

SPICe Briefing

Abusive Behaviour and Sexual Harm (Scotland) Bill

12 November 2015

15/74

Graham Ross

The Abusive Behaviour and Sexual Harm (Scotland) Bill was introduced in the Parliament on 8 October 2015. The Bill includes, amongst other things, provisions setting out a new specific domestic abuse aggravator; a new offence for the non-consensual sharing of private and intimate images (“revenge porn”); a requirement for juries in sexual offence cases to be given specific directions by the trial judge where certain conditions apply; and reforms to the system of civil orders available to protect communities from those who may commit sexual offences.

This briefing considers the background to and the main provisions within the Bill.



CONTENTS

EXECUTIVE SUMMARY	3
INTRODUCTION	4
THE BILL	4
<i>Domestic abuse</i>	5
<i>Statutory aggravation for domestic abuse</i>	5
<i>Provisions in the Bill</i>	6
<i>Proposal for a specific offence of domestic abuse</i>	7
<i>Disclosing or threatening to disclose, an intimate photograph or film</i>	9
<i>Consultation</i>	9
<i>“Sexting”</i>	10
<i>Provisions in the Bill</i>	11
<i>Exemptions for information society services/EU Directive</i>	12
<i>Making of non-harassment orders in criminal cases</i>	13
<i>Fitness to stand trial</i>	13
<i>Consultation responses</i>	14
<i>Provisions in the Bill</i>	15
<i>Jury directions relating to sexual offences</i>	15
<i>Consultation responses</i>	16
<i>Research</i>	16
<i>Provisions in the Bill</i>	17
<i>Incitement to commit certain sexual acts elsewhere in the United Kingdom/ Commission of certain sexual offences elsewhere in the United Kingdom</i>	19
<i>Provisions in the Bill</i>	20
<i>Sexual harm prevention orders and sexual risk orders</i>	21
<i>Provisions in the Bill</i>	22
<i>Sexual harm prevention orders</i>	22
<i>Sexual risk orders</i>	23
SOURCES	24

EXECUTIVE SUMMARY

- The [Abusive Behaviour and Sexual Harm \(Scotland\) Bill](#) (“the Bill”) was introduced in the Parliament on 8 October 2015 by the Cabinet Secretary for Justice, Michael Matheson MSP
- The Scottish Government has stated that the provisions in the Bill will help improve how the justice system responds to abusive behaviour including domestic abuse and sexual harm thereby helping to improve public safety through ensuring perpetrators are appropriately held to account
- The Bill:
 - provides a new specific domestic abuse aggravator that an offence was aggravated by involving abuse of a person’s partner or ex-partner
 - provides a new specific offence for non-consensual sharing of private, intimate images (often referred to as “revenge porn”)
 - allows courts to directly protect victims where the court is satisfied a person did harass another person, but a conviction does not take place due to the mental or physical condition of the person
 - requires juries in sexual offence cases to be given specific directions about how to consider the evidence
 - ensures child sexual offences committed in England and Wales by Scottish residents are capable of being prosecuted in Scotland
 - reforms the system of civil orders available to protect communities from those who may commit sex offences

INTRODUCTION

In June 2014, the Scottish Government published [Equally Safe: Scotland's Strategy for Preventing and Eradicating Violence Against Women and Girls](#) ("the Strategy"). The Strategy was co-produced with COSLA and set out the Government's 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." (Scottish Government 2014)

Priorities which were identified in seeking to achieve this aim included that interventions are early and effective thereby preventing violence and maximising the safety and wellbeing of women and girls; and that men desist from all forms of violence against women and girls and perpetrators of such violence receive a robust and effective response.

In March 2015, the Scottish Government published the consultation [Equally Safe – Reforming the criminal law to address domestic abuse and sexual offences](#). (Scottish Government 2015) The consultation sought views 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. The consultation also sought 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, sometimes referred to as "revenge porn." The consultation also sought views on three 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.

Following the consultation, the [Abusive Behaviour and Sexual Harm \(Scotland\) Bill](#) ("the Bill") was, along with [accompanying documents](#), introduced in the Parliament on 8 October 2015 by the Cabinet Secretary for Justice, Michael Matheson MSP.

The Scottish Government have indicated that the Bill's overarching objective is to improve how the justice system responds to abusive behaviour, including domestic abuse and sexual harm, which will help to improve public safety by ensuring that perpetrators are appropriately held to account for their conduct.

THE BILL

The Bill is in three parts:

Part 1 deals with abusive behaviour and includes provision for:

- a new specific "domestic abuse" aggravator
- a specific offence concerning the non-consensual sharing of private, intimate images (often referred to as "revenge porn")

- courts to make a non-harassment order in cases where the court is satisfied that a person did harass someone else but is not fit to stand trial due to their mental or physical condition or is not convicted because they lacked mental capacity at the time they did the act constituting the offence

Part 2 deals with sexual harm and includes provisions which would:

- require juries in certain sexual offence cases to be given specific directions by the trial judge about how to consider certain evidence which is led
- ensure that sexual offences committed against children in England and Wales by Scottish residents are capable of being prosecuted in Scotland
- reform the system of civil orders available to protect communities from sexual offenders

Part 3 contains general and ancillary provisions.

The briefing goes on to consider the provisions in the Bill and also examines some of the issues raised in responses to the Equally Safe consultation.

Domestic abuse

In the Equally Safe consultation (“the consultation”), the Scottish Government sought views on whether a specific offence should be created to deal with domestic abuse and/or whether there should be a statutory aggravation that a criminal offence was committed against a backdrop of domestic abuse. The definition of domestic abuse used by Police Scotland is:

“Any form of physical, sexual or mental and emotional abuse that 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.”

Although it is generally accepted that the majority of offences involving domestic abuse will involve a male perpetrator and a female victim, such abuse can be perpetrated in same sex relationships and by women on men. There were 58,439 incidents of domestic abuse recorded by the police in Scotland in 2013-14. In 2014-15, this number had risen to 59,882 – an increase of 2.5%. (Scottish Government 2015c)

Incidents of domestic abuse recorded by the police in Scotland with a female victim and a male perpetrator represented 79% of all reported incidents of domestic abuse in 2014-15 where gender information was recorded. The proportion of incidents with a male victim and a female perpetrator (where gender was recorded) has increased from 11% in 2005-06 to 18% in 2014-15.

Statutory aggravation for domestic abuse

A clear majority (97%) of those who responded to the consultation agreed that there should be a statutory aggravation that an offence was committed against a background of domestic abuse. Consultees noted that the statutory aggravation model is well understood and that it would ensure that the fact that an offence was connected to domestic abuse to be formally recognised and recorded through the court process.

For example, the Crown Office and Procurator Fiscal Service (COPFS) stated:

“COPFS supports the creation of a statutory aggravation of domestic abuse. Such an aggravation would be a useful tool for prosecutors as it would allow the full context and background of offending to be explored and led in evidence where there was insufficient evidence to prosecute a substantive charge of domestic abuse. This would ensure that victims can speak openly and candidly about the nature and cumulative impact of the accused’s behaviour rather than simply restricting their evidence to isolated incidents of abuse.” (Scottish Government 2015a)

Provisions in the Bill

The Bill as introduced provides for a new statutory aggravation that an offence involved abuse of a person’s partner or ex-partner, and requires the courts to take account of the aggravation when sentencing offenders.

The Policy Memorandum to the Bill points out that statutory aggravations exist in order to assist in the identification and prosecution of a number of different types of crime. Examples in Scotland include where a perpetrator of an offence is motivated by religious or racial prejudice; or by malice or ill-will towards a person based on their sexual orientation, transgender identity or disability.

The aggravation in the Bill will apply where it is libelled in an indictment or specified in a complaint that an offence is aggravated by involving abuse of the partner or ex-partner of the person committing it and the offence is then proven to be aggravated. An offence will be aggravated if in committing the offence the person intends to cause a partner or ex-partner to suffer physical or psychological harm or where a person is reckless as to causing the partner or ex-partner to suffer physical or psychological harm. Psychological harm includes fear, alarm or distress.

As such, the aggravation could be libelled where, for example, a person commits an assault against their ex-partner’s child with the intent of causing psychological harm to their ex-partner. Where a person is reckless as to whether their behaviour would cause a partner or ex-partner to suffer harm, the aggravation would apply irrespective of whether or not it was their intent to cause such harm. Evidence from a single source will be sufficient to establish that an offence is aggravated.

The Bill requires that, where an aggravation is proved, the court must take that aggravation into account when determining sentence. The court must also explain how the aggravation has affected the sentence (if at all) and record the conviction to make it explicit that the offence was aggravated by constituting abuse of a partner or ex-partner.

The Bill provides that a person is the partner of another person if they are:

- spouses or civil partners of each other
- living together as if spouses or civil partners of each other
- in an intimate personal relationship with each other

References to a person’s ex-partner are to be construed accordingly.

Proposal for a specific offence of domestic abuse

The Scottish Government has stated that an initial analysis of the consultation responses showed strong support for a specific offence of domestic abuse to be created but there was no consensus on how such an offence should be framed.

Scottish Women's Aid was in favour of a specific offence being created and stated:

“Domestic abuse is a cause and consequence of women's inequality and occurs within the context of on-going control and repeated abuse.

A new criminal offence capturing patterns of coercive and controlling behaviour in intimate relationships between partners and ex-partners would strengthen the law in this area. There is a need, as the consultation paper acknowledges, for an offence to bridge the gap in addressing controlling behaviours not covered by existing offences and crimes, particularly those that cannot be dealt with via common assault, threatening and abusive behaviour, and stalking. A new offence would also need to address the cumulative effect of domestic abuse, and the long-term damaging impact that this can have on women, children and young people.” (Scottish Government 2015a)

The Crown Office and Procurator Fiscal Service (COPFS) also supported the creation of a specific offence designed to capture the full range of actions and behaviours which constitute domestic abuse and which would allow those behaviours to be brought together and libelled as one course of conduct. It was acknowledged that drafting such an offence would be a complex task but its creation would improve the way the criminal justice system responds to domestic abuse in a number of ways.

For example, COPFS argued that the creation of a specific offence would reflect the true experience of victims and recognise the ongoing and long-term nature of domestic abuse suffered by victims:

“Whilst in certain circumstances it is possible under existing law to prosecute perpetrators of abuse for patterns of behaviour, in general, the law is incident focused. It is commonplace to prosecute individual incidents of abuse, such as discrete assaults, single acts of vandalism or specific threats uttered. However, the very nature and mechanics of domestic abuse suffered by many victims is that it is not a series of separate episodes of abuse. Instead, the victim's experience is of an ongoing and continuing course of conduct where their abuser uses multiple tactics and strategies of abuse to maintain power and control – those tactics may include episodic acts of violence but that violence being only one of a number of tactics of control. To distil the victim's experience into a number of separate incidents minimises, if not denies, the cumulative effect of domestic abuse and shields the perpetrator from the full scrutiny of the law.” (Scottish Government 2015a)

It was also recognised that the existing law tends to focus on harm caused to a victim's physical integrity or personal property, yet many victims of domestic abuse are subjected to controlling and coercive behaviour which by its very nature “does not target or harm the physical integrity of the victim but rather their confidence, autonomy and sense of self.”

The Faculty of Advocates (“the Faculty”) is of the view that the existing criminal law provides police and prosecutors with sufficient powers to investigate and prosecute perpetrators of domestic abuse. The Faculty stated that it was difficult to assess whether a specific offence of

domestic abuse would improve the justice system's response to domestic abuse where no definition of the suggested crime was given.

They went on to say:

“The official definition of domestic abuse in Scotland, developed by the National Strategy to Address Domestic Abuse (2000) contains behaviours that are not criminalised but are evidenced as being common in abusive relationships, for example, withholding money.

Criminalising the actions that make up the individual components of domestic abuse, as defined, outwith the context of a relationship which is defined by coercive control would be difficult to effectively enforce and would not achieve the policy aim which is presumably reducing the incidence of, and improving the criminal justice response to, domestic abuse. The Faculty is of the view that the most effective law reform should be informed by the academic research that has drawn a distinction between common couple violence and coercive control.” (Scottish Government 2015a)

The Faculty stated that if policy and law reform focussed on policing and punishing coercive control whilst recognising a distinction between common couple violence and coercive control, this would facilitate the justice system response to domestic abuse being more effective and allow the resources of police and prosecution to be focussed appropriately. With regard to domestic abuse, this would involve not only criminalising particular actions but focussing on whether those actions are part of ongoing coercive control within a relationship.

The Faculty is of the view that embodying this distinction in a workable definition of a crime would be extremely challenging as it would:

“...necessitate departing from the standard approach in criminal law of a narrow lens on a particular event or chain of discrete events. In essence, if the policy aim is to criminalise abusive behaviours that are underpinned by coercive control, this will be extremely difficult to codify into a crime.”

Although there may be generally accepted definitions of those behaviours which constitute “domestic abuse”, the possible complexity of drafting a bespoke offence is further highlighted by the response to the consultation by Families Need Fathers Scotland. They point out that a high proportion of non-resident fathers who contact the organisation report that they experience the restriction or denial of parenting time with their children by their former partner as a form of domestic abuse. The organisation points out that this can occur where court orders granting specified access to children are in place or where there is an informal agreement to maintain contact¹. Families Need Fathers argue that such restrictions or denials should be recognised as a form of coercive control and should therefore be taken into consideration when looking at creating a specific offence of domestic abuse.

In its [Programme for Government 2015-16](#), the Scottish Government announced that it would publish and seek views on the exact wording of a specific offence to deal with those who commit psychological abuse and coercive and controlling behaviour during 2015, separate from the current Bill. As such, the Bill does not include a specific domestic abuse offence.

¹ Legal remedies are available where breach of a contact order occurs.

Disclosing or threatening to disclose, an intimate photograph or film

The provisions in the Bill will make it a criminal offence for a person to share, publish or distribute private, intimate images relating to another person without that person's consent. It will also be an offence to threaten to disseminate intimate images. The distribution of such images in the circumstances outlined is often referred to as "revenge porn".

"Revenge porn" has become a generally accepted term for the non-consensual publication of explicit images by an individual of an ex-partner, usually via the internet and websites which specifically cater for this type of material. (The use of the term "revenge porn" is discussed below). Photographs and videos on such sites often link to a person's social media accounts with the aim of prompting unsolicited contact and causing distress to victims. There have been cases in which the names and contact details of victims have been posted together with such private images. Depending on the facts and circumstances of a particular case, there are already a number of criminal offences which can be used to prosecute people who publish or share private images of a partner or former partner without their consent; for example, breach of the peace, threatening or abusive behaviour, stalking and improper use of a public electronic communications network.

The Policy Memorandum to the Bill states that:

"However, in the absence of an offence specifically concerned with the sharing of intimate images the exact scope of the law in this area can be seen by many as being unclear. Victims of this kind of behaviour may not be aware that a criminal offence has been committed against them, and potential perpetrators may not be aware that what they are doing is criminal. Even where a successful prosecution has taken place, a victim may consider that the prosecution of the perpetrator for an offence such as threatening and abusive behaviour does not fully reflect their particular experience."

Consultation

The Scottish Government have pointed to the fact that a very clear majority (99%) of respondents to the consultation agreed that a specific offence should be created.

A majority of respondents to the consultation (73%) did not agree that the offence should be restricted to images as other materials, such as audio files, texts and e-mails, could be used by a perpetrator to humiliate or control a victim. However, those who agreed that the offence should be restricted to images expressed the view that keeping the offence specific would help to ensure that it remains clear that creating a broad offence of criminal infringement of privacy (which they argued that extending the offence to cover written and voice materials would do) without proper consideration of the possible consequences could create problems.

In their [response](#) to the consultation on whether there should be a specific offence, Professors Clare McGlynn and Erika Rackley stated that it was vital that there is a clear criminal offence proscribing the non-consensual distribution of private sexual images. With regard to the nature of the harm caused by revenge porn, they stated that:

"Such conduct is extremely harmful and is a form of harassment and abuse. It is a fundamental breach of an individual's privacy and for the women affected, and it is mostly women, the impact can be devastating.

For some, their entire livelihood is in danger through threats to their working and professional lives; others rightly fear for their personal safety, especially where their address and other forms of identification are included alongside the disclosed images. There can also be adverse impacts on family life and many suffer mental health problems

because of the trauma arising from the abuse and stigma following the images being distributed. These intimate images routinely go viral, being widely distributed across social media, and often ending up on dedicated ‘revenge porn’ or on mainstream pornography sites.” (Scottish Government 2015a)

In a written submission to the Justice Committee, Professors McGlynn and Rackley also commented on difficulties with the term “revenge porn”. They state that although the term is in common usage to describe and explain the phenomenon of non-consensually shared images, there are a number of difficulties with the term.

The professors argue that the term focusses on a relatively narrow range of image-based sexual abuse – typically consensually taken photos then distributed by a vengeful ex-partner without consent. Secondly, the term unduly focusses on the sexual nature of the material, rather than on the actions of the offender who has breached the trust and privacy of another:

“To frame this form of harassment and abuse as ‘pornography’, shifts attention away from the motivations and actions of the perpetrator and onto the content of the image and actions of the victim. This, in turn, facilitates victim-blaming attitudes and questions along the lines of “why did she pose for the pictures in the first place?” (Scottish Parliament 2015)

“Sexting”

Another phenomenon which could potentially be captured by the offences in the Bill would be “sexting”. “Sexting” is when someone sends or receives a sexually explicit text, image or video on their mobile telephone. When people talk about “sexting” they usually refer to sending and receiving²:

- naked pictures or “nudes”
- “underwear shots”
- sexual or “dirty” pictures
- rude text messages or videos

This was something which was highlighted by Scotland’s Commissioner for Children and Young People in his response to the consultation:

“The prevalence among young people of ‘sexting’, which may include the sharing of private, intimate images (including photos and videos), and the risks inherent in sharing such images, notably their distribution or sharing, has received much media attention in recent years. It is important to emphasise in the context of the debate about creating an offence that will capture the behaviour of some children and young people within its scope that our care and justice system must be equipped to deal appropriately, proportionately and effectively with children and young people referred for such offences.

Crucially, it will be in the interests of children and young people, and of society as a whole to invest in preventative programmes including work to challenge sexist attitudes and gender stereotypes which underpin abusive behaviour, as well as universal,

² Childline UK.

inclusive, timeous and high quality Relationships, Sexual Health and Parenthood Education in schools.” (Scottish Government 2015a)

Provisions in the Bill

The Bill provides that it is an offence to disclose or threaten to disclose, a photograph or film showing a person in an intimate situation. The *mens rea*³ of the offences is intention to cause fear, alarm or distress to the person shown in the intimate image or recklessness as to fear, alarm or distress being caused. It would not be an offence where the intimate image has already been made publicly available with the consent of the person shown in the intimate situation.

The Bill provides definitions of “film” and “photograph”. Those terms include any material that was originally captured by photography or by making a recording of a moving image, whether or not it has been altered in any way. As such, the offences apply to digitally enhanced or manipulated photographs or films, but do not apply to material that looks like a photograph or film but does not in fact contain any photographic element (for example, because it has been generated entirely by computer).

The Bill also brings within the scope of the offences, disclosure of material in a format from which a photograph or film can be created, for example a photographic negative or data stored electronically on a portable hard drive or disk.

For the purposes of the Bill, a person would be in an “intimate situation” if:

- the person is engaging or participating in, or present during, an act which a reasonable person would consider to be a sexual act and is not of a kind ordinarily done in public; or
- the person’s genitals, buttocks or breasts are exposed or covered only with underwear.

However, an image is not considered to be an intimate image if it was taken in a public place and other members of the public were present, whether or not on payment of a fee. The Policy Memorandum states that this ensures that the offence does not extend to, for example, photographs taken by members of the public of a naked protestor, or of a stalker at a sporting event.

(This perhaps leaves open the possibility of a situation where someone taking a photograph of another person in a night club exposing their underwear (and being unaware that a photograph was being taken) would not be caught by the offence if they then disclosed the photograph on a “revenge porn” website. However, this would depend on the facts and circumstances of the case including whether the person was in fact, exposing themselves or whether the photographer was being underhand in obtaining the image. The taking of a photograph in those circumstances might amount to voyeurism at section 9 of the Sexual Offences (Scotland) Act 2009).

The Bill provides for four defences to the offences:

- that the person in the photograph or film consented to it being disclosed
- that the person taking the photograph or film reasonably believed that the person in the photograph or film consented to disclosure

³ The state of mind indicating culpability.

- the person taking the photograph reasonably believed that its disclosure was necessary for the purposes of the prevention, detection, investigation or prosecution of crime (for example, disclosing to the police an image believed to be portraying illegal activity)
- the person taking the photograph reasonably believed that disclosure was in the public interest (the Explanatory Notes to the Bill state that it is anticipated that there will be few occasions on which the disclosure of such images could be reasonably believed to be in the public interest, bearing in mind that what is of interest to the public is not the same thing as what is in the public interest: this would be a matter for the courts to determine in the particular circumstances of a case)

The maximum penalty for the new offences will be, on summary conviction, imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both) and, for conviction on indictment, imprisonment for a term not exceeding 5 years or a fine (or both).

Exemptions for information society services/EU Directive

The Bill includes special provision in relation to providers of information society services. The information below is taken from the Explanatory Notes accompanying the Bill.

Section 4 of the Bill introduces schedule 1, which addresses the position of information society services in respect of the new offences. This gives effect to Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, often referred to as the E-Commerce Directive (“the Directive”).

An “information society service” is defined as:

“Any service normally provided for remuneration at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, at the individual request of a recipient of the service”⁴.

Paragraph 1 of schedule 1 sets out the conditions under which service providers may be exempted from liability under the section 2 offence where acting as “mere conduits” for the transmission of, or provision of access to, information. This means that, providing the conditions in paragraph 1 are met, a business providing access to the internet (e.g. a home internet service provider) is exempted from liability if the person using their service discloses an intimate image while making use of the internet. This accords with Article 12 of the Directive.

Paragraph 2 of schedule 1 sets out the conditions under which service providers may be exempted from liability for “caching” information, that is, for the automatic, intermediate and temporary storage of information. This means that when an internet service provider automatically makes and “caches” a local copy of a file accessed by a user of its service (which is done in order to provide a more efficient service) it is not criminally liable in the event that the information consists of an intimate image, providing the conditions in paragraph 2 are met. This accords with Article 13 of the Directive.

Paragraph 3 of schedule 1 sets out the conditions under which service providers may be exempted from liability for “hosting” information, that is, storing information at the request of a recipient of the service. For example, if a person discloses an intimate image using a social network, then, providing the conditions in paragraph 3 are met, the social network is exempt from criminal liability. This accords with Article 14 of the Directive.

⁴ [Electronic Commerce \(EC Directive\) Regulations 2002](#).

Making of non-harassment orders in criminal cases

Non-harassment orders (NHOs) can be granted by the courts to prevent someone from carrying out a specified action or actions. Failure to comply with a non-harassment order is a criminal offence. In the criminal courts an order can only be granted on the motion of the prosecutor with the object of preventing any future misconduct, and can also be made in addition to, or instead of any other disposal imposed in the proceedings.

The NHO regime was previously amended by the Criminal Justice and Licensing (Scotland) Act 2010 with the aim of making it easier for prosecutors to apply for an order. The amendments changed the test to be applied in seeking an NHO where a person is convicted of an offence to one involving “misconduct towards” a victim. Misconduct is defined as including “conduct that causes alarm or distress”. This is intended to be a lower threshold than the previous reference to “harassment” of the victim and to remove the need for the accused to have been convicted of an offence which in itself involved conduct on more than one occasion. The regime was also amended so that an NHO can be made to prevent “harassment” rather than any “further harassment” and was intended by the Scottish Government to give the court power to protect victims at an earlier stage. The courts must be satisfied of the need for an order only on the balance of probabilities as a means of protecting an identified victim.

Fitness to stand trial

The Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) provides a mechanism whereby the court may hold that a person is mentally or physically unfit to stand trial. The test for unfitness is that the person is incapable of participating effectively in the trial because of a mental or physical condition. In carrying out an assessment of a person’s ability in this regard, the court will take into account whether the person will be able to understand key elements of the trial process and instruct a lawyer.

Where the court is satisfied that an accused person is unfit to stand trial, the court can carry out an examination of facts to decide whether the person did in fact carry out the acts constituting the offence with which they are charged. In such circumstances, where the court decides that a person did carry out the acts constituting the offence with which they have been charged, this is not recorded as a conviction and the person is not “sentenced” to a criminal penalty. (Policy Memorandum para 45)

Section 51A of the 1995 Act provides that an accused may be acquitted on the grounds that they were not criminally responsible for their acts at the time of the offence, whilst accepting that the accused did commit the act(s) constituting the offence. Again, this would not be recorded as a conviction.

The Scottish Government has stated that this has implications for the disposals available to the court. The Policy Memorandum refers to a recent case⁵ which highlighted an issue in relation to the operation of NHOs imposed by the criminal courts.

The orders are intended to provide a means of ensuring that on-going harassment by one individual of another can be prevented. NHOs can be granted in the civil courts on application by the person suffering the harassment, or by a criminal court following conviction for a criminal offence involving harassment of the person to whom the order relates. In either case, an NHO can require a person to desist from all contact with another person for a period of time – something which would be determined by the court. Breach of an NHO is a criminal offence.

⁵ The Policy Memorandum does not provide details of the case in question.

The Scottish Government has pointed out that while the criminal courts can impose an order following conviction, they have no power to impose one following an examination of facts (as outlined above).

“It would be open to a victim to apply to the civil courts to impose an NHO or interdict, but this requires the victim to initiate a separate legal process notwithstanding that the criminal court has already come to the view that the relevant person has committed acts constituting an offence against the person applying for an NHO.” (Policy Memorandum para 49)

Consultation responses

In their [response](#) to the consultation on this issue, the Mental Welfare Commission for Scotland stated that while they agreed that it should be possible for the courts to impose an NHO following an examination of facts, their view was that any benefit would be minimal, and there were difficult questions about when this disposal would ever be justified:

“In general, we believe it is reasonable to afford as wide a discretion as possible to courts to make appropriate disposals, provided certain important principles are maintained. In relation to mental illhealth, these include that people should not be subject to punishment if they are not responsible for their behaviour, and that the courts should not impose requirements on people which they are not able to fulfil, and which cannot realistically be enforced.

We accept that the first of these tests is met, in that this is not a punitive disposal. We do have concerns about the second test – as the consultation acknowledges, a person who is so unwell as to be unable to be tried is unlikely to be well enough to follow the requirements of a non-harassment order. In theory, this may be the case with someone who is currently acutely unwell but where a recovery is anticipated, but we find it hard to imagine a set of circumstances where this would in practice be the most appropriate option.” (Scottish Government 2015a)

The Law Society of Scotland responded in a similar vein:

“Although we do not anticipate any particular difficulty with this proposal, we question its practical effect as it could only usefully be made in cases where the condition resulting in the accused’s unfitness to plead is:

- transient and
- was not in itself the cause of the harassment

In terms of *Finegan v Heywood* 2000 JC 444 where the accused went drink-driving whilst sleepwalking; the court held that there were special reasons for not disqualifying as a disqualification order could not prevent the accused driving whilst sleepwalking in the future. We accordingly question the point in the court making an order with which the individual cannot be expected to comply.”

As outlined above, breach of an NHO is a criminal offence. The Scottish Government has acknowledged that there may be a risk that someone who is found unfit to stand trial in respect of the offence for which the NHO was imposed might similarly be found unfit to stand trial for breaching the terms of the order. The Scottish Government considers that this does not negate the usefulness of an NHO.

The Government argues that having an NHO in place may make it easier for the police to intervene to protect a victim of harassment at an early stage in the event of on-going

harassment by the subject of the order, as behaviour which is contrary to the terms of the NHO (e.g. approaching the person named in the order) would not necessarily otherwise constitute a criminal offence. The Government adds that it will continue to be the responsibility of the trial judge to satisfy themselves that it is appropriate to grant the NHO in any individual case.

Provisions in the Bill

The Bill amends the 1995 Act:

- to enable a court to make an NHO where a person has been found unfit to stand trial by reason of a physical or mental condition and the court has determined that the person has done the act or made the omission constituting the offence; or
- because they were not criminally responsible for their actions at the time of the offence because of a mental disorder.

The Bill makes consequential amendments to the 1995 Act to reflect the fact that a person who has an NHO imposed on them will not necessarily have been convicted of a criminal offence.

The Bill also makes further amendments to the 1995 Act which enable the prosecutor to inform the court about previous instances on which the person against whom the order is sought has, in relation to the same victim, been found to have done acts constituting an offence, but has not been fit to stand trial, or has been acquitted of the offence on the basis of a lack of criminal responsibility.

The Bill makes provision for the imposition of NHOs in the above circumstances to be appealed as if they were a sentence.

Jury directions relating to sexual offences

Concerns have been raised in the past that members of juries in sexual offence cases may hold certain preconceptions about the precise nature of sexual violence which may in turn, make understanding victims' responses to such crimes more problematic. The Policy Memorandum to the Bill states:

“It is thought that some members of the public imagine that a sexual assault is almost always violent and that, if assaulted, a victim would be very likely to respond by trying to physically resist their attacker.”

Prior to the decision of the High Court of Justiciary in Lord Advocate's Reference (No 1 of 2001) a defining element of rape was that sexual intercourse took place against the will of the victim. To prove that intercourse was against the will of the victim it was necessary for the prosecution to show that the accused used, or threatened to use, force. This understanding of the law changed when in Lord Advocate's Reference (No 1 of 2001) the Court held that rape is defined as a man having sexual intercourse with a woman without her consent, regardless of whether or not force was used.

Currently under Scots law, a sexual offence is committed when a person engages in sexual activity with another person without consent. Therefore, there is no requirement that the offender must use physical force to overcome their victim, or that the victim must attempt to physically resist their assailant for an offence to be committed.

It has also been suggested that some members of the public (i.e. jurors) may regard the fact that a significant amount of time has passed between the time of an alleged sexual crime taking place and a report being made to the police as being evidence that the allegation is false. This is despite the fact that there may be very good reasons for such a delay to have occurred.

Recently there has been a significant increase in the proportion of cases in which sexual offences have been reported to the police many years after they were alleged to have taken place. Police Scotland management information for 2013-14 indicated that a quarter of all sexual crimes and 36% of rapes were reported 1 year or more after the alleged incident took place.

There may be various reasons for delaying the reporting of an alleged offence but these might include: fear on the part of victims at the time an offence has been committed; changes in the way that the police carry out investigations into such crimes; increased media attention on cases involving high profile offenders; and confidence among victims that their cases will be taken seriously by the police and the wider justice system. Consequently, juries may more often be asked to consider cases where a significant amount of time has elapsed between the alleged offence taking place and a report being made to the police.

Consultation responses

In their response to the consultation on whether there should be statutory jury directions in sexual offence cases where certain conditions apply, the Sheriff's Association stated that:

“...there is danger in creating by legislation an obligation on the presiding judge to give directions on these issues in every sexual assault prosecution where there is evidence of a time lapse between the alleged crime and the reporting of it. The dangers are that the directions might in fact be unnecessary, might create a misconception where none existed and might confuse the jury's task by diverting it from the real matters in dispute.

In our view, however, regardless of the lack of hard evidence of a problem, there is clearly an appetite in some quarters for judges at least to feel able to give these directions in appropriate cases, using their discretion. We would suggest that the best vehicle for giving judges the confidence to deliver these directions when the circumstances of the case make it appropriate is the Jury Manual.

In the Manual it would be open to the Judicial Institute to devise suggested forms of words for the directions and to explain the reasoning which lies behind them. The suggested directions would have the approval of the senior judiciary. Ultimately whether to give the directions or not would lie in the discretion of the trial judge but the judge would be best placed to decide if the directions were necessary and could phrase the directions in a form tailored to the circumstances of the case.” (Scottish Government 2015a)

The Sheriff's Association also commented that even proceeding on the basis that statutory jury directions would be introduced, the consultation paper recognised that the trial judge should decide exactly what to say. The Association believes that proper exercise of the judge's discretion must include deciding that any direction is unnecessary.

Research

The terms of the Contempt of Court Act 1981 currently prohibit research being carried out with “real jurors” who have taken part in trials but research has been undertaken using “mock juries” taking part in simulated sexual offence trials – this is discussed further below.

Professors Vanessa Munro and Louise Ellison conducted a study in which 9 different mini-trials were scripted and reconstructed by actors and barristers in front of an audience of members of the public. Across these trials, key facts and role-players were constant but variables were introduced. In three of the trials, the (female) complainant displayed signs of bruising and scratching and reported the attack immediately, but was emotionally “flat” and calm during

testimony. In another three of the trials the complainant had signs of bruising and scratching but was visibly upset during testimony and had waited three days before reporting the attack to the police. In the final set of trials, the complainant reported immediately, was visibly upset during testimony but displayed no signs of physical injury and sought to explain her lack of resistance on the basis that she had “frozen” during the attack.

Procedural variables were also introduced so that in each sub-set of three mini-trials, the extent to which jurors were provided with educational guidance differed. In some trials an extended judicial instruction informed jurors about the different emotional reactions that victimisation might elicit, the reasons for a delay in reporting, or failure to resist physically during an attack.

The professors have submitted a [summary of their research findings](#) as written evidence on the Bill to the Scottish Parliament’s Justice Committee. The research findings supported concerns regarding the limits of current public understanding as to what constitutes a “normal” reaction to sexual attack. For example, with regard to the demeanour of a complainant, it was clear that participants who did not receive educational guidance were often perplexed by the calmness exhibited by the complainant during testimony. The majority of jurors expected a visible display of emotion, and several suggested that the calm complainant’s testimony was “too precise” – a concern not raised in the other trials, despite the fact that the content of the complainant’s evidence was unchanged.

Despite being directed that the use of force is not a requirement of the law of rape, in scenarios in which the complainant showed no signs of physical injury, jurors routinely emphasised the significance of this to their not guilty verdicts. There was a strong belief that a “normal” response to sexual attack would be to struggle physically.

“Overall, while jurors in the no-education trials paid lip-service to the notion that “different people will react differently” to traumatic experiences, such as rape, assumptions regarding the instinct to fight back, the compulsion to report immediately and the inability to control one’s emotions continued to influence their deliberations.” (Scottish Parliament 2015)

Provisions in the Bill

The Bill introduces, for the first time in Scotland, statutory jury directions which must be given by the judge in sexual offence trials where certain conditions apply.

The Policy Memorandum to the Bill points out that currently, the “[Scottish Jury Manual](#)”⁶ provides information and guidance to judges who have the responsibility of charging juries in criminal trials. The Manual does not, however, specifically address the question of how the judge should direct the jury on the question of what account to take of any significant period of time elapsing between the incident taking place and it being reported to the police, or concerning any suggestion by the defence that an apparent lack of resistance on the part of the alleged victim or a lack of physical force being used by the alleged perpetrator might indicate that the allegation is false.

The Scottish Government has stated that it is not aware of any jurisdiction that has legislated to provide for statutory directions concerning what weight to place on the fact that there was a lack of physical resistance on the part of the complainer, or that the alleged perpetrator did not use physical force to overcome the will of the complainer, in a sexual offence case.

However, a number of jurisdictions do have mechanisms in place (whether statutory or based in case law) to enable or require a judge to caution a jury not to dismiss an allegation of rape or

⁶ The Scottish Jury Manual is produced by the Judicial Institute for Scotland.

sexual assault simply because the complainer did not report the crime for some time after it was alleged to have taken place, and to inform the jury of reasons as to why a victim may not report a sexual offence at the time it took place.

The Policy Memorandum notes that the Australian states of New South Wales and the Northern Territory have provisions requiring the trial judge to direct juries on this matter when evidence is led or a question is asked of a witness which tends to suggest delay by the person making the complaint. New Zealand has a similar mechanism but any such direction is made at the discretion of the judge. The Supreme Court in Canada has held that in relevant cases, the trial judge should inform the jury about the reasons why a victim may delay in reporting an alleged sexual assault. In England and Wales, guidance is provided to judges in Chapter 17 of the [“Bench Book on Directing the Jury”](#), produced by the Judicial Studies Board, on a number of issues which may arise in the context of sexual offence trials, and includes an illustrative example of how the trial judge might direct the jury when questions arise about delayed reporting by a complainant.

Jury directions are given as part of the trial judge’s charge⁷ to the jury. The Bill provides for two statutory jury directions:

- Where evidence is led at trial which suggests that a person did not tell or delayed in telling anyone about the offence, or did not report or delayed reporting the offence to the police, the judge, in charging the jury, must advise that there can be good reasons why a victim of a sexual offence may not tell others about it or report it to the police, or may delay in doing so, and that this does not necessarily indicate that an allegation is false
- Where evidence is given which suggests that sexual activity took place without physical resistance on the part of the victim, the judge, in charging the jury, must advise that a person might not physically resist the sexual activity and that the absence of physical resistance on the part of the victim does not necessarily indicate that the allegation is false. It also provides that where evidence is given which suggests that the sexual activity took place without the accused using physical force to overcome the will of the victim, the judge must advise that a person may commit a sexual offence without using physical force and its absence does not necessarily indicate that the allegation is false.

The actual wording of the jury directions to be given will remain a matter for the trial judge.

The Bill provides that a direction need not be given if the judge considers that the circumstances of the case are such that no reasonable jury could consider the fact that there was a delay or failure to report the offence, or tell another person about the offence, to be relevant to the question of whether the offence has been proven. This may be the case where, for example, the offence is alleged to have been committed against someone who was a very young child at the time the offence was alleged to have been committed and could not understand that an offence had been committed against them.

Similarly, the judge does not need to give such a direction where it is considered that the circumstances of the case are such that no reasonable jury could consider the fact that the complainer did not offer physical resistance to their alleged attacker to be relevant to the question of whether the offence was proven. This may be the case where, for example, the person against whom the offence is alleged to have been committed was asleep or unconscious at the time of the alleged offence.

⁷ Following closing speeches by the prosecution and the defence, the trial judge will direct the jury on the law to be applied in coming to a verdict – it is for the jury to judge the facts of the case.

For the purposes of the provision concerning the absence of the use of force by the accused, or physical resistance by the alleged victim, “sexual offence” means:

- rape (whether at common law or under section 1(1) of the Sexual Offences (Scotland) Act 2009 “the 2009 Act”)
- indecent assault
- sodomy
- clandestine injury to women
- an offence of sexual assault by penetration (section 2 of the 2009 Act)
- an offence of sexual assault (section 3 of the 2009 Act)
- sexual coercion (section 4 of the 2009 Act)

The provision relating to cases where the complainer does not immediately report the alleged offence adopts a wider definition of “sexual offence” as any offence listed at section 210A of the 1995 Act.

The Scottish Government has taken the view that there are no other approaches which would achieve its desired policy objective.

Incitement to commit certain sexual acts elsewhere in the United Kingdom/ Commission of certain sexual offences elsewhere in the United Kingdom

The Equally Safe consultation pointed out that, 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.

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 offence⁸. This applies irrespective of whether the conduct constituted a criminal offence in the country in which it took place.

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

⁸ 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.

tackling, preventing and disrupting child sexual exploitation; and to make recommendations on what needs to be done to improve the effectiveness of those measures."

In 2013, the Committee took evidence from the Lord Advocate 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 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. The Scottish Government has stated that 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.

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.

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 (particularly where the two victims' accounts corroborate each other under the *Moorov* doctrine⁹).

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.

In addition the Scottish Government has stated that 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.

The Scottish Government therefore proposed 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.

Provisions in the Bill

Section 7 of the Bill amends section 54 of the Sexual Offences (Scotland) Act 2009 ("the 2009 Act") to provide that it is a criminal offence under Scots law for a person to incite the commission of a sexual act that would constitute an offence listed at Part 1 of schedule 4 to the 2009 Act ("a listed offence") in Scotland, where the act in question is intended to occur outside Scotland, whether within or outside the United Kingdom. Section 54 currently only provides for the incitement offence to have extraterritorial effect where the criminal act is intended to occur

⁹ The Moorov doctrine permits the evidence of a single witness to a crime to corroborate that of a single witness to another crime where those crimes are sufficiently connected in time, character and circumstances to suggest that they form part of a single course of criminal conduct.

outside the United Kingdom.

The Bill also provides that where the person inciting the commission of a sexual act elsewhere in the United Kingdom is not a habitual Scottish resident, they only commit an offence if the act which they are inciting involves the commission of a criminal offence in the part of the United Kingdom in which it is intended to take place.

This means that, for example, in the event that a person habitually resident in Northern Ireland incites the commission of a sexual act in Northern Ireland which is a criminal offence under Scots law listed at part 1 of schedule 4 of the 2009 Act, but which is not unlawful in Northern Ireland, they would not commit the offence. But if a Scottish habitual resident incited an offence in Northern Ireland in the same circumstances, the section 54 incitement offence would be committed, because in that case there is no requirement for the intended conduct to be a criminal offence in both jurisdictions.

Section 8 of the Bill inserts new sections 54A and 54B into the 2009 Act, so as to provide that the Scottish courts may take jurisdiction over an act which takes place elsewhere in the United Kingdom that would have constituted a “listed offence” had it taken place in Scotland. The effect of this provision is that the extra-territorial jurisdiction of Scottish courts in this area is expanded to cover the other jurisdictions of the United Kingdom, as well as places outwith the United Kingdom (which is provided for at section 55 of the 2009 Act). Section 54A(2) and (3) of the Bill restrict the extra-territorial offence by providing that it may be committed by a person who is not a habitual resident of Scotland only if the act in question is also a criminal offence, however described, in the place where it was alleged to have taken place.

New section 54B places limitations on the use of section 54A to prosecute listed sexual offences which were committed elsewhere in the United Kingdom and which also constitute a criminal offence in the country where they were committed. This applies whether the person committing the offence is a Scottish habitual resident or not.

Section 54B(3)(a) provides that the offence cannot be prosecuted in the Scottish courts if the person is being or has been prosecuted for the same conduct in the country within the United Kingdom where the act took place. Section 54B(3)(b)(i) provides that, before initiating a prosecution for a listed offence which is alleged to have occurred in another country within the United Kingdom, the prosecutor must consult the director of public prosecutions in the country in which the offence is alleged to have been committed.

Section 54B(3)(b)(ii) provides that prosecution for a listed offence which is alleged to have occurred in another country within the United Kingdom is only competent where the accused is also charged, on the same indictment, with an act in Scotland constituting a listed offence. This is intended to ensure that the Scottish courts can only hear a case relating to an offence alleged to have been committed elsewhere in the United Kingdom where it forms part of a course of conduct of offending, a part of which took place in Scotland.

Sexual harm prevention orders and sexual risk orders

The Policy Memorandum to the Bill states that concerns have been raised by the [Child Exploitation & Online Protection Centre](#) and the police about the practical efficacy of both sexual offence prevention orders (SOPOs) and foreign travel orders (FTOs) made under the Sexual Offences Act 2003 (“the 2003 Act”) and risk of sexual harm orders (RSHOs) under the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (“the 2005 Act”). These concerns relate predominantly to the flexibility of the orders and their remit in terms of who they can be imposed on and who they are designed to protect.

The Parliament's Public Petitions Committee [report on tackling child sexual exploitation in Scotland](#) also noted that the use made of such orders by legacy police forces in Scotland was extremely low. As a consequence, the Parliament's Justice Committee decided to hold an [evidence session in relation to child sexual exploitation](#).

The UK Government has already acted to address similar concerns by introducing amendments to the Anti-Social Behaviour, Crime and Policing Act 2014. Schedule 5 of the 2014 Act amends the 2003 Act to repeal the SOPO, FTO and RSHO provisions in England and Wales and replace them with two new orders: the sexual harm prevention order and the sexual risk order. The new orders have a lower risk requirement than the previous orders - the existing test of "serious sexual harm" will be replaced by a test of "sexual harm". Both orders can be used to manage risk against adults and vulnerable adults abroad, as well as children. The remit of the new orders is wider, enabling, for example, foreign travel restrictions to be applied. A legislative consent motion in the Scottish Parliament ensures that any new orders issued in England and Wales are enforceable in Scotland.

Provisions in the Bill

The Bill makes largely equivalent provision for sexual harm prevention orders and sexual risk orders in Scotland.

Sexual harm prevention orders

The sexual harm prevention order (SHPO) will be a civil preventative order designed to protect the public from sexual harm and replaces the SOPO and FTO in the 2003 Act.

Section 10(1) of the Bill sets out the three circumstances in which the court may make a SHPO against a person on sentencing:

- the first is on conviction when it deals with a person in respect of an offence listed in [schedule 3 of the 2003 Act](#);
- the second circumstance is acquittal of such an offence by reason of the special defence set out in section 51A of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") which provides a defence where a person is unable by reason of mental disorder to appreciate the nature or wrongfulness of their conduct;
- the third circumstance is a finding of unfitness for trial in relation to such an offence under section 53F of the 1995 Act (which provides that a person is unfit for trial if it is established on the balance of probabilities that the person is incapable, by reason of a mental or physical condition, of participating effectively in that trial). In relation to the third circumstance there must also be a finding that the person has done the act constituting the offence.

The Bill provides that the court may make a SHPO at its own instance or on a motion of the prosecutor.

Section 10(4) provides the tests for making a SHPO on sentencing. The court must be satisfied that it is necessary to do so for the purpose of protecting the public or any particular members of the public from sexual harm from the person, or protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the person outside the United Kingdom.

Section 15 of the Bill deals with the content and duration of a SHPO. A prohibition or requirement contained in a SHPO applies throughout the United Kingdom (unless specifically confined to particular localities) and a prohibition or requirement has effect for a fixed period

which will be specified in the order of not less than 5 years. The only exception to this relates to a prohibition on foreign travel which must be for a fixed period of not more than 5 years (although an application to have the prohibition on foreign travel extended may be granted).

A prohibition on foreign travel means a prohibition on travelling to any country outside the UK named or described in the order; a prohibition on travelling to any country outside the UK other than a country named or described in the order; or a prohibition on travelling to any country outside the UK – where this particular prohibition is imposed the person named in the order must surrender all their passports to the police.

The Bill also allows the chief constable to apply for an interim SHPO where an application has been made for a full order.

Sexual risk orders

Sexual risk orders (SROs) will also be civil preventative orders designed to protect the public from sexual harm. These orders replace RSHOs (see above).

The Bill provides that the chief constable may apply to a sheriff for a SRO against a person. The SRO differs from a SHPO in that it may be made where a person has not previously been convicted of a sexual (or any other) offence but their behaviour indicates a risk that others may be harmed and that intervention at an early stage is necessary to prevent that harm.

The tests for making a SRO are as follows. The sheriff may only make an order if satisfied that the person to whom the order relates has done an act of a sexual nature¹⁰ and, as a result, an order is necessary to protect the public or any particular members of the public from harm. An order can also be made to protect children or vulnerable adults generally, or any particular children or vulnerable adults, from harm from the person outside the UK.

Section 27 of the Bill makes provision for the content and duration of a SRO. Each prohibition and requirement in a SRO is for a fixed period and the order itself is for a fixed period. An SRO will last for a minimum of 2 years although there is no maximum period with the exception of any foreign travel restriction which expires after a maximum of 5 years (notwithstanding the possibility of this being extended – as with SHPOs). The prohibitions on foreign travel are the same as those applied to SHROs and as with SHROs, anyone prohibited from travelling to any country outside the UK must surrender all passports to the police.

The Scottish Government recognises that SROs could significantly interfere with a person's right to respect for private life without the person having been convicted of an offence. However, the Government points to the fact that the court must be satisfied that the person to whom the order will apply has done an act of a sexual nature and that as a result of that act it is necessary to make a SRO for the purpose of protecting the public from sexual harm. Additionally, the only prohibitions or requirements which a court may impose in an order are those which it considers necessary to protect the public or a particular member of the public from harm from the person to whom the order relates. Such orders are also to be of time-limited duration, and there is provision enabling them to be appealed against, or for an application to be made for discharge or variation.

¹⁰ The Bill does not define an act of "a sexual nature".

SOURCES

Abusive Behaviour and Sexual Harm (Scotland) Bill [as introduced] Session 4 (2015). SP Bill 81. Edinburgh: Scottish Parliament. Available at: [http://www.scottish.parliament.uk/S4_Bills/Abusive%20Behaviour%20and%20Sexual%20Harm%20\(Scotland\)%20Bill/SPBill81S042015.pdf](http://www.scottish.parliament.uk/S4_Bills/Abusive%20Behaviour%20and%20Sexual%20Harm%20(Scotland)%20Bill/SPBill81S042015.pdf)

Abusive Behaviour and Sexual Harm (Scotland) Bill: Explanatory Notes (and other accompanying documents) Session 4 (2015). SP Bill 81-EN. Edinburgh: Scottish Parliament. Available at: [http://www.scottish.parliament.uk/S4_Bills/Abusive%20Behaviour%20and%20Sexual%20Harm%20\(Scotland\)%20Bill/SPBill81ENS042015.pdf](http://www.scottish.parliament.uk/S4_Bills/Abusive%20Behaviour%20and%20Sexual%20Harm%20(Scotland)%20Bill/SPBill81ENS042015.pdf)

Abusive Behaviour and Sexual Harm(Scotland) Bill: Policy Memorandum Session 4 (2015). SP Bill 81-PM. Edinburgh: Scottish Parliament. Available at: [http://www.scottish.parliament.uk/S4_Bills/Abusive%20Behaviour%20and%20Sexual%20Harm%20\(Scotland\)%20Bill/SPBill81PMS042015.pdf](http://www.scottish.parliament.uk/S4_Bills/Abusive%20Behaviour%20and%20Sexual%20Harm%20(Scotland)%20Bill/SPBill81PMS042015.pdf)

Scottish Government (2014) *Equally Safe: Scotland's Strategy for Preventing and Eradicating Violence Against Women and Girls*. Available at: <http://www.gov.scot/Resource/0045/00454152.pdf> [Accessed 26 October 2015]

Scottish Government (2015) *Equally Safe – Reforming the criminal law to address domestic abuse and sexual offences*. Available at: <http://www.gov.scot/Resource/0047/00473932.pdf> [Accessed 26 October 2015]

Scottish Government (2015a) *Equally Safe - Reforming the criminal law to address domestic abuse and sexual offences – Consultation responses*. Available at: <http://www.gov.scot/Publications/2015/10/9329/downloads> [Accessed 26 October 2015]

Scottish Government (2015c) *Domestic Abuse Recorded by the Police in Scotland, 2013 & 2014-15*. Available at: <http://www.gov.scot/Publications/2015/10/8859> [Accessed 2 November 2015]

Scottish Parliament (2015) *Submissions received on the Abusive Behaviour and Sexual Harm (Scotland) Bill: Professor Louise Ellison and Professor Vanessa Munro*. Available at: http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/ABSH2_Ellison_and_Munro.pdf [Accessed 4 November 2015]

THIS PAGE IS INTENTIONALLY BLANK



SPICe

The Information Centre

Scottish Parliament Information Centre (SPICe) Briefings are compiled for the benefit of the Members of the Parliament and their personal staff. Authors are available to discuss the contents of these papers with MSPs and their staff who should contact Graham Ross on extension 85159 or email graham.ross@scottish.parliament.uk Members of the public or external organisations may comment on this briefing by emailing us at SPICe@scottish.parliament.uk. However, researchers are unable to enter into personal discussion in relation to SPICe Briefing Papers. If you have any general questions about the work of the Parliament you can email the Parliament's Public Information Service at sp.info@scottish.parliament.uk.

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

Published by the Scottish Parliament Information Centre (SPICe), The Scottish Parliament, Edinburgh, EH 99 1SP

www.scottish.parliament.uk