ABUSIVE BEHAVIOUR AND SEXUAL HARM (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Abusive Behaviour and Sexual Harm (Scotland) Bill introduced in the Scottish Parliament on 8 October 2015. It has been prepared by the Scottish Government to satisfy Rule 9.3.3 of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 81–EN.

POLICY OBJECTIVES OF THE BILL

2. The provisions in the Bill will help improve how the justice system responds to abusive behaviour including domestic abuse and sexual harm. This should help improve public safety through ensuring perpetrators are appropriately held to account for their conduct.

3. 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 the non-consensual sharing of private, intimate images (often called “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.

4. The Bill will help contribute to the Scottish Government’s national outcome of helping people live their lives safe from crime, disorder and danger by improving how the justice system is able to deal with domestic abuse and sexual offending. This should give confidence to victims that action under the criminal law can be taken when they are subject to coercive control by their partner.
5. In line with the Scottish Government’s Justice Strategy\(^1\), the Bill will help ensure people experience low levels of crime as well as experience low levels of fear, alarm and distress. The Bill will also help people to have high levels of confidence in justice institutions and processes.

6. It is important to understand the wider context within which these reforms are being progressed.

7. In June 2014 the Scottish Government launched the Equally Safe Strategy\(^2\). This is an ambitious, high level strategy which was developed in partnership with COSLA and in association with a wide range of partners including Scottish Women’s Aid and Rape Crisis Scotland alongside Police Scotland and NHS Health Scotland. The aim is to create a strong and flourishing Scotland where all individuals are equally safe and respected, where women and girls live free from abuse and the attitudes which perpetuate it.

8. There is a clear and unequivocal message which runs through the Strategy that violence against women and girls will not be tolerated, and a bold and unapologetic approach which links systematic gender inequality with the root causes of violence against women. The Strategy seeks to involve everyone in a shared understanding of the problem and the causes, risk factors and the scale of the problem within Scotland. Equally Safe seeks to instigate a step change in emphasis on preventing violence from occurring in the first place, and where it does occur intervening at the earliest possible stage to minimise the harm caused. Equally Safe acknowledges that both women and girls and men and boys can be victims of abuse and sexual harm.

9. Progress under the Strategy can already be seen within the justice sector with, for example, Police Scotland’s decision for a national roll out of its Disclosure Scheme for Domestic Abuse. There were 60,080 incidents of domestic abuse recorded by the police in Scotland in 2012-13. Of these incidents 80% had a female victim and a male perpetrator. The disclosure scheme provides a formal mechanism through which people can request information from Police Scotland about their partner’s background if they suspect their partner has a history of violence. This scheme will not eradicate domestic abuse on its own, but is a good example of the type of practical scheme that can be seen within a context of measures and interventions to increase the support provided to potential victims of domestic abuse.

10. The Scottish Government has invested long-standing equalities funding in measures to tackle violence against women and girls. In March this year, new funding of £20m was committed from the justice budget to be used in the period 2014-15 to 2016-17 to better support victims of violence and sexual assault and help prevent abuse and harm. This funding will go towards measures within the justice system to reduce delays, inconvenience and stress for victims and their families; widening access to specialist advocacy and support services for the victims of crime, including domestic abuse and sexual offences; exploring an expansion to innovative initiatives such as the Caledonian System, which work with men convicted of domestic abuse related offences to address the underlying causes of their behaviour and further protect women; and improving education and information resources within schools and work

\(^{1}\) http://www.scotland.gov.uk/Topics/Justice/justicestrategy
\(^{2}\) http://www.gov.scot/Publications/2014/06/7483
places to help increase public understanding of these crimes and reinforce a zero-tolerance approach to domestic abuse and sexual crimes.

11. Further details of the specific policy contained within the Bill are given in the following paragraphs.

**SPECIFIC PROVISIONS**

**Aggravation of offence where abuse of partner or ex-partner**

**Policy objectives**

12. To provide for a new statutory aggravation that an offence involved abuse of a person’s partner or ex-partner, and require courts to take account of that fact in sentencing the offender.

**Key information**

13. 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 where the perpetrator is motivated by 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 person because of their sexual orientation. Where offences are proven to have been motivated by 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.

14. 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 or ill-will towards the victim based on their membership (or presumed membership) of a racial group.

15. The Human Trafficking and Exploitation (Scotland) Bill recently passed by the Parliament, establishes 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.

16. A statutory aggravation that an offence or offences involved abuse of a person’s partner or ex-partner provides a means of ensuring that the courts formally recognise a victim’s experience. By placing a statutory duty on the courts to take this fact into account when sentencing the offender, as they are required to do by existing legislation concerning e.g. offences aggravated by prejudice, victims can have greater confidence that the sentencing decisions of the courts reflect the fact that the offence occurred in the context of an abusive relationship.

17. The Bill provides that an offence is aggravated by involving abuse of a person’s partner or ex-partner where it is established that the convicted person intended to cause their partner or
ex-partner to suffer physical or psychological harm by committing the offence or else, where the offence was committed against the person’s partner or ex-partner, the offender was reckless as to whether the offence would cause such harm. As such, the aggravation will apply where a person is convicted of an offence against a third party (e.g. their ex-partner’s child) and it is proven that their intent in committing the offence was to cause their ex-partner to suffer psychological harm. Where the offence is committed against a partner or ex-partner, it is sufficient to prove that the accused was reckless as to whether their actions would cause physical or psychological harm, so where, for example, a person assaults their ex-partner, it would not be necessary to show that it was their intent to cause harm, providing it can be shown that they were reckless as to whether their actions would cause such harm.

Alternative approaches

18. The consultation, *Equally Safe – Reforming the criminal law to address domestic abuse and sexual offences*, sought views on the creation of a specific offence to deal with domestic abuse. Initial analysis of the consultation responses confirmed strong support for such an offence but a wide range of different views about how the specific offence should be framed. The Scottish Government’s Programme for Government in September 2015, announced that the Government will 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. This will allow time for engagement between stakeholders to seek to establish broad support for the terms of the offence.

19. While the creation of a specific offence could be seen as an alternative to the creation of a “domestic abuse” aggravation, the great majority of consultation respondents were of the view that a statutory domestic abuse aggravation should be introduced in addition to any specific offence as, even once a specific offence has been introduced, there may be individual cases where it is more appropriate to prosecute the offender for another substantive offence and label the aggravation to reflect the fact that the offence amounted to the abuse of the offender’s partner or former partner.

Consultation

20. The Scottish Government’s consultation, *Equally Safe – Reforming the criminal law to address domestic abuse and sexual offences*, sought views on a proposal to introduce a statutory aggravation that an offence was committed as part of a course of conduct amounting to domestic abuse.

21. A clear majority of those who responded to this question (97%) thought that there should be a statutory aggravation that an offence was committed against a background of domestic abuse being perpetrated. 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.

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3 http://www.gov.scot/Publications/2015/03/4845
4 http://www.gov.scot/Publications/2015/09/7685/5
Disclosing, or threatening to disclose, an intimate photograph or film

Policy objectives

22. To 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, or to threaten to do so.

Key information

23. Recent technological developments mean that it is easier than ever before to take and share pictures, messages and videos with friends and 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 attracted much attention in recent years has been the non-consensual sharing of private and intimate images, typically of partners or former partners.

24. This often involves images being shared on the internet, sometimes on websites set up specifically for this purpose. There have been cases in which the names and contact details of victims have been posted together with such private images. In other cases, threats to publish such material on the internet have been used by abusive partners or ex-partners to control victims as part of a campaign of intimidation or blackmail.

25. 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, for example, 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.

26. 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.

27. By proving for a new offence concerning the sharing of private, intimate images, we intend to make clear that it is unlawful to share private, intimate images of another person without their consent.

28. This new offence will criminalise a person who publishes, shares or otherwise distributes private, intimate images of another person without their consent where they either intend to cause that person to feel fear, alarm or distress or otherwise are reckless as to the possibility that sharing such material will cause them to feel fear, alarm or distress.

29. The intimate images covered by the offence include still or moving images of a person:
   - engaging in a sexual act of a kind not ordinarily done in public, or
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- in which their genitals, buttocks or breasts are exposed or covered only with underwear.

30. 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. 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 “streaker” at a sporting event.

31. The maximum penalty for the new offence on conviction on indictment will be 5 years imprisonment. The offence is broadly comparable with the existing threatening and abusive behaviour offence which carries 5 year imprisonment as a maximum penalty.

Alternative approaches

32. Three broad options for addressing the non-consensual sharing of private, intimate images were considered.

33. The first was to rely on the existing law to prosecute those who share or distribute private, intimate images of a person without their consent. Depending on the facts and circumstances of the particular case, it may be possible to prosecute people who engage in this conduct using offences of blackmail, breach of the peace, threatening or abusive behaviour, stalking and improper use of a public electronic communications network. However, a very clear majority of respondents to the Scottish Government’s consultation supported the creation of a specific offence, and it is considered that the creation of a specific offence would make the exact scope of the law in this area clear and send a clear message to both victims and potential perpetrators that such conduct is criminal.

34. Another option which was considered was replicating the provisions at sections 33 to 35 of the Criminal Justice and Courts Act 2015, which provide for an offence of “disclosing private sexual photographs and films with intent to cause distress”. However, it is considered that the approach taken in this offence was insufficiently broad. It requires that the accused acted with the intent of causing fear, alarm or distress to the victim, and not merely that they were reckless as to the possibility that their actions would have this effect. Stakeholders have advised that this could represent a significant barrier to prosecution.

35. Consideration was given as to whether the offence should extend to the sharing of private and intimate written and audio communications, such as letters, text messages, e-mails and voice-mail recordings. However, while the sharing of such material could, in some circumstances, be used to cause alarm or distress to the person to whom it relates, in practice, almost all the cases which the Scottish Government is aware of have involved the sharing of intimate images. Furthermore, providing a clear definition of an intimate written or recorded communication that is easy to interpret, and does not risk unintended consequences in terms of interference with freedom of speech, would be very difficult. It should be noted that it will remain possible for the Crown Office and Procurator Fiscal Service (COPFS) to prosecute the sharing of such materials using, for example, the Communications Act 2003 offence or the offence of threatening or abusive behaviour, in appropriate cases.
Another approach suggested by some respondents to the consultation was a broad “breach of privacy” type offence which would make it a criminal offence to share, distribute or publish any images of another person or other communications sent by that person such as text messages, voice-mails, e-mails or letters, without their consent. However, it is considered that such an offence would be considerably wider in scope than is required to deal with the core harm of the sharing of private, intimate images, and that there was a risk of creating unintended consequences, for example, potentially inadvertently criminalising much ordinary use of internet social media and photo-sharing sites.

The consultation also sought views on whether the offence should adopt a test for an “intimate image” where an image is considered to be private and intimate if the person featured in the image and the person sharing the image considered it to be so. This would have the advantage that it would include images that may not be “sexual” images, but which would be considered to be private because of the particular circumstances or cultural beliefs of the person featured in it (e.g. an image of a person who would always choose to wear a headscarf in public who is not wearing a headscarf, or an image of a transgender person prior to that change). While there was considerable support for this from consultees, the Scottish Government considers that such an approach risked perpetuating the very ambiguity in the law which a specific offence is seeking to address, and that it may be very difficult for police and prosecutors to establish that such a shared understanding, that a particular image was “intimate”, actually existed between the person featured in the image and the person sharing the image.

Consultation

The Scottish Government’s consultation, *Equally Safe – Reforming the criminal law to address domestic abuse and sexual offences*, sought views on proposals to introduce a specific offence concerning the non-consensual sharing of private, intimate images. The very clear majority of respondents (99%) agreed that a specific offence should be created.

Respondents also identified a range of issues that should be considered or addressed if legislation is taken forward. These included consideration of how the offence could impact on particular groups (e.g. children, or those with a learning disability) who may not understand the consequence of their behaviour, and extension of any offence to cover other materials that can be used to humiliate or control, including sound or audio files (such as voicemail), other moving image recordings, photo-shopped or composite images and texts and e-mails.

The 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.

There was support from the majority of respondents (79%) for the proposal to define an image as an “intimate image” if the person featured in the image and the person sharing the image both considered it to be so, as such a definition would allow for intimate but non-sexual images to be covered, taking account of images which might be considered intimate because of
the cultural or religious beliefs of those involved. Those who favoured an objective test of what constitutes an “intimate image” tended to have concerns that too wide a definition could lack clarity and certainty as to when an offence had been committed, and would be too open to interpretation and subjective judgment, including at the trial stage.

42. There was support from a clear majority of respondents (94%) that it should be an offence to threaten to share intimate images of another person without their consent. Comments most frequently focused on the powerful and harmful effect that such threats can have on the person affected. Those who disagreed that it should be an offence tended to voice concerns about how enforceable such an offence would be.

Making of non-harassment orders in criminal cases

Policy objectives

43. To provide the court with a power to make a non-harassment order (NHO) where a person is unfit to plead, but the court decides they did commit the offence with which they are charged or where a person is acquitted as they were not criminally responsible at the time of the offence due to a mental condition.

Key information

44. Where a person is 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. 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.

45. Where the court is satisfied that an accused person is unfit to stand trial, the court can hold 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.

46. 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. This again is not recorded as a conviction.

47. This has implications for the disposals available to the court. Recently, a court case highlighted an issue in relation to the operation of NHOs imposed by the criminal courts. NHOs are intended to provide a means of ensuring that on-going harassment by one individual of another can be prevented. In Scotland, NHOs can be granted in a civil court on application by the person suffering 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
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can 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. Breach of the terms of an NHO is a criminal offence.

48. However, while the criminal court can impose an NHO on an offender following conviction, they have no power to do so following an examination of facts where a person has been found by the court to have carried out acts constituting a criminal offence, but where the court has accepted either that they are unfit to stand trial, or that they were not criminally responsible for their acts at the time of the offence.

49. It would be open to the victim to apply to the civil court 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.

50. The Bill amends the 1995 Act to enable the prosecutor to apply to the court to make an NHO against a person who, following an examination of facts, has been found to have carried out the acts constituting the offence with which they were charged or who has been acquitted under section 51A of the 1995 Act because they were not criminally responsible for their actions at the time they committed the offence.

51. Breach of an NHO is a criminal offence. There is of course a risk that, in some cases, a person 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 if they are at a later date charged with a criminal offence for breaching the terms of that NHO. However, it is not considered that this negates the usefulness of an NHO. Having an NHO in place may make it easier for the police to intervene to protect the victim of harassment at an early stage in the event of ongoing 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. 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.

52. It is worth noting that the courts can impose a sexual offences prevention order (SOPO) (one of the civil orders reformed by this Bill) where a person has been found to have committed an offence following a finding of facts, or where they have been acquitted because they lacked criminal responsibility at the time the offence was committed. A SOPO imposes conditions on the offender either prohibiting them from doing something described in the order or requiring them to do something described in the order. They are intended to protect the public from serious sexual harm from the offender. As with NHOs, their purpose is to protect members of the public, rather than to punish an offender and, as such, it may be appropriate to impose a SOPO whether or not a person was criminally responsible for their actions at the time of the offence, or fit to stand trial.

Consultation

53. The Scottish Government’s consultation, Equally Safe – Reforming the criminal law to address domestic abuse and sexual offences, sought views on a proposal to enable non-harassment orders to be imposed following a finding of facts, in circumstances where the
accused is unfit to stand trial, or where the person who committed the act constituting the offence was not criminally responsible for their actions at the time of the offence.

54. The clear majority of respondents (97%) thought that non-harassment orders should be available to the court in such circumstances. Many of those responding to the consultation stressed the importance of providing protections to those harassed or stalked in circumstances where the perpetrator is found not fit to stand trial. They also noted the burden that can be placed on victims if they have to apply for a civil order (especially where they do not qualify for legal aid).

Alternative approaches

55. There is no alternative approach that can achieve the policy objective. Retaining the status quo would mean that, in the small number of cases where this issue arises, the victim would require to seek a non-harassment order or interdict through the civil courts where the perpetrator was unfit for trial, or acquitted because they lacked the mental capacity to be criminally responsible for their actions.

Jury directions relating to sexual offences

Policy objectives

56. To require judges in sexual offence trials to provide juries with directions in cases where evidence is led or elicited at trial that: an alleged sexual offence may not have been reported until some time after it was alleged to have been committed, of the fact that it is not alleged that the accused used physical force to overcome the victim, or that the alleged victim did not physically resist their assailant. The judge’s directions must set out that there may be good reasons why that happened and that may not necessarily indicate that an allegation is false.

Key information

57. Concern has been expressed that certain ill-founded preconceptions held by members of the public, who make up juries, about the nature of sexual violence make understanding victims’ responses to such crimes more difficult.

58. 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.

59. Equally, it has been suggested that jurors may regard the fact that a significant period of time passed 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 there are many reasons that a victim may not tell anyone or make a report to the police about a sexual offence committed against them until some time after it has happened. 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.
60. In individual cases, COPFS can and do lead expert evidence on the question of the different ways in which people respond to sexual violence, 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, and the fact that a victim of a sexual assault may not offer physical resistance to their attacker and may be as likely to “freeze” or avoid physical resistance for fear of provoking their assailant.

61. However, the Scottish Government considers that, where relevant, directions should be given to juries by the trial judge on these matters without the need to lead expert evidence in every case. It will remain open to COPFS to lead such expert evidence in individual cases where they consider it would be helpful and appropriate to do so.

62. In recent years, there has been a significant increase in the proportion of cases in which sexual offences have been reported to the police only some years after they were alleged to have been committed. This may be the result of changes in police investigations, the media attention given to cases involving certain high-profile sex offenders and may also reflect greater confidence among victims that their cases will be taken seriously by the justice system. As a consequence, juries are more often being asked to consider cases in which a significant period of time has elapsed between the time an offence is alleged to have been committed and the point at which it is reported to the police.

63. A statutory jury direction is a provision which requires that, in the circumstances set out in that provision, the trial judge must or may direct a jury about the matter set out in the provision. At present, there are no statutory jury directions in place in Scots law. The “Scottish Jury Manual”

5, produced by the Judicial Institute for Scotland, provides information and guidance to judges who have the responsibility of charging juries in criminal trials, but it does not 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.

64. A number of jurisdictions have mechanisms in place, whether statutory or based in case law, to enable or to require 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 the jury’s attention the reasons why a victim may not report a sexual offence at the time it took place.

65. For example, the Australian states of New South Wales6 and the Northern Territory7 have provision requiring the trial judge to direct the jury 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. In New Zealand8, there is provision 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

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Wales, Australia, any such direction is made at the discretion of the judge. In Canada, the Supreme Court has held that in relevant cases, the trial judge should inform the jury about the reasons a victim may delay in reporting a sexual assault, and in England and Wales, guidance is provided to judges in the “Bench Book on Directing the Jury”\(^9\), 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 the complainant.

66. Similarly, 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 the accused did not use physical force to overcome the will of the complainer when committing the assault.

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

68. 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 their attacker to retaliate and escalate the physical violence of the assault, or the shock of being sexually assaulted may cause the victim to freeze and simply wish for the horrific experience to be over as soon as possible.

69. The Scottish Government is not aware of any jurisdiction that has legislated to provide for statutory jury 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.

70. However, the “Bench Book on Directing the Jury” provides “example” jury directions\(^10\) for judges in England and Wales to use where this issue arises, which are intended to make clear to a jury that there is no single “typical” response to non-consensual sexual activity and that it should not be assumed that a victim will necessarily resist or loudly protest. A number of other jurisdictions address the issue indirectly through judicial directions concerning consent, though these address a slightly different issue in that they are concerned with impressing upon a jury that physical resistance (or verbal protest) is not required for the crime of rape (or sexual assault) to be committed.

71. The Bill makes provision for two statutory jury directions. The first provides that, where evidence is led at trial which suggests that a person did not tell or delayed in telling anyone about

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the offence, or did not report or delayed in reporting, the offence to the police, the judge, in charging the jury, must advise that there can be good reasons why the 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.

72. The second provides that, where evidence is given which suggests that sexual activity took place without physical resistance on the part of the person against whom the offence is alleged to have been committed, the judge, in charging the jury, must advise that a person against whom a sexual offence is committed might not physically resist the sexual activity and that the absence of such physical resistance does not necessarily indicate that an allegation is false. It also provides that, where evidence is given which suggests that that sexual activity took place without the accused using physical force to overcome the will of the victim, the judge, in charging the jury must advise that a person may commit a sexual offence without using physical force to overcome the will of the victim and that an absence of the use of such physical force does not necessarily indicate that the allegation is false.

Alternative approaches

73. There are no other approaches that would meet the desired policy objective. While it could be left to the discretion of judges in individual cases to decide whether it is appropriate to direct the jury on what account to take of apparent “delay” in reporting an alleged sexual offence, or of the absence of the use of physical force by the alleged perpetrator or of the absence of physical resistance by the alleged victim, responses to the consultation underlined concern that such directions are not necessarily being given in appropriate cases at present. Furthermore, in the absence of statutory jury directions on these issues, the prosecution may decide it is necessary to lead expert evidence on these issues in cases where they would not otherwise consider it appropriate, which may incur unnecessary expense and increase the time taken for a case to be tried.

Consultation

74. The Scottish Government’s consultation, Equally Safe – Reforming the criminal law to address domestic abuse and sexual offences, sought views on proposals to introduce statutory jury directions to provide guidance on how juries should consider the fact that a significant period of time elapsed between the time the offence was alleged to have been committed and the point at which it was reported to the police, or the fact that it is not alleged that the alleged attacker used physical force, or that the alleged victim did not physically resist their attacker.

75. The majority of respondents to the consultation (89%) agreed that the proposed statutory jury directions should be introduced. Groups representing victims of sexual crime and which campaign on issues relating to violence against women were especially likely to be supportive. However, some respondents, mainly those from a legal or academic background, expressed concern that the introduction of mandatory jury directions interfered with the independence of the judiciary and that it is the role of the trial judge to direct the jury as he or she sees fit in each individual case.

76. A number of those who supported the introduction of statutory directions concerning delay in reporting commented that many damaging myths and common misconceptions and
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prejudices that persist in relation to rape and sexual offences and delays in reporting in particular. The majority of consultation respondents (88%) considered that the terms of the jury direction used in New South Wales, Australia, offered an appropriate model for a similar direction concerning delay in reporting in Scots law.

77. Similarly, those who supported the introduction of jury directions concerning the absence of the use of physical force by the accused, or the absence of physical resistance by the alleged victim, referenced prevalent myths and misconceptions regarding how victims of sexual assault typically respond.

Child sexual offences committed elsewhere in the United Kingdom

Policy objectives

78. To extend the extra-territorial effect of the law concerning sexual offences committed against children to include offences committed elsewhere in the United Kingdom.

Key information

79. As a general principle, criminal offences can usually be prosecuted only in the jurisdiction in which a crime was committed. A theft which occurred in Spain could not be prosecuted in Scotland, irrespective of whether the perpetrator (or indeed the victim) of the theft was a UK national normally resident in Scotland.

80. 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 to 56 of the 2009 Act provide that the sexual offences against children listed at Parts 1 and 2 of schedule 4 of that 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 offence. This applies irrespective of whether the conduct constituted an offence in the country in which it took place.

81. In 2013, following consideration of public petition PE139311 by Barnardos Scotland on tackling child sexual exploitation in Scotland, the Public Petitions Committee of the Scottish Parliament set up an inquiry12 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.”

82. In 2013, the Committee took evidence from the Lord Advocate13 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

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11 www.scottish.parliament.uk/Petitions_Archive/PE1393.pdf
12 http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/60242.aspx
Scottish courts have no jurisdiction to prosecute sexual offences against children committed elsewhere in the United Kingdom.

83. In the vast majority of cases this does not present significant difficulties as it is most appropriate to prosecute such offences in the jurisdiction in which they were committed, and there is no suggestion that other jurisdictions within the UK are failing to prosecute the sexual abuse of children.

84. 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. 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 a child in different locations around the UK over a period of time, it may be useful to be able to prosecute all the conduct on a single indictment, as the alternative would be to require the child to go through the ordeal of two separate trials or to prosecute only the offences which were committed in one jurisdiction. There may also be cases where a single offender commits offences against two (or more) different children in different jurisdictions within the UK and it may be useful to prosecute all the conduct on a single indictment (particularly where the two victims’ accounts corroborate each other under the Moorov doctrine).

85. The Bill amends the 2009 Act so as to provide that the extra-territorial effect of the offences listed at Parts 1 and 2 of schedule 4 of the Act extends to offences committed in England, Wales and Northern Ireland.

Consultation

86. The Scottish Government’s consultation, Equally Safe – Reforming the criminal law to address domestic abuse and sexual offences, sought views on a proposal 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.

87. The clear majority of respondents (98%) agreed with this proposal. Amongst the reasons given by consultation respondents for supporting the proposed change to the law was that it would allow for additional evidence that may exist in the rest of the UK to corroborate or strengthen a criminal case in Scotland, and could enable prosecution on a single indictment, which would avoid forcing a child to go through the trauma of two trials in different jurisdictions.

Alternative approaches

88. There is no alternative approach that would meet the policy objective of allowing these offences to be prosecuted in the Scottish courts in the small number of cases where it is appropriate to do so.
Reforms to system of civil orders available to protect communities from those who may commit sexual offences

Policy objectives

89. To simplify and rationalise the existing system of civil orders available to protect communities from those who may commit sex offences.

Key information

90. Practitioners, including the Child Exploitation & Online Protection Centre (“CEOP”) and the police, have for some years raised concerns about the practical efficacy of sexual offences 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) made under the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (“the 2005 Act”). These concerns, which were reinforced in an independent report by Hugh Davies QC which was published in May 2013, predominantly related 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).

91. More recently, the Scottish Parliament’s Public Petitions Committee Report on tackling child sexual exploitation in Scotland published by the Scottish Parliament on 14 January 2014 noted, by virtue of certain freedom of information requests in 2012, that Lothian and Borders, Strathclyde and Central Police forces had each only ever made two RSHOs. Accordingly the Committee made the following recommendation: “The Committee recommends that risk of sexual harm orders (RSHOs) are used in a much more comprehensive way for the protection of young people in Scotland”.

92. The Centre for Excellence for Looked After Children in Scotland (CELCIS) 2013 study also reported disquiet among practitioners that the 2005 Act was not well known or well used. Among other things this study noted that voluntary sector organisations and Police Scotland “called for RSHOs to be available for children up to the age of 18”.

93. For its part, the UK Government introduced amendments to the Anti-social Behaviour, Crime and Policing Act 2014 (“the 2014 Act”) to address the concerns of professionals, including the police, that the use and effectiveness of the existing civil orders imposed on sex offenders and those who pose a risk could be improved to better protect the public from sexual harm. Schedule 5 of the 2014 Act therefore amends the 2003 Act to repeal the SOPO, FTO, and RSHO in England and Wales and replaced 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” in existing provision will be replaced with a test of “risk of sexual harm”. Both orders can also be used to manage risk against adults and vulnerable adults abroad, as well as children. In addition, their remit is wider, enabling, for example, foreign travel restrictions to be applied under either order. Again, the aim

14 http://www.ecpat.org.uk/sites/default/files/the_davies_review.pdf
15 http://www.scottish.parliament.uk/S4_PublicPetitionsCommittee/Reports/puR-14-01w-rev.pdf
17 http://www.legislation.gov.uk/ukpga/2014/12/schedule/5 (see Schedule 5).
of streamlining the orders was to provide the police and practitioners with greater clarity and flexibility.

94. The Scottish Parliament recognised the civil order measures in the Anti-social Behaviour, Crime and Policing Act 2014, by virtue of a Legislative Consent Motion (January 2014) to ensure that any new orders issued in England and Wales are enforceable in Scotland.

95. The Bill therefore makes largely equivalent provision for sexual harm prevention orders in Scotland. This will be a civil preventative order designed to protect the public from sexual harm. The order will replace SOPOs and the FTOs in Scotland. The Bill also makes provision for the sexual risk order ("SRO"). Again this will be a civil preventative order designed to protect the public from sexual harm. The order will be available in Scotland and replaces RSHOs as provided for by sections 2 to 8 of the 2005 Act. The person in respect of whom the SRO is made may or may not have a conviction for a sexual (or any other) offence. The grounds on which both these orders will be made are wider than those for the current orders, so they could be used by the police to manage risk against adults as well as children. The available prohibitions are also wider so, for example, foreign travel restrictions could be imposed under either order.

96. The test of "serious sexual harm" in existing provision is also replaced. Accordingly a court will be able to grant a new order if it is satisfied that it is necessary to protect a person from "sexual harm."

Alternative approaches

97. While the reforms are beneficial in their own policy terms, it should be noted that the UK Government introduced similar measures. There has been a parallel regime for sex offenders north and south of the border for many years until the recent UK Government reforms and one of the benefits of reforms being progressed in Scotland is to re-introduce this parallel regime. For example, those individuals who may be subject to the orders may well have sought to take advantage of a less robust regime operating in Scotland.

Consultation

98. This policy was developed in discussion with Police Scotland. From a child protection perspective, aspects of these measures are also included in the Scottish Government’s National Action Plan to Tackle Child Sexual Exploitation (November 2014) 18. The Ministerial Working Group overseeing implementation of the plan also highlighted the need to see progress in this area.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

99. An Equality Impact Assessment (EQIA) has been carried out and the results will be published on the Scottish Government’s website at http://www.gov.scot/publications/recent.

100. In relation to the provisions contained within the Bill, the Scottish Government considers that these do not discriminate on the basis of the protected characteristics namely age, maternity and pregnancy, marriage and civil partnership, gender reassignment, race, disability, religion and belief, sex or sexual orientation.

**Human rights**

101. The Scottish Government has considered the extent to which the provisions in this Bill engage Articles 6 (right to a fair trial), 7 (no punishment without law), 8 (right to respect for private and family life) and 10 (freedom of expression) of the European Convention on Human Rights and is satisfied that the provisions of the Bill are compatible with those rights. It is not considered that the Bill engages rights under any other article of the Convention.

**Aggravation of offence where abuse of partner or ex-partner (section 1)**

102. This section enables courts to consider an offence to be aggravated if it is committed with the intention of causing physical or psychological harm to a partner or ex-partner, or (where it is committed against the partner or ex-partner only) with recklessness as to that being the effect. The fact that the offence was so aggravated will be recorded and the court is required to take this fact into account in sentencing the offender.

103. In taking account of the aggravation when sentencing the offender, the court is bound under the Human Rights Act 1998 to exercise its powers compatibly with the offender’s Convention rights.

**Disclosing or threatening to disclose intimate images (sections 2 to 4)**

104. This provision is intended to protect the rights of persons who may be caused fear, alarm or distress by the non-consensual sharing of private and intimate images in which they appear.

105. The Scottish Government considers that it is compatible with the ECHR rights under Article 10 concerning freedom of expression as this is a qualified right which may be interfered with where it is necessary in a democratic society in pursuit of one of the “legitimate aims” set out in Article 10(2), which include protecting the rights or reputation of others.

**Making of non-harassment orders in criminal cases (section 5)**

106. This provision enables a non-harassment order (NHO) to be granted where a person is acquitted on the grounds they were not criminally responsible at the time of the offence due to a mental disorder, or where a court finds that they did the acts constituting the offence but are unfit to stand trial by reason of a mental or physical condition. It is intended to give the courts an alternative means to protect victims in cases involving abuse and harassment of individuals where there can be no conviction, for example, due to a mental disorder.

107. The Scottish Government considers this provision is compatible with Article 6(1) right to a fair trial in relation to civil rights and obligations. Section 234A of the 1995 Act, which provides for NHOs, contains a number of procedural protections, giving the person against whom a NHO is granted the opportunity to make representations and providing a mechanism for the NHO to be varied or revoked on application. The imposition of a NHO can be appealed as if it were a sentence.
108. The Scottish Government recognises that NHOs engage a person’s rights under Article 8 (respect for private and family life) and Article 10 (freedom of expression). However, these are qualified rights which may be interfered with where it is necessary in pursuit of, for example, safeguarding public safety, preventing disorder or crime, and protecting the rights and freedoms of others. The court in determining whether to grant a NHO is bound under the Human Rights Act 1998 to exercise its powers compatibly with the person’s Convention rights.

Jury directions relating to sexual offence cases (section 6)

109. These provisions oblige judges, when certain sexual offences are being tried by way of solemn proceedings, to direct the jury with regard to certain evidential matters.

110. The Scottish Government considers that the provisions are compatible with the right to a fair trial at Article 6 of the ECHR. Jury directions will only be required to be made if certain circumstances arise and while the provisions mandate what the directions must relate to, the wording and form of those directions is left to the trial judge, who is required to act in accordance with the convention rights set out in the Human Rights Act 1998.

Enabling child sexual offences committed elsewhere in the UK to be prosecuted in Scotland (sections 7 and 8)

111. The Scottish Government considers that this provision protects the rights of child victims of sexual offences by ensuring that, where these offences are committed in another jurisdiction within the United Kingdom, the Scottish courts have the same powers to prosecute these offences as they currently have in respect of offences committed in jurisdictions outside the United Kingdom.

112. The Bill makes provision to prevent the prosecution of a matter in Scotland where it has already been prosecuted elsewhere within the UK and to require Scottish prosecutors to consult with their counterparts in other parts of the UK before prosecuting acts which have taken place elsewhere within the UK. The Scottish Government considers this provision is compatible with the Article 6 right to a fair trial.

Sexual harm prevention orders (sections 9 to 24)

113. Sexual harm prevention orders (SHPOs) can be made by a court when it is dealing with a person convicted of a sexual offence listed at schedule 3 of the 2003 Act or via an application at the instance of the chief constable at another date subsequent to the conviction.

114. SHPOs could interfere with a person’s Article 8 right to respect for private life. A prohibition on foreign travel is an example of a prohibition which may interfere with this right, though there may be others, depending on the facts and circumstances of the particular case. SHPOs are intended to prevent disorder and crime, protect health and morals and protect the rights and freedoms of others, and as such, as the rights at Article 8 are qualified rights, and the orders are intended to prevent the very serious harm which can be experienced by a victim of sexual offending, the Scottish Government considers this interference to be justified.

115. In making the order, the court must act compatibly with Convention Rights. The court may make an order only if it is satisfied that it is that it is necessary to do so for the purpose of
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protecting the public from sexual harm. Furthermore, 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 sexual harm. Such orders are 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.

Sexual risk orders (sections 25 to 34)

116. Sexual risk orders (SROs) can be made by a Scottish court on the application of the chief constable. A court may make a SRO only if it is satisfied that it is necessary to do so for the purpose of protecting the public or any individual member of the public from sexual harm from the person who is to be the subject of the order. SROs are intended to replace risk of sexual harm orders and will prohibit the person against whom they are made from doing anything described in the order, or will require the person to do a thing described in the order.

117. The Scottish Government recognise 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 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. Furthermore, 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 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.

Island and rural communities

118. Domestic abuse and sexual offences can occur in urban, rural and island communities. The Scottish Government is satisfied that the Bill has no differential impact upon island or rural communities

Local government

119. Courts may use community sentences in dealing with those committing some of the offences provided for in the Bill. Local authorities will have responsibility for implementing such sentences as part of their wider responsibility for criminal justice social work. This would include, for example, responsibility for planning and supervising unpaid work to be carried out by an offender as part of a community payback order. The financial implications for local government are set out in the Financial Memorandum accompanying the Bill.

Sustainable development and environmental issues

120. The Scottish Government is satisfied that the Bill has no negative effect on sustainable development. The potential environmental impact of the Bill has been considered. A pre-screening report confirmed that the Bill has no impact on the environment and consequently that a full Strategic Environmental Assessment does not need to be undertaken. It is, therefore, exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.
Business and regulatory impact assessment

121. The Scottish Government is satisfied that the Bill has no significant impact on businesses and other non-public bodies.
ABUSIVE BEHAVIOUR AND SEXUAL HARM (SCOTLAND) BILL

POLICY MEMORANDUM