

11 September 2008

To The Justice Committee,

## **Sexual Offences (Scotland) Bill**

### **Written Evidence at Stage 1**

#### **Introduction**

Engender is a membership organisation working on an anti-sexist agenda in Scotland and Europe to increase women's power and influence and make visible the impact of sexism on women, men and society. We provide a wide range of information and support to individuals, organisations and institutions who seek to achieve equality and justice.

To its shame, Scotland has one of the lowest rape conviction rates in Europe, with figures suggesting that less than 3% of rapes recorded by the police result in a conviction.

Engender welcomes the Sexual Offences (Scotland) Bill and wholeheartedly supports the comments made by The Equality and Human Rights Commission (EHRC) in their written evidence.

Engender shares the concerns of the EHRC with regard to definitions, consent and reasonable belief, sexual history and character evidence, sexual offences and older children, the role of the Gender Equality Duty and the wider challenges around public attitudes to rape.

#### **Conclusion**

Engender welcomes the Sexual Offences (Scotland) Bill and believes that this is an important step in improving legal responses to sexual offences in Scotland. However, changes within legal responses to rape must be matched by a commitment to challenge attitudes within Scottish society to women's behaviour and sexuality. Engender believes that it is absolutely essential to effect a fundamental shift in attitudes to women if we are to stand any chance of significantly improving the ability of our legal system to provide justice to women surviving rape and other sexual offences.

**For further information please contact:**

Niki Kandirikirira, Executive Director, 0131 558 9596,

[niki@engender.org.uk](mailto:niki@engender.org.uk) or Carol Flack, Policy Lead, [Carol.Flack@engender.org.uk](mailto:Carol.Flack@engender.org.uk)

## **Sexual Offences (Scotland) Bill Written Evidence at Stage 1**

### **1. Introduction**

- 1.1 The Equality and Human Rights Commission was established by the Equality Act 2006 and came into being on 1 October 2007. We are the independent advocate for equality and human rights across the three nations of Great Britain, and we work to reduce inequality, eliminate discrimination, strengthen good relations between people, and promote and protect human rights. We enforce equality legislation on age, disability, gender, gender reassignment, race, religion or belief, and sexual orientation and encourage compliance with the Human Rights Act. In Scotland, we co-locate and work in partnership with the Scottish Commission for Human Rights
- 1.2 The Commission welcomes this opportunity to comment on this timely and important piece of legislation. The Commission has a remit to protect and promote equality and our submission covers the areas which we believe have an equalities dimension, specifically gender, age and sexual orientation. The Commission has previously submitted evidence to the Scottish Law Commission's proposals for the reform of the law on rape and sexual offences<sup>i</sup>.
- 1.3 The Commission welcomes the Rape and Sexual Offences (Scotland) Bill. We have a number of specific comments to make, regarding definitions, consent and reasonable belief, sexual history and character evidence, sexual offences and older children, the role of the Gender Equality Duty (GED) and the wider challenges around changes public attitudes to rape. This last point is fundamental to the debate around changes to the law on rape and sexual offences in Scotland. Legislative change, however welcome, will not on its own lead to improved conviction rates for rape, nor will women have greater protection from crimes of sexual violence without a sustained challenge to widely held public attitudes to rape, in particular the still prevalent myth that a woman can in some way be responsible for being raped, depending on how she was dressed, or how much she had had to drink, or because of her sexual history. As the Lord Advocate stated in March 2008, "for as long as society is prepared to blame the

victim, we cannot begin to hope that it will blame the perpetrators, no matter what the law might say<sup>ii</sup>”.

## **2. Definition of Rape**

- 2.1 The Commission supports the Bill’s retention of the term rape (Section1). This definition conveys in specific terms the nature of the offence, while its separation from other sexual crimes denotes it as a specific and uniquely unacceptable of crime. . We also support the widening of the definition of rape to include oral and anal penetration, and the recognition inherent within this definition that any penile penetration without consent violates a person’s autonomy.
- 2.2 This move away from a common law definition of rape, which only covers penetration of the vagina, is also welcome in giving legal recognition that men can also be victims of rape. This, along with the removal of the outmoded offence of sodomy, means that the law on rape will apply without distinction to gender, gender identity or sexual orientation. This is to be welcomed.

## **3. Consent and Reasonable Belief**

- 3.1 The Commission also welcomes the statutory definition of consent as free agreement. However, the proposal to introduce the concept of “prior consent” to sex (Section 10, (2) (b)) is of serious concern to the Commission. It is very difficult to see under what circumstances an individual would wish consent to sexual activity at some point in the future when they would be asleep or unconscious. This provision also has the potential to undermine the provisions at Section 8 (Administering a substance for Sexual Purposes).
- 3.2 In addition, the provision at 10, (2) (c) is insufficient since it does not adequately capture the effect of historical abuse on a person’s ability freely agree to sexual activity. It is not clear how distant in time do previous instances (or threats) of violence have to be to be irrelevant? It does not address the impact that living in a relationship built on threats of violence and sexual coercion has on an individual’s capacity to freely agree to sexual activity. The Bill must seek to address the more insidious forms of violence and coercion that can accompany rape and sexual offences.

3.3 The reasonable belief provision in section 12 “regard is to be had to whether the person took any steps to ascertain whether there was consent or, as the case may be, knowledge; and if so, what those steps were” raises the question of how the court is to determine if any such steps were taken if the defendant refuses to provide evidence. How, without prejudicing a defendant’s right to silence, will section 12 achieve its aim? Can it be made explicit that an inference may be drawn from a defendant’s refusal to outline the steps taken to determine consent? The Commission would ask that the Committee considers that without such a provision if section 12 runs the risk of being meaningless.

#### **4. Children**

4.1 The Commission welcomes the provisions which protect children from rape and sexual offences, including the definition of rape for children under Section 13.

4.2 The Commission recognises the need for the law to take a different approach to consensual activity between older children aged 13 to 15 (section 27). The Commission recognises the need to retain a criminal justice response to sexual offences committed by older children on other older children, but believes that care must be taken to determine where a criminal justice response should take precedence over other interventions better able to reflect the character, needs and circumstances of individual children. A child protection and public health approach to older children who are, or may be, engaging in sexual activity would, we believe, be the more appropriate response in most instances.

#### **5. Sexual History and Character evidence**

5.1 Although the Bill does not contain provisions for the reform of the law on sexual history and character evidence this remains a crucial issue. At present 70 per cent of women in rape trials are asked questions about their sexual history and character. This questioning is intrusive and humiliating, and the prospect of enduring such questioning in court acts as a deterrent for some women not reporting a rape to the police. Seeking to disclose a woman’s sexual history in court can also entrench some of the

commonly held myths about women somehow being responsible for getting raped.

- 5.2 Related to this is the increased frequency of cases where a complainer's medical records are used in court. Again, the admission of irrelevant details about a person's mental and sexual health feeds into ingrained attitudes about a complainer's character and the validity of her evidence.
- 5.3 At the same time, there are currently restrictions on the admissibility in courts of "analogous convictions" – a defendant is obliged to reveal these if an application is made to question a complainer on her sexual history. However, the current definition of analogous conviction is very narrow – one recent example being a defendant on trial for the rape of his wife not being required to a previous conviction for her disfigurement[reference?]. This failure to recognise the commonality of crimes of violence and sexual violence against women must be addressed.

## **6. Challenging Public Attitudes**

- 6.1 The Commission welcomes the changes will offer further legal protection for victims of rape and other sexual offences and particularly improved protection for transgender people. However, it is important to be realistic about the impact that legislation can bring for women victims of rape and sexual offences.
- 6.2 Scotland has an alarmingly low conviction rate for rape; in 2006/07 convictions fell to a record low of 27 in 2006/2007. In the same year 922 rapes were reported to the police. This suggests that the conviction rate for rape has dropped to under 3% for the first time, with only 2.9% of rapes reported to the police leading to a conviction. Just 7% of reported rapes led to a prosecution, with the vast majority of cases not reaching court.
- 6.3 Sexist attitudes towards women victims of rape are well documented; 30% of people believe that victims of rape are partially or totally responsible for the crime if they were drunk at the time with similar numbers blaming the victim where she behaved flirtatiously or wore revealing clothing.
- 6.4 If conviction rates for rape are truly to be improved the Commission strongly believes that there needs to be a fundamental shift in attitudes which blame women for sexual violence. These issues should be addressed across Scotland but

with particular attention on the criminal justice system to ensure that women victims have full access to justice.

## **7. The Gender Equality Duty**

- 7.1 The Gender Equality Duty has an important role to play in requiring police, prosecutors and the courts to assess the impact of policy and practice in the conduct of rape and sexual offences cases. The Commission recognises that work is ongoing in this area, with the Crown Office currently implementing the fifty recommendations made in a review of the investigation and prosecution of rape and sexual offences in Scotland<sup>iii</sup>. The Commission is planning to contribute to this debate with a research project later in 2008 looking at the role the Gender Equality Duty can assist public authorities in addressing violence against women, including rape and sexual violence.

## **Conclusion**

The Rape and Sexual Offences (Scotland) Bill heralds an important and much needed reform of Scots criminal law in this area, and the Equality and the Human Rights Commission welcomes its publication. We look forward to continuing to work with the Scottish Parliament, Scottish Government, as well as all the key actors in the criminal justice system and our partners in women's and equality organisations, as together, we look to address the wider policy and attitudinal changes which must accompany reform of the law

## **Equality and Human Rights Commission September 2008**

### **For further information please contact:**

Euan Page, Parliamentary Affairs Manager, 0141 228 5971,  
[euhan.page@equalityhumanrights.com](mailto:euhan.page@equalityhumanrights.com) or Helen Miller, Policy Officer,  
0141 228 5958,  
[helen.miller@equalityhumanrights.com](mailto:helen.miller@equalityhumanrights.com)

---

---

## References

<sup>i</sup> [www.equalityhumanrights.com/Documents/Scotland/ScotRapeandSexualOffences.doc](http://www.equalityhumanrights.com/Documents/Scotland/ScotRapeandSexualOffences.doc)

<sup>ii</sup> Rt Hon Elish Angiolini QC, speech to Rape Crisis Scotland Conference, “Legal Responses to Rape: Redressing the Balance”, Tuesday 4 March 2008, [www.copfs.gov.uk/Resource/Doc/6/0000375.pdf](http://www.copfs.gov.uk/Resource/Doc/6/0000375.pdf)

<sup>iii</sup> Crown Office and Procurator Fiscal Service, *Review of the Investigation and Prosecution of Sexual Offences in Scotland: Report And Recommendations*, June 2006  
[www.copfs.gov.uk/Resource/Doc/9/0000174.pdf](http://www.copfs.gov.uk/Resource/Doc/9/0000174.pdf)