

Scottish Law Commission Proposals for Reform of Law on Rape & Sexual Offences

Background

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, organizations 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 4% of rapes recorded by the police result in a conviction. Long-standing concerns over the response of the criminal justice system to the crimes of rape and sexual assault led in 2004 to Scottish Ministers asking the Scottish Law Commission to review the law relating to rape and sexual offences.

This review has now concluded, and the Scottish Law Commission has drafted a new Sexual Offences Bill which has been released by the Scottish Government for consultation.

Engender is pleased to submit its response to this consultation which wholeheartedly supports the recommendations of the briefing paper prepared by Rape Crisis Scotland.

www.rapecrisisscotland.org.uk/documents/BriefingPaper2008.pdf

Engender welcomes the proposed Sexual Offences Bill and recognizes that this represents one of the most significant opportunities for many years to reshape Scottish law on rape and sexual abuse as well as to eliminate the remaining discrimination on grounds of sexual orientation and gender identity.

The introduction of a new model of consent

Engender strongly supports the development of a statutory definition of consent: given the myths and prejudices which surround female sexuality and rape, it is essential that the law provides as clear a framework as possible as to what is meant by consent.

We support the Scottish Law Commission's proposed general definition of consent as being "free agreement". We also strongly support the inclusion of a non-exhaustive list of particular definitions comprising factual situations which denote the absence of consent and which therefore constitute in and of themselves (though by no means exclusively so) the act of rape.

However, we are concerned that there should not be the impression that this is some sort of checklist. It must be made absolutely clear that the scope of situations which constitute rape is very much wider than this narrow group and that the list is open to future additions. Furthermore, within the list of factual situations, we have serious reservations about potential problems posed by the wording of the first two of these proposed for inclusion in the list (**Recommendation 5 (a) and (b) & Draft Bill 10, (2), (a) & (b)**), in particular at the reference they make to giving advance consent:

The introduction of the idea of ‘advance’ consent into the law is very problematic, and would seem to go against the theoretical underpinning of the bill, which is that consent is not a contract, and can be withdrawn at any time. We would not, however, support the removal of alcohol and sleeping from this list.

Notice of a ‘defence’ of consent

Engender is opposed to the removal of the requirement for advance notice to be given if the accused plans to use a defence of consent. Although consent is the defence in the large majority of sexual offence trials, some women do not know, prior to the court case, whether the defence will be consent or mistaken identity. Advance notice should mean that complainers will know which defence will be used, and can perhaps prepare themselves emotionally for what this might mean. In addition, should the accused try to lead this defence after the trial has begun, he must first show cause as to why it was not introduced within the timeframe stipulated.

Consent: scope and withdrawal

Engender supports all of the proposed elements in the **Recommendations 6 and 7, and Draft Bill, Section 11**, and the rejection of any “implied escalation” of consent that this constitutes. It is a commonly held myth that a woman, having consented to engage in some level of intimate activity, loses the right to refuse consent to sex and it is vital that this is challenged directly within statute as well as elsewhere.

The issue of sexual offences

Definition of rape

Engender supports the broadening of the definition of rape to include penetration by a person with his penis not only of the vagina, but also of the anus or mouth of another person without that person’s consent.

We welcome that the proposed new law of rape will now include anal and oral rape of a woman or a man, and will fully include transgender people.

However, we feel strongly that sexual penetration of someone with an object (non-penile penetration) without that person's consent should not form part of a broad spectrum of offences under the single heading of sexual assault, but should (as recommended in the SLC's original consultation paper) remain distinct from other forms of sexual assault as a separate offence of sexual penetration equivalent in severity to rape.

Communicating indecently

Engender supports the draft provisions on communicating indecently. However, at the moment, these would only apply where the Crown Office could prove that the accused's purpose was to obtain sexual gratification, or was for the purpose of humiliating, distressing or alarming someone. We therefore recommend that these provisions be extended to include circumstances where the accused is reckless as to whether his behaviour has this impact. (**Recommendation 20, Draft Bill Section 6**)

Mens rea

Currently in Scotland there is no requirement that any belief in consent held by the accused in rape or sexual offence trials is reasonable. This allows the accused to claim an 'honest belief' in consent even when it is not reasonable to hold such a belief. Engender strongly supports the move away from the subjective approach currently taken to establish mens rea.

We wholeheartedly support the decision of the Scottish Law Commission to reject the inclusion of the phrase "having regard to all circumstances" in any definition of reasonable belief, as we believe such a move would mean retaining a significant subjective element. We are of the firm view that the only test to belief in consent which would go any way to protecting a woman's sexual autonomy and right to bodily integrity is an objective test.

Engender also strongly supports the increased focus on the steps taken by the accused to ensure that consent was given (**Recommendation 22, Draft Bill, Section 12**) and hopes that a more just and appropriate division of courtroom scrutiny will emerge from this provision.

Offences based on a protective principle

Engender welcomes the introduction of a specific offence entitled rape of a young child and the communication of the particular gravity of this offence that this description affords.

We also welcome the abolition of the common law offences of lewd and libidinous practices.

With regard to the proposals around older children, we note that the provisions proposed in **Recommendations 28 and 29, and Draft Bill Sections 21–26** represent a significant change from the current common law, and also from the Scottish Law Commission's original position.

Engender is concerned that the proposed changes (which effectively de-criminalise sex between older children) might potentially reduce the extent to which young people are protected, and might also limit options for prosecutors.

If these changes are to be implemented, we would need to be satisfied that there exists sufficient evidence that there are significant problems with the current legal framework in this area, given that there is already a policy of non-prosecution in cases involving consensual intercourse between children aged 13 to 16. If there are problems with current practice, consideration should be given to whether any issues can be addressed through the issuing of new guidelines to police and other relevant agencies.

Evidence

Engender is disappointed that the opportunity to address the very real difficulties presented by matters of evidence in rape trials will not accompany the rest of the proposed new legislation at this time.

Legal change in respect of evidence is one development which could greatly increase the chances of rape complainers of receiving justice. By failing to tackle this most problematic aspect of sexual offence trials directly alongside closely related legislation on rape and other sexual offences, the benefits that would accrue to an integrated approach and the rounded legislation that would result from that are not to be found here.

We are aware that the Scottish Law Commission is conducting a separate review on matters of evidence which will hopefully address issues such as corroboration and the Moorov doctrine and we believe it is vital that every possible avenue that might lead to improvement is explored and implemented sooner rather than later.

The use of sexual history and character evidence in rape trials is another key omission from this consultation and the Draft Bill it has produced. A recent evaluation commissioned by the Scottish Government of legislation designed to protect complainers from this type of irrelevant and intrusive questioning found that 7 out of 10 women in rape trials will be asked about their sexual history or character. It is completely unacceptable that women in Scotland continue to be treated in this way.

Engender accepts that the Scottish Government has already legislated twice in this area, but there can be no doubt that the provisions to which these efforts have led have failed to protect women in Scotland. It is crucial that this aspect of the law remains under regular review, to determine whether or not further legislation is required.

Following on from the same research findings, Engender also urges the Scottish Government to broaden out the definition of “analogous convictions” (to include other forms of violence against women) which the accused is obliged to reveal if an s.275 application is made in his defence to question the complainer on her sexual history or character. This is in light of the findings that revealed, for example, that a man who had a previous conviction for disfiguring his wife was not obliged to disclose that in the course of his trial for her rape, as it was not considered to be an analogous conviction.

Offences based on public morality

Engender is entirely opposed to the inclusion of legislation related to sado-masochistic practices in this Bill (**Recommendation 57, Draft Bill Section 37**) and sees this as wholly inappropriate. In particular, the recommendation that “It should not be the crime of assault for one person to attack another where (b) the purpose of the attack is to provide sexual gratification to one or other (or both) of the parties, and the parties agree to that purpose” causes us significant concern at the possibility that it may be used as a defence in rape or domestic abuse cases.

Closely related considerations

Engender is of the view that close examination of the caution currently issued on arrest might have a part to play in restoring the balance of focus in the courtroom as it would have a significant impact on the accused’s decision to give evidence, in addition to the encouragement to do so provided by the new provisions around mens rea.

Evaluation and Review of Rape and Sexual Offences legislation

Engender feels that the benefits offered by the proposed legislation will be far more sustainable if it is subject to evaluation and review on a regular basis (e.g. every 2 years).

Conclusion

Engender welcomes the Scottish Law Commission's Report and believes that the new Sexual Offences Bill is an important step in improving legal responses to rape in Scotland. However, we also strongly feel that it can't be seen in isolation from wider changes which are required. This includes issues relating to the laws of evidence which will be considered as part of a further, broader, Scottish Law Commission review.

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.

Respondent Information

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We are happy for our response to be made available to the public (in the Scottish Government library and/or on the Scottish Government website)

We are happy for the Scottish Government to contact us again in the future in relation to this consultation response.