Stage 3 proceedings on the Sexual Offences (Scotland) Bill are scheduled to take place on 10 June 2009.

This briefing considers some key recommendations made by the Justice Committee in its Stage 1 Report, the Scottish Government’s response to those recommendations and a number of key Stage 2 amendments.
# CONTENTS

INTRODUCTION ..........................................................................................................................................................3

SEXUAL ASSAULT BY PENETRATION ....................................................................................................................4

  Part 1 of the Bill: sexual offences based on a lack of consent.................................................................4
  Part 4 of the Bill: children ..................................................................................................................................5

VOYEURISM ................................................................................................................................................................5

CONSENT ....................................................................................................................................................................7

SEXUAL OFFENCES COMMITTED BY YOUNG CHILDREN....................................................................................8

CONSENSUAL SEXUAL ACTIVITY BETWEEN OLDER CHILDREN.......................................................................9

PENALTIES FOR RAPE AND SEXUAL ASSAULT .................................................................................................10

SOURCES ..................................................................................................................................................................11

RELATED BRIEFINGS ..............................................................................................................................................12
INTRODUCTION

The Scottish Government introduced the Sexual Offences (Scotland) Bill in the Parliament on 17 June 2008. It seeks to provide a statutory framework for sexual offences, so that most offending of a sexual nature would in future 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.

The Parliament’s Justice Committee was designated as lead committee for parliamentary consideration of the Bill. Its Stage 1 Report was published on 16 January 2009. The Scottish Government provided a written response to the Stage 1 Report later the same month. The Bill completed Stage 1 (consideration of general principles) with the Stage 1 Debate on 12 February 2009.

Stage 2 (detailed consideration) was completed by the Justice Committee on 31 March 2009 and was followed by publication of the Bill (as amended at Stage 2).

Stage 3 (final consideration) is scheduled for 10 June 2009.

Other SPICe briefings, providing information on the Bill as introduced, are also available on the Parliament’s website:

- Sexual Offences (Scotland) Bill (McCallum 2008a)
- Sexual Offences (Scotland) Bill: Children (McCallum 2008b)

Key dates in the Parliament’s consideration of the Bill are set out in the following table.

<table>
<thead>
<tr>
<th>Summary of Parliamentary Consideration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bill introduced</td>
</tr>
<tr>
<td>Stage 1: Justice Committee evidence sessions</td>
</tr>
<tr>
<td>Stage 1: Subordinate Legislation Committee</td>
</tr>
<tr>
<td>Stage 1: Finance Committee</td>
</tr>
<tr>
<td>Stage 1: Equal Opportunities Committee</td>
</tr>
<tr>
<td>Stage 1: Justice Committee report published</td>
</tr>
<tr>
<td>Stage 1: Plenary Debate</td>
</tr>
<tr>
<td>Stage 2: Justice Committee</td>
</tr>
<tr>
<td>Stage 3: Plenary Debate</td>
</tr>
</tbody>
</table>

The rest of this briefing looks at some of the main issues raised during both Stage 1 and Stage 2 consideration of the Bill. (It does not seek to outline all of the issues debated or changes made.)
SEXUAL ASSAULT BY PENETRATION

Part 1 of the Bill: sexual offences based on a lack of consent

The Bill as introduced included offences of rape and sexual assault:

- rape (section 1) – covering non-consensual penile penetration of the vagina, anus or mouth of the victim
- sexual assault (section 2) – covering various types of non-consensual conduct which a reasonable person would, in all the circumstances of the case, consider to be sexual (eg touching the victim in a sexual manner)

The Bill as introduced provided that a conviction for either offence could result in a maximum sentence of life imprisonment. However, the definition of sexual assault means that it would cover a very wide range of offending behaviour, including some of the most serious cases (eg the brutal penetration of a victim with an object) as well as less severe assaults.

Clearly, the severity of any sexual assault could be reflected in the prosecution’s choice of court (eg whether to prosecute in the High Court or a sheriff court) and the sentence passed on conviction. However, 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. It was argued that there should be a separate offence of “sexual assault by penetration” or “rape with an object” covering various types of non-penile penetrative assault. After considering the evidence, the Justice Committee’s Stage 1 Report (2009a) recommended that “there should be a separate offence of rape with an object or with another part of the body, limited to vaginal or anal penetration” (para 97).

In its written response to the Stage 1 Report, the Scottish Government stated that it sympathised with the Justice Committee’s reasons for proposing a new offence. At Stage 2, the Government brought forward an amendment to create an additional statutory offence of sexual assault by penetration. There was some debate on whether or not the new offence should be described as a form of rape (eg to help emphasise the seriousness of the offence) but the proposed amendment, which does not use the word “rape”, was agreed to.

The result is that the offences of rape and sexual assault remain but the Bill as amended at Stage 2 now contains an additional offence of sexual assault by penetration:

- sexual assault by penetration (section 1A) – covering non-consensual sexual penetration of the vagina or anus of the victim by any body part or object

The maximum penalty is the same as for rape and sexual assault (ie life imprisonment) and as for rape (but not sexual assault) it can only be prosecuted under solemn procedure.

It may be noted that the three offences of rape, sexual assault by penetration and sexual assault effectively cover some of the same types of offending behaviour. Most of what is covered by the offence of rape is also covered by sexual assault by penetration; and everything that is covered by the offence of sexual assault by penetration is also covered by sexual assault. The intention behind this is to avoid difficulties in prosecuting cases where what exactly happened may not be wholly clear. It will be for the prosecution to select the most appropriate charge (eg where there is clear evidence of rape the case should be prosecuted as rape rather than as one of the other offences).
It may also be noted that the offence of sexual assault by penetration, unlike the offence of rape, does not cover penetration of the victim’s mouth. It was argued that including penetration of the mouth would extend the scope of the offence to less serious sexual assaults (e.g., where the attacker forces his tongue into the victim’s mouth), contrary to the aim of labelling a particularly serious form of sexual assault.

**Part 4 of the Bill: children**

Government amendments agreed at Stage 2 also added specific penetrative sexual offences to Part 4 of the Bill, which deals specifically with child victims. Two new offences were added dealing with young child victims and older child victims:

- sexual assault on a young child by penetration (section 14A) – covering sexual penetration of the vagina or anus of the victim by any body part or object, where the victim is aged less than 13
- engaging in penetrative sexual activity with or towards an older child (section 21A) – covering sexual penetration of the vagina or anus of the victim by any body part or object, where the victim is aged 13, 14 or 15

As for other offences in Part 4 of the Bill, the main differences between these additional offences and the new offence of sexual assault by penetration in Part 1 of the Bill relate to the fact that a conviction for an offence in Part 4:

- requires proof that the victim was (at the time of the offence) a child of the relevant age
- does not rely on proving a lack of consent (sexual activity with a child is an offence regardless of whether the child apparently consented to the activity)

The maximum penalty for the offence in section 14A of the Bill is life imprisonment (i.e., the same as for the offence in section 14 – rape of a young child). The maximum custodial penalty for the offence in section 21A is ten years (i.e., the same as for the offence in section 21 – having intercourse with an older child).

**VOYEURISM**

The Bill as introduced did not include a statutory offence of voyeurism. At present, such behaviour is prosecuted under the common law as a breach of the peace.

Given the sexual nature of such offending, Scottish Government amendments were agreed at Stage 2 adding three additional offences to the Bill:

- voyeurism (sections 7A and 7B)
- voyeurism towards a young child (section 19B)
- voyeurism towards an older child (section 26B)

In outlining the amendments creating the new offence of voyeurism, the Minister for Community Safety told the Justice Committee that:

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1 As is the case with offences against older children more generally, the prosecution could in appropriate situations prosecute an alleged offender under the equivalent offence in Part 1 of the Bill (in this case section 1A rather than the offence in section 21A) with the consequence of a higher maximum sentence being available to the court.
“[Section 7A] makes it an offence for a person to observe, for the purpose of obtaining sexual gratification or of humiliating, distressing or alarming the victim, another person without their consent or without any reasonable belief that they consent as they engage in a private act, as defined in [section 7B], in a place or in circumstances in which they could reasonably expect privacy. The provision is similar to the offence of voyeurism in England and Wales under the Sexual Offences Act 2003.

[Section 7A] also makes it an offence to operate equipment such as a webcam, enabling the accused or a third person to observe the victim engaging in a private act, for the purpose of obtaining sexual gratification either for the accused or for a third party or of humiliating, distressing or alarming the victim without the victim’s consent and without any reasonable belief that the victim consents.

It will also be an offence for the accused to record the victim with the intention of enabling the accused or a third person to look at an image of the victim engaging in a private act without the victim’s consent and without any reasonable belief that the victim consents for the purpose of obtaining sexual gratification for the accused or a third party or of humiliating, distressing or alarming the victim.

Finally, a person will commit an offence if he or she installs equipment such as a video camera or constructs or adapts – for example, by drilling a peephole – a structure or part of a structure with the intention of enabling him or herself or a third party to carry out any of the three actions described above for the purpose of sexual gratification for either the accused or a third party or of humiliating, distressing or alarming the victim.

[Section 7B] defines terms used in voyeurism offences. Under the amendment, a person is engaged in a private act if they are in a place in which the circumstances are such that there is a reasonable expectation of privacy and the person’s genitals, buttocks or breasts are exposed or covered only with underwear, the person is using a lavatory, or the person is doing a sexual act that is not of a kind ordinarily done in public.” (Scottish Parliament Justice Committee 2009b, col 1653)

The equivalent offences relating specifically to child victims (sections 19B and 26B of the Bill as amended) do not rely on proving a lack of consent.

It has been suggested that the new offences may not catch all types of undesirable voyeuristic activity. For example, would the offence of voyeurism cover the practice sometimes referred to as “upskirting”? An example of this would be where a person attempts to use a camera (eg hidden in a bag) to secretly film up women’s skirts in a public place. It may be argued that such activity would not be covered by the new offence on the basis that the women are not engaged in doing a private act. It may, of course, still be possible to prosecute a person engaging in such activity for breach of the peace, although this might also depend on the circumstances of the case.

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2 Some possible examples are highlighted in an article ‘Two Problems in the Sexual Offences (Scotland) Bill’ by James Chalmers (School of Law, University of Edinburgh), to be published in the publication Scottish Criminal Law (W Green, Edinburgh).
CONSENT

The lack of consent of the victim, in relation to the activities covered by the offence, is a central element in the definition of many of the offences in the Bill. Section 9 of the Bill as introduced provided a general definition of consent as meaning “free agreement”. Section 10 went on to provide a non-exhaustive list of factual situations where consent is by law held to be absent.

To a large extent the Justice Committee supported the approach to consent set out in the Bill as introduced. It did, however, receive evidence expressing strong concerns about some of the provisions set out in section 10. In particular, there were concerns about section 10(2)(b) which provided that consent is always absent:

“where, at the time of the conduct, B [the victim] is asleep or unconscious, in circumstances where B has not, prior to becoming asleep or unconscious, consented to the conduct taking place while B is in that condition”.

There was no dispute that consent is absent in such circumstances. However, there was concern that the provision had by implication introduced a concept of prior consent and that this would, for example, make it harder for the prosecution to prove an absence of consent in cases where an attacker takes advantage of a victim who has passed out (eg as the result of drink or drugs). It was also pointed out that, if prior consent is possible in such circumstances, it would mean that it could exist in circumstances where it could not be readily withdrawn.

Arguments put forward in support of the general approach in section 10(2)(b) included ones:

- arguing that consent to sexual activity must always be prior to the act in question and comparing the approach in the Bill to how consent is dealt with in other situations (eg where a patient gives consent prior to an operation under a general anaesthetic)
- referring to some of the consequences if it is not possible to consent in advance to sexual activities (eg a couple could not validly agree that whoever wakes up first in the morning should wake the other by means of a sexual embrace – meaning that such an embrace would be a sexual assault)

In light of the concerns expressed by witnesses, the Stage 1 Report noted that the Justice Committee had some reservations about section 10(2)(b) of the Bill as introduced and asked the Scottish Government to further consider the matter.

Government amendments agreed at Stage 2 removed section 10(2)(b) and inserted a new section 10A providing, in relation to relevant sexual offences, that “a person is incapable, while asleep or unconscious, of consenting to any conduct”. In moving the relevant amendments, the Cabinet Secretary for Justice stated that the new section:

“replicates our understanding of the current law by providing that someone who is asleep or unconscious cannot give consent while in that state. The new section provides that consent cannot be given in such circumstances, although it does not, in terms, exclude the possibility of a reasonable belief in consent, nor does it place any specific restrictions on how such a reasonable belief may arise.” (Scottish Parliament Justice Committee 2009c, col 1662)

What are the consequences of the Stage 2 amendments in this area? It is clear that any claimed indication of consent given whilst a person is asleep or unconscious cannot give rise to consensual activity. However, the provisions in the Bill as introduced also made this clear. So,
do the amendments go further and also invalidate any prior consent? Reasons for suggesting that they do not, include:

- the manner in which the Cabinet Secretary for Justice described the intended effect of the relevant amendments (ie that they provide that someone who is asleep or unconscious cannot give consent while in that state)
- the fact that section 10(2)(a) of the Bill (both as introduced and as amended) implies that prior consent can be relevant in other circumstances

On the other hand, if the new section 10A of the Bill was only intended to apply to claimed indications of consent given whilst a person is asleep or unconscious, it could have said so more explicitly. As things stand, a comparison of the wording used in section 10A with that used in some of the relevant offences does appear to leave an element of doubt. For example, section 2 of the Bill provides that a person may be guilty of sexual assault if the other person is not “consenting” – the same term used in section 10A.

**SEXUAL OFFENCES COMMITTED BY YOUNG CHILDREN**

As the law currently stands, any child who has reached the age of criminal responsibility (ie aged at least eight) could be prosecuted for:

- any of the offences set out in Part 1 of the Bill
- those offences set out in Part 4 of the Bill which are aimed at protecting “young children” – those aged less than 13

Although children as young as eight can be prosecuted for many offences (not just sexual offences) in the Scottish criminal courts, this is not the norm. Section 42(1) of the Criminal Procedure (Scotland) Act 1995 provides that “no child under the age of 16 years shall be prosecuted for any offence except on the instructions of the Lord Advocate, or at his instance”. In practice the vast majority of alleged child offenders under the age of 16 are dealt with through the Children’s Hearings System.

Concerns were expressed during Stage 1 about the potential for prosecuting young children (ie those aged less than 13) in the criminal courts, especially in relation to those offences in Part 4 of the Bill which are aimed at protecting young children. After considering the evidence, the Justice Committee stated in its Stage 1 Report (2009a) that it:

> “considers that offences committed by children under the age of 13 are best dealt with via the Children’s Hearing System rather than the criminal courts. However, the Committee notes that under the terms of the Bill, the Lord Advocate will retain the option of criminal prosecution.” (para 217)

In relation to the Bill as amended at Stage 2, it is still the case that young children could (in exceptional cases) be prosecuted in the criminal courts for any of the offences set out in Part 1

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3 It should be noted that a proposed Stage 3 amendment put forward by Margaret Curran MSP would, if agreed, amend section 10(2)(a) of the Bill in a way which would remove the suggestion that prior consent may be relevant in the circumstances covered by the subsection (see Scottish Parliament 2009b, section G). In fact, it would appear to remove the possibility of valid prior consent in such circumstances. Thus, sexual activity would always be non-consensual and thus criminal if it took place at a time when any of those involved was incapable, because of the effect of alcohol or any other substance, of consenting to it.
of the Bill and those offences set out in Part 4 of the Bill which are aimed at protecting young children.

It should be noted that the above position may be changed by the Criminal Justice and Licensing (Scotland) Bill (currently subject to Stage 1 parliamentary scrutiny). Section 38 of that bill seeks to increase the age at which children can be prosecuted in the criminal courts from eight to 12. It would still be possible to deal with children aged between eight and 12 on offence grounds under the Children’s Hearings System.

The Criminal Justice and Licensing (Scotland) Bill was introduced in the Parliament after Stage 1 consideration of the Sexual Offences (Scotland) Bill had been completed. However, there has been some debate as to whether it still makes sense to retain the possibility of prosecuting young children for offences in the Sexual Offences (Scotland) Bill given that the interaction between the two pieces of legislation will mean, if they are both passed in their current forms, that it is only young children aged 12 who could be prosecuted.

CONSENSUAL SEXUAL ACTIVITY BETWEEN OLDER CHILDREN

In general, offences against older children under Part 4 of the Bill can only be committed by those aged 16 or over. However, section 27 of the Bill allows older children (ie those aged 13, 14 or 15) to be prosecuted for engaging in certain sexual activities with other older children. As for other offences in Part 4 of the Bill, a lack of consent is not an element of the offence so the accused can be found guilty even if all of those involved claim to have consented. The relevant offences in section 27 as introduced covered sexual activities involving penetration of the vagina or anus by anything other than the mouth (eg penetration by a penis, finger or sex toy would have been covered whilst penetration by a tongue would not have been covered). Oral sex would not have been covered by the offences – either because the mouth is used to penetrate or because it is the mouth that is penetrated.

The question of whether or not it should be possible to prosecute older children for engaging in consensual sexual activities with other older children was keenly debated during Stage 1. The main arguments are summarised in the SPICe briefing Sexual Offences (Scotland) Bill: Children (McCallum 2008b). Following the consideration of evidence at Stage 1, the Justice Committee supported the continued possibility of prosecuting older children for engaging in certain consensual sexual activities with other older children. This support was given on the basis that criminal prosecution would not be the norm, and that in most cases the Children’s Hearings System would continue to be used where some form of compulsory intervention might be required.

Another issue which arose in relation to the offences in section 27 of the Bill concerned the range of sexual activities covered. As noted above, the offences set out in the Bill as introduced did not cover oral sex. The Justice Committee’s Stage 1 Report (2009a, paras 288-289) recommended that the offences should be extended to oral sex. Scottish Government amendments agreed at Stage 2 extended the scope of the offences in section 27 to cover oral sex. However, those amendments also narrowed the scope of the offences by no longer criminalising penetrative sexual activities involving penetration of the vagina or anus by, for example, a finger or sex toy.
PENALTIES FOR RAPE AND SEXUAL ASSAULT

Concerns were raised during Stage 1 proceedings that the Bill as introduced implied that it might be appropriate for a person who is convicted of rape (and certain other very serious offences) to receive a sentence which consists only of a fine. This was on the basis that schedule 1 of the Bill as introduced stated that the maximum penalty for rape is “life imprisonment or a fine (or both)”. Members of the Justice Committee did not want to give this impression (even if such a sentence was extremely unlikely in practice).

The Scottish Government sought to address such concerns by way of a number of amendments agreed at Stage 2. Section 37(2) of the Bill as amended at Stage 2 provides that a penalty of a fine alone cannot be imposed where a person is convicted under solemn procedure of any of the following offences:

- rape (section 1) or rape of a young child (section 14)
- sexual assault by penetration (section 1A) or sexual assault on a young child by penetration (section 14A)
- sexual assault (section 2) or sexual assault on a young child (section 15)

Solemn procedure (as opposed to summary procedure) is used when prosecuting very serious offences. In fact, it will only be possible to prosecute the offences of rape and sexual assault by penetration (as well as the equivalent young child offences) under solemn procedure. However, the scope of the proposed offence of sexual assault is wide, potentially covering both very serious and much less serious examples of offending behaviour. This is reflected in the fact that it can be prosecuted under both summary and solemn procedures.

Given the broad nature of the sexual assault offence, it may well be appropriate to impose a financial penalty alone in some cases. The Government has sought to limit the prohibition on sentences which impose a fine alone to appropriate cases by stating that it applies only where a person is convicted of sexual assault under solemn procedure. It might be argued that any conviction for a sexual assault under solemn procedure will involve a very serious assault. This is likely to be so in most cases, but it may also be argued that it will not always be the case. For example, a person might be prosecuted under solemn procedure on the basis that the allegations, if they are all proven, amount to a very serious sexual assault. However, the accused may during the course of the case be cleared of most of the allegations and convicted of just some matters amounting to a relatively minor sexual assault. Given this possibility, it may be argued that the amendments agreed at Stage 2 could unduly restrict the powers of a court when sentencing a person for sexual assault.
SOURCES


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