be statutory jury directions which require the trial judge to make the jury aware that there may be good reasons why a victim of a sexual offence may not physically resist their attacker and that this does not indicate that it is false?

19. Do you have any comments on how such a statutory jury direction should be worded?

PART 4: COURT DISPOSALS AVAILABLE TO PROTECT A VICTIM WHERE AN ACCUSED IS UNFIT TO STAND TRIAL DUE TO A MENTAL OR PHYSICAL CONDITION

4.1 Where a person is being prosecuted for a criminal offence there is a mechanism in the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) for the court to hold that the person is mentally or physically unfit to stand trial.²² The test for unfitness to stand trial is that the person is incapable of participating effectively in the trial because of a mental or physical condition. In assessing this, the court will take into account whether the person has the ability to understand key elements of the trial process and instruct a lawyer. Where the court is satisfied that an accused is unfit to stand trial (on the basis of professional medical evidence), the court can hold an examination of facts to decide whether the person carried out the acts constituting the offence with which they are charged.

4.2 In such circumstances, where the court decides a person did carry out the acts constituting the offence with which they have been charged, this is not recorded as a conviction. This is important as it has implications for the disposals available to the court.

4.3 For example, a recent court case has brought to light an issue in relation to the operation of non-harassment orders imposed by the criminal courts. In Scotland, non-harassment orders can be granted in a civil court or by a criminal court following conviction for a criminal offence. Both types of order can only be imposed by the court and require a person to desist all contact with another person for a period of time as laid down by the court within the terms of the order. This period of time can include an indeterminate period of time. Breach of the terms of a non-harassment order is a criminal offence.

4.4 The availability of non-harassment orders is focused on providing a means of ensuring on-going harassment by one individual of another can be prevented. Within the context of domestic abuse and stalking, non-harassment orders have an important role to play in providing legal protection to individuals from their partners and ex-partners.

4.5 A ‘criminal’ non-harassment order is only available upon conviction. In practice, this means that in cases where a person has been found by the court to have carried out acts constituting an offence but where the court has accepted they are unfit to stand trial, a criminal non-harassment order is not available to be imposed by the court to protect the victim from further harassment.

4.6 A civil non-harassment order or an interdict would potentially be available, but this would rely on the victim putting forward a separate application to the court rather than allowing the prosecutor to be able to apply on the victim’s behalf, as is the case for a non-harassment order imposed following a criminal conviction.

4.7 Clearly, it is not ideal that this additional burden and potential trauma of having to initiate a separate legal process is placed on the victim when the court has

²² <http://www.legislation.gov.uk/ukpga/1995/46/section/53F>

come to the view that the relevant person has committed an offence against the person.

4.8 In order to address this issue, we are considering whether the law should be improved in this area. This might be done through amending the law so that non-harassment orders will be available to the court upon conviction or where otherwise the court has, following an examination of facts, come to a view that a person did carry out the acts constituting the offence with which they were charged.

4.9 Through this consultation, we are seeking views on whether non-harassment orders should be available following a court reaching a decision that a person did harass another person, but where a conviction did not result due to the person being found unfit to stand trial. We are aware that there are other types of order that are available to the court upon conviction where such a change may be seen as desirable and we will continue to consider whether a change for non-harassment orders of this sort could have wider application.

4.10 As noted above, breach of a non-harassment order is a criminal offence. We are aware that there is a risk that, in some cases, a person who is found unfit to stand trial in respect of the offence for which a non-harassment order, under these proposals, may be imposed might then be similarly found unfit to stand trial if they are later charged with a criminal offence for breaching the terms of a non-harassment order. We do not consider this negates the usefulness of a non-harassment order. This is because it would make it easier for the police to intervene where the subject of the order continues to engage in behaviour amounting to harassment, irrespective of whether the subject of the order is fit to stand trial in respect of any breach of the order.

4.11 However, we recognise that making a person who has been deemed unfit to stand trial the subject of a non-harassment order may not necessarily be an appropriate means of ensuring effective protection for the victim from on-going harassment and we would welcome views on whether there are other solutions which may be more effective in managing the risk posed in such cases. An example of another possible solution would be to make the person subject to supervision and requirements to comply with instructions given by a supervising officer (e.g. desisting from the conduct constituting the offence, which might be particularly useful in harassment cases), similar to the current supervision and treatment order, available under section 57(2)(d) of the 1995 Act and set out more fully in schedule 4 of that Act.

Questions

20. Do you agree that non-harassment orders should be available to the court where the court is satisfied, following an examination of facts, that a person did carry out the acts constituting the offence with which they were charged?

21. If you do not support extending the circumstances in which the courts can make a non-harassment order in this way, do you have any views on other approaches that would protect victims from harassment or stalking by persons found unfit for trial?

PART 5: EXTRA-TERRITORIAL JURISDICTION OF SCOTS LAW ON SEXUAL OFFENCES: EXTENSION TO THE REST OF THE UK

Background

5.1 As a general principle, criminal law usually has effect with respect to the jurisdiction within which a crime is committed. A robbery which occurs in France could not normally be prosecuted in Scotland, irrespective of whether the perpetrator of the robbery was a UK national normally resident in Scotland.

5.2 However, the Sexual Offences (Scotland) Act 2009 (“the 2009 Act”) provides for an exception to this rule in respect of sexual offences committed against children. Sections 54-56 of the 2009 Act provide that the listed sexual offences against children at Parts 1 and 2 of Schedule 4 to the Act have extra-territorial effect. As such, if a UK national does an act in a country outside the United Kingdom which would, if it had been done in Scotland, constitute a listed offence, then the UK national commits the offence²³. This applies irrespective of whether the conduct constituted a criminal offence in the country in which it took place.

5.3 The offences listed at Schedule 4 are sexual offences against children under the age of 18, both under the 2009 Act and under other legislation, including the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 and legislation concerning indecent images of children contained in the Civic Government (Scotland) Act 1982, as well as various common law and statutory offences which were repealed by the 2009 Act.

Issue concerning offences committed elsewhere in the UK

5.4 Following consideration of public petition PE1393 by Barnardo's Scotland on tackling child sexual exploitation in Scotland, the Public Petitions Committee of the Scottish Parliament set up an inquiry with the following remit:

“To examine the nature and extent of child sexual exploitation in Scotland; in conjunction with relevant agencies and stakeholders to determine the most pertinent issues which need to be addressed; to examine the effectiveness of current measures aimed at tackling, preventing and disrupting child sexual exploitation; and to make recommendations on what needs to be done to improve the effectiveness of those measures.”

5.5 In 2013, the Committee took evidence from the Lord Advocate²⁴ about the prosecution of child sexual exploitation offences and he raised concerns about the fact that, while extra-territorial jurisdiction for sexual offences against children

²³ The Act also extends extra-territorial effect to UK residents who are not UK nationals, with the proviso that the act must constitute an offence under the law in force in the country in which the act took place. This requirement for dual criminality in such cases avoids creating a situation where, for example, a person habitually resident in Scotland, who holds Spanish citizenship could be prosecuted in Scotland for an act which occurred in Spain and was legal in Spain. Such situations may arise as a result of, for example, different jurisdictions having different ages of consent for sexual activity.

²⁴ <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8408&mode=pdf>

extends to the rest of the world, the Scottish courts have no jurisdiction to prosecute sexual offences against children committed elsewhere in the United Kingdom. In the vast majority of cases this does not present significant difficulties as it is most appropriate to prosecute sexual offences committed against children in the jurisdiction in which they were committed, and there is no suggestion that other jurisdictions within the UK are failing to take the sexual abuse of children seriously.

5.6 However, the fact that extra-territorial jurisdiction does not extend to the rest of the UK has created difficulties for prosecutors in a small number of cases. While the Scottish courts can prosecute a UK national who travels anywhere else in the world and commits sexual offences against a child, they have no jurisdiction if the offender travels to another part of the UK and commits the same offence.

5.7 In cases where an offender engages in a course of conduct consisting of a number of separate but connected offences committed over a period of time, it can be useful to prosecute all the offending behaviour on a single indictment or complaint. For example, in a case where an offender has sexually abused two different children in different locations over a period of time, it may be useful to be able to prosecute all the conduct on a single indictment so as to help to demonstrate a course of conduct.

5.8 Where a single child is abused over a period of time in more than one location, it can be still more important to be able to prosecute all the offending behaviour on a single indictment as the alternative would either be not to prosecute in respect of some of the offences, or to require the child victim to go through the ordeal of two separate trials.

5.9 Furthermore, while it will only be relevant in a very small number of cases, difficulties could arise in the event that a victim of abuse was unable to say whether offences were committed in England or Scotland because, for example, they were being moved by the abuser to somewhere close to the border. In such a case, it may not be possible for either the Scottish or English courts to prosecute the alleged perpetrator.

5.10 We therefore propose to amend the provisions concerning the extra-territorial effect of Scots law concerning sexual offences committed against children to enable the Scottish Courts to prosecute offences committed elsewhere in the UK.

Question

22. Do you agree that the provisions concerning extra-territorial effect of Scots law on sexual offences against children should be amended to enable Scottish courts to prosecute offences committed in other jurisdictions within the United Kingdom?

ADDITIONAL QUESTIONS ON ISSUES CONCERNING EQUAL OPPORTUNITIES, FINANCIAL IMPLICATIONS AND OTHER IMPACTS

Equal Opportunities

- 23. Do you consider that any of the reforms proposed in this paper will have a particular impact - positive or negative - on a particular equality group (e.g. gender, race, disability, sexual orientation)**
- 24. Are there any other issues relating to equality which you wish to raise in relation to the reforms proposed in this paper?**

Financial implications

- 25. Do you have any comments or information on the likely financial implications of the reforms proposed in this paper for the Scottish Government (police, Scottish court service, prison service, COPFS), local government or for other bodies, individuals and businesses?**

Other impacts

- 26. Do you consider that the any of the proposals would have an impact on island communities, human rights, local government or sustainable development?**
- 27. Do you have any other comments about the content of this paper?**



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St Andrew's House
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