

BRIEFING PAPER

Abusive Behaviour and Sexual Harm (Scotland) Bill

Background to the Bill

The Abusive Behaviour and Sexual Harm (Scotland) Bill was introduced in the Parliament on 8th October 2015 by Michael Matheson MSP, Cabinet Secretary for Justice.

In June 2014, the Scottish Government published *'Equally Safe: Scotland's Strategy for Preventing and Eradicating Violence Against Women and Girls (VAWG)'*. This Strategy, published following consultation with civic society, set out the Government's ambition to ensure that everyone in Scotland is equally safe and where women and girls are able to live free from abuse. Some of the priorities set out included the importance of early and effective interventions, as well as men desisting from all forms of VAWG.

In March 2015, the Scottish Government published the consultation *Equally Safe - Reforming the Criminal Law to Address Domestic Abuse and Sexual Offences*. This consultation sought views on whether a specific offence of domestic abuse would make the prosecution of such cases more effective and better reflect the nature of the crime. It also sought views on a proposal to create a specific criminal offence to address the increasing issue of non-consensual sharing of private, intimate images, often by ex-partners, referred to as 'revenge porn'. A number of other areas were considered, including the introduction of statutory jury directions in sexual offences cases and expanding the remedies available to protect victims from harassment.

Following the consultation, the Abusive Behaviour and Sexual Harm (Scotland) Bill was introduced.

This Briefing Paper provides a summary of the key points raised in the Bill. The SWC have been involved in the aforementioned consultation processes and welcome the provisions put forward, which aim to further tackle specific areas and instances of VAWG.

Part 1: Abusive Behaviour

1. Aggravation of offence where there is abuse of a partner or ex-partner.

This means that if, for example, a person is convicted of assaulting their partner, or ex-partner, and this has taken place in the context of a domestic abuse situation, then the courts can impose a tougher sentence on the convicted person.

An offence is aggravated if:

- The person committing it intends to cause their partner (or ex-partner) to suffer physical or psychological harm, or
- The person shows no regard to the consequences of their actions as to the physical or psychological harm they cause to the victim.

It does not matter if the offence does not actually cause harm to the victim - all that is required is that there was intent or recklessness which could have done so.

Where an offence is found to be aggravated, this must be recorded and taken into account by the judge when deciding the length of sentence that the person who committed the offence is given.

- If the sentence is longer than it would have been without the aggravator, the sentencing judge must state why (i.e. **The assault was part of a pattern of abusive behaviour, therefore it must be sentenced in a different way than if it was a one-off event**).



2. Disclosing, or threatening to disclose, an intimate photograph or film.

This part of the Act relates to offences around so-called 'revenge porn', the increase of which is having a significant impact on women.

A person (A) commits an offence if they:

- Disclose, or threaten to disclose, a photograph or a film which shows (or appears to show) the other person (B) in an intimate situation.
- Their intent in doing this is to cause fear, alarm or distress to B or they show no regard that what they are doing will cause fear, alarm or distress.
- The photograph or film has not already been disclosed to either the public in general or any section of the public by B or with B's consent.

A disclosure happens if the image or film is given, shown or made available to a person other than A or B.

A has a defence if any of the following can be proven:

- B consented to the image being disclosed.
- A reasonably believed that B had given their consent for the disclosure of the image or film.
- There was reasonable belief that the image or film had to be disclosed for the purposes of prevention, detection, investigation or prosecution of crime.
- There was reasonable belief that disclosure was in the public interest.

These defences only exist if:

- **B** was the person in the intimate situation.
- They were not in that intimate situation as a result of the deliberate act of another person which they did not agree to.
- When **B** was in the intimate situation, they were in a place where members of the public had access and were present.

An **intimate situation** occurs where a person engages, participates in or is present during an act which a reasonable person would consider to be a sexual act, which is not ordinarily done in a public setting.

A person who commits this type of offence is liable to two different maximum sentence lengths, depending on how they have been convicted.

- If it is a **summary conviction**, they are liable to a sentence of no more than **12 years**, or a **fine of no more than the statutory minimum**, or both.
- If it is a **conviction on indictment**, they are liable to a sentence of no more than **5 years**, or a **fine**, or both.
- **Summary convictions** occur in where a person is prosecuted in front of a sheriff sitting alone - i.e. without a jury.
- **Conviction on indictment** are criminal offences which are prosecuted before a jury.



Part 2: Sexual Harm

6. Jury directions relating to sexual offences.

Jury directions are given by a judge to the jury before they consider their verdict. Jury directions ordinarily include matters which they jury should take into consideration when making their decision.

A judge can make directions to a jury in the following cases where evidence is given which suggests that the victim:

- Did not tell, or delayed in telling, anyone about the offence; or
- Did not report, or delayed reporting, the police.

In giving these directions, the judge must advise that there can be good reasons as to why a person who is a victim of a sexual offence may not tell anyone what has happened to them. **This does not mean that the allegation is false.**

- **The aim of this is to take away potential preconceived ideas and stigma that juries may have towards victims of sexual offences.**

A judge can also make directions where evidence suggests that the sexual activity took place without the use of either physical force by the person committing the offence, or physical restraint by the victim. Again, the judge must advise that there are good reasons as to why physical force may not be used (e.g. where the victim is asleep or unconscious) or where physical resistance may not be used (e.g. where the victim is frozen in fear and is unable to offer resistance).

Part 3: Sexual Harm Prevention Orders

A **Sexual Harm Prevention Order (SHPO)** is an order designed to protect the public from those who have committed a sexual offence. They can be given by the courts in the following circumstances:

- Where a person is being **sentenced for a sexual offence**, following conviction.
- Where a person has been **acquitted**, because they have been unable to fully understand what they have done and why it was wrongful.
- Where the accused is found **unfit to stand trial**, for either physical or mental health issues. In this circumstance, there must be a finding that the person has in fact carried out the offence.

The court must be satisfied that an SHPO is necessary to protect the public from sexual harm. Each aspect of the order is for a fixed period of time, as is the overall SHPO itself.

A **Sexual Risk Order (SRO)** differs from a SHPO. It can be **made where a person has not previously been convicted of a sexual offence**, but their behaviour indicates a risk that others may be harmed. Intervention is, therefore, necessary to prevent that harm.

The Chief Constable of Police Scotland can apply to a Sheriff for a SRO against a person. The order can only be made if the Sheriff is satisfied that the person the order is to be made against has done an act of a sexual nature; and an order is necessary in order to protect the public.



For further information on the Bill, from introduction to its passing, visit:

To read the Scottish Women's Convention Responses to consultations which have influenced the creation and passage of the Bill, visit: