Sexual Offences (Scotland) Bill

Bill Number: SP Bill 11
Introduced on: 17 June 2008
Introduced by: Kenny MacAskill (Government Bill)
Passed: 10 June 2009
Royal Assent: 14 July 2009

Passage of the Bill

The Sexual Offences (Scotland) Bill [SP Bill 11] was introduced in the Parliament on 17 June 2008. The Justice Committee, as lead committee, commenced taking Stage 1 oral evidence on the general principles of the Bill at its meeting on 28 October 2008. The Stage 1 debate took place on 12 February 2009 and the Bill was passed following the Stage 3 parliamentary debate on 10 June 2009.

Purpose and objectives of the Bill

The Bill seeks to provide a statutory framework for sexual offences so that most offending of a sexual nature will, once the provisions of the Bill become law, be prosecuted under one of the offences in the Bill. As well as consolidating much of the existing law on sexual offences, the Bill seeks to reform and clarify the law in a number of important areas.

Provisions of the Bill

The Bill is divided into seven parts. Part 1 sets out a range of sexual offences in which the lack of consent of the victim is a central element in the definition of the offence. Part 2 deals with the concept of consent, and the related issue of reasonable belief in consent, whilst Part 3 deals with the capacity of mentally disordered persons to consent to sexual activity.

Part 4 contains sexual offences relating to sexual activity involving children (under the age of 16). A conviction for these offences does not require proof that the child victim did not consent. Part 5 sets out sexual offences dealing with situations where the accused holds a position of trust in relation to the victim. It provides that a position of trust exists in various situations where the victim is a child (under the age of 18) or a mentally disordered person. Again, a conviction for offences does not require proof that the victim did not consent.
Part 6 deals with the penalties for the offences set out in the Bill. Part 7 contains miscellaneous and general provisions.

The Bill is based on proposals put forward by the Scottish Law Commission in its Report on Rape and Other Sexual Offences (2007). The provisions in the Bill do, however, differ from those set out in the Commission’s report in a number of significant respects. Some of these differences existed in the Bill as introduced whilst others are the result of amendments to the Bill.

Parliamentary consideration

In general, the Bill attracted wide support across the Parliament. There were, however, a number of issues which were keenly debated, leading to important amendments in some areas. Three of these issues are highlighted below.

The Bill as introduced included new statutory offences of rape (wider in scope than the current common law offence of rape but still restricted to penile penetration) and sexual assault (similar in scope to the current common law offence of indecent assault). Concerns were expressed during Stage 1 that including penetrative sexual assaults with objects within the broad offence of sexual assault failed to clearly label them as potentially some of the most severe forms of sexual offence. In light of this evidence, the Justice Committee’s Stage 1 Report recommended that there should be a separate offence. The Government brought forward relevant amendments at Stage 2 and the Bill as passed includes an offence of sexual assault by penetration.

The Bill sets out a statutory definition of consent which includes a non-exhaustive list of factual situations where consent is by law held to be absent. Concerns were raised during parliamentary consideration about the implication in the Bill as introduced that a person could be said to have given prior consent to a sexual activity which that person could not consent to at the time of the activity (eg because the person is too intoxicated or is asleep at the time). These concerns led to a number of amendments being agreed to at Stages 2 and 3 which sought to restrict the validity of prior consent.

One of the main differences between the proposals put forward by the Scottish Law Commission and those contained in the Bill as introduced, concerned how the law should deal with consensual sexual activity between older children (aged 13, 14 or 15). The Commission recognised that such activity could give rise to serious concerns about the welfare of the children involved. However, instead of applying the criminal law in such circumstances, it recommended that there should be a new non-offence ground for referring children involved in sexual activity to the Children’s Hearings System. The Government, whilst acknowledging that the Hearings System is the most appropriate avenue for intervention in most cases, favoured retaining the possibility of prosecuting children, and the Bill as introduced sought to criminalise some forms of consensual sexual activity between older children. The issue was examined in detail during Stage 1 and, on balance, both the Justice Committee and the Parliament as a whole favoured the Government’s approach – although a number of changes were made to the range of sexual activities covered by relevant offences.