

Sexual Offences (Scotland) Bill

Evidence to the Justice Committee

11th September 2008

Equality Network, 30 Bernard St, Edinburgh, EH6 6PR

Tel: 07020 933 952

en@equality-network.org

www.equality-network.org

The Equality Network is a network of around one thousand lesbian, gay, bisexual and transgender (LGBT) individuals and organisations in Scotland, working for LGBT equality. The Equality Network's policy work is based on consultation with LGBT communities across Scotland, and reflects the concerns that LGBT people have raised with us. We welcome the opportunity to provide evidence to the Justice Committee on the Sexual Offences (Scotland) Bill. Our evidence covers only those parts of the bill where we have identified an LGBT equality impact.

Overall, we very much welcome the bill, which removes most of the remaining discrimination on grounds of sexual orientation and transgender identity, from sexual offences law. However, there are a small number of areas where we feel the equality impact of the bill could be improved.

In their report which formed the basis for the bill, the Scottish Law Commission (SLC) noted that the European Convention on Human Rights prohibits sexual orientation discrimination in the enjoyment of Convention rights. Article 8 of the Convention can be engaged by sexual offences laws¹. The SLC concluded that "A further guiding principle is that the law on sexual offences should not involve distinctions based on sexual orientation"².

Although the SLC did not explicitly set out a principle for their draft bill of non-discrimination on grounds of transgender identity, it is well established that a failure to respect the gender identity of transsexual people can breach their Convention rights³. The bill includes provisions

¹ E.g., L. & V. v. Austria, 2003; A.D.T. v. UK, 2000

² Paragraph 1.29, Report on Rape and Other Sexual Offences, Scot Law Com no. 209

³ Goodwin v. UK, I. v. UK, 2002

intended to ensure that transsexual people are equally protected by the law.

We particularly welcome the following aspects of the bill, which remove significant inequalities from the current law.

Definition of rape

At present, male rape cannot be charged as rape, and is instead prosecuted as sodomy, a crime that is inappropriately defined⁴ and not widely understood. Section 1 of the bill widens the definition of rape to include vaginal, anal or oral penetration with the penis, regardless of the gender of the victim.

At present, it is unclear whether a rape of a transsexual woman, or a rape perpetrated by a transsexual man, could be prosecuted as rape. Section 1 of the bill is gender-neutral for both the victim and perpetrator, and subsection (4) ensures that the definitions of “vagina” and “penis” include surgically constructed parts. This means that transsexual people will be fully covered by the law, regardless of whether they have obtained a gender recognition certificate.

Gender anomalies in penalties

At present, some penalties for statutory sexual offences against older children are different according to the genders of the people involved. Where an adult man engages in sexual activity with a boy of 15, the maximum penalty in statute is two years⁵, while it is ten years where a man or woman engages in sexual activity with a girl of 15⁶. It may not be an offence at all at present for an adult woman to engage in sexual activity with a boy of 15. The bill removes these anomalies, by introducing a consistent set of gender neutral offences which protect young people equally.

⁴ The crime of sodomy currently covers a range of acts, including male rape, but also including, for example, consensual sex between men in the bushes of a park

⁵ S. 13 of the Criminal Law (Consolidation) (Scotland) Act 1995

⁶ S. 6 of the Criminal Law (Consolidation) (Scotland) Act 1995

Outdated and discriminatory language

The law still uses outdated and offensive language to describe sex between men: “gross indecency” (originally meaning any sexual activity between men) and “sodomy”.

The bill replaces what the law currently distinguishes as “homosexual offences”, that is, the common law crime of sodomy, and section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995, with gender neutral offences. With one exception, discussed below, the bill does away with the out of date and discriminatory language.

Remaining problems with the bill

We welcome all these changes, but there are three areas, described below, where we believe that the bill does not completely fulfil its promise of eliminating sexual orientation and gender identity discrimination from sexual offences law.

Surgically constructed body parts

As noted above, section 1(4) of the bill extends the definitions of “penis” and “vagina”, for the purposes of the whole bill, to include surgically constructed parts. This ensures that transsexual people are fully covered by the law. However, the language chosen by the drafters – “artificial penis” and “artificial vagina” – is very unsatisfactory. A surgically constructed penis or vagina would not be referred to by a gender reassignment specialist, or by a transsexual person, as “artificial”.

For obvious reasons, transsexual people find the term “artificial” to be problematic – it is considered discriminatory and offensive to refer to their genitals as “artificial”. The same standards of language should be used here as when referring to any other surgically constructed body part.

An artificial leg is a prosthetic one, made of inanimate material such as plastic or metal. A living leg which has been surgically reconstructed after an accident would not be called “artificial”. A toe which has been re-implanted onto a hand to replace a missing thumb is not an artificial thumb – it is a surgically constructed, living thumb.

The term “artificial penis” would mean in standard usage an inanimate penis-shaped object, which is why section 1(4) as it stands requires to include the further qualification “if it forms part of A/[B]”.

These problems could be easily removed, by using language similar to that in the corresponding provision in English law (section 79(3) of the Sexual Offences Act 2003), which reads “References to a part of the body include references to a part surgically constructed (in particular, through gender reassignment surgery).”

We therefore recommend that section 1(4) of the bill be amended to read:

(4) In this Act –

“penis” includes a surgically constructed penis, and

“vagina” includes –

(a) the vulva, and

(b) a surgically constructed vagina (together with any surgically constructed vulva).

Retention of some “homosexual offences” legislation

Schedule 5 to the bill repeals most of section 13 (“homosexual offences”) of the Criminal Law (Consolidation) (Scotland) Act 1995. This reflects the replacement of offences in that section with gender neutral offences in the bill.

However, subsections (9) and (10) of section 13 of the 1995 Act cover offences dealing with male prostitution, and prostitution was specifically excluded from the scope of the Scottish Law Commission project which led to the development of this bill. Subsections (9) and (10) of section 13, along with subsection (4), which provides a definition, and part of subsection (11), which places a time bar on proceedings brought under subsection (9), are therefore not repealed by the bill.

Section 13 of the 1995 Act, as amended by the bill in its current form, would read as follows:

13 Homosexual offences

- (4) In this section, “a homosexual act” means sodomy or an act of gross indecency or shameless indecency by one male person with another male person.

- (9) A person who knowingly lives wholly or in part on the earnings of another from male prostitution or who solicits or importunes any male person for the purpose of procuring the commission of a homosexual act within the meaning of subsection (4) above shall be liable—
 - (a) on summary conviction to imprisonment for a term not exceeding six months; or
 - (b) on conviction on indictment to imprisonment for a term not exceeding two years.

- (10) Premises shall be treated for the purposes of sections 11(1) and 12 of this Act as a brothel if people resort to it for the purposes of homosexual acts within the meaning of subsection (4) above in circumstances in which resort thereto for heterosexual practices would have led to its being treated as a brothel for the purposes of those sections.

- (11) No proceedings for any offence under subsection (9) above which consists of soliciting or importuning any male person for the purpose of procuring the commission of a homosexual act shall be commenced after the expiration of twelve months from the date on which that offence was committed.

In our view this is highly unsatisfactory, for a number of reasons.

Firstly, the offence of “soliciting or importuning” in subsection (9) does not appear to be restricted to soliciting or importuning for the purposes of male prostitution. We are very concerned about the retention on the statute book of an (albeit not recently charged) offence that, on its face, potentially criminalises any man who proposes to another man that they engage in sexual activity. Subsection (9) should be amended to ensure

that it only catches soliciting and importuning for purposes of prostitution.

Secondly, “homosexual act” is defined in subsection (4) by reference to three offences which are already or will become obsolete. The common law crime of shameless indecency was effectively abolished by a bench of five judges of the High Court in *Webster v. Dominick* in 2003. It was replaced by an offence of more limited scope under the name of public indecency. The bill itself abolishes the common law crime of sodomy, and repeals the statutory offence of gross indecency for all other purposes.

Thirdly, the retention of the terms “gross indecency” and “homosexual offences” is inconsistent with the principle of equality. It is absurdly outdated, and offensive that, in the age of civil partnerships, sexual acts between men should be described in statute as “gross indecency”. The small parts of section 13 that remain are not accurately described as “homosexual offences” – they are offences relating to male prostitution.

To provide complete equality, we believe that the remaining parts of section 13 of the 1995 Act – subsections (4) and (9) to (11) – should ideally be replaced by amendments to relevant parts of existing legislation relating to prostitution (for example on living on the earnings of prostitution and brothel-keeping), to ensure that it covers both female and male prostitution.

If it is felt that these amendments to prostitution law fall outwith the scope of the bill, then this bill should certainly make appropriate minor amendments to section 13 of the 1995 Act, consequential on the other provisions in the bill. Amendments to section 13 should be appended to paragraph 1 of schedule 4 to the bill, to:

- **limit the scope of the soliciting and importuning offence in subsection (9) to ensure that it covers prostitution related behaviour only, since the rationale for retaining subsection (9) is that it deals with prostitution related offences;**
- **remove from subsection (4) the references to offences already obsolete or made obsolete by the bill, for example by redefining “homosexual act” simply as a sexual act between men; and**
- **replace the title of the section (“Homosexual offences”) with a title which is properly descriptive of the purpose of the**

remaining parts of the section, and less discriminatory, such as “Offences relating to male prostitution”.

Rape with an object

The bill classes sexual penetration, without consent, with something other than the penis, as a sexual assault. Sexual assault will be a very wide crime, ranging from rape with an object, through to the less serious kinds of touching through clothing. Sexual assault will inevitably be seen generally as a less serious crime than rape, just as indecent assault is now.

We believe that this does not deal seriously enough with non-penile rape.

In the case of a sexual assault by a woman on another woman, there may be forced penetration with the hand or with an object. This is experienced as a form of rape. We believe that, for example, where a woman is raped in this way by her female partner, this should be taken as seriously by the law as the rape of a woman by her male partner. To do otherwise could be said to be a form of indirect sexual orientation discrimination.

English law includes a specific offence of assault by penetration, but we feel that the word “rape” is an important one to use in this context.

We recommend that an offence of “rape with an object” should be introduced, to cover sexual penetration, without consent, of the vagina or anus with any part of the body or with anything else.

In effect, this would separate out part of section 2(2)(a) of the bill into a separate offence. A parallel change would be needed to the set of offences against young children.