

Scottish Law Commission report on rape and other sexual offences

Submission to the Scottish Government

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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 respond to the Scottish Government's consultation on the Scottish Law Commission's report on rape and other sexual offences. Our response covers only those parts of the proposals where we have identified an LGBT equality impact.

Background – issues with the current law

The most direct forms of historic discrimination, on grounds of sexual orientation, have been removed from sexual offences law. Sex between men over 21 was legalised by the Criminal Justice (Scotland) Act 1980. The 'age of consent' for such sexual activity was reduced from 21 to 18 by the Criminal Justice and Public Order Act 1994, and to 16 by the Sexual Offences (Amendment) Act 2000. The rule that sexual activity between men was always criminal if more than two people took part was repealed by the Convention Rights (Compliance) (Scotland) Act 2001.

Generally speaking, the kinds of sexual activity that are legal between women and men are now legal between people of any gender. However, significant sexual orientation discrimination remains in Scotland's sexual offences law. For example:

- Male rape cannot be charged as rape, but instead is charged as "sodomy", a crime that is outdated and not widely understood.

- Penalties are different for some statutory offences 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 statute¹ is much lower than where the sexual activity is with a girl of 15². It cannot be right to suggest that the offence cannot be as serious when committed against a boy.
- The law still uses outdated and offensive terminology to describe all sex between men: “gross indecency”³ and “sodomy”. It is absurd, in the era of civil partnerships, to term all sexual acts between men “gross indecency”.

Similar anomalies existed in English law until recently, but have been abolished. Rape was extended to include male rape by the Criminal Justice and Public Order Act 1994, and the remaining sexual orientation discrimination in the law was removed by the Sexual Offences Act 2003.

Scots sexual offences law may also discriminate on grounds of transgender identity. We are not aware of any cases, but it is at present unclear whether a charge of rape would be competent in a case involving a transsexual person as complainer or accused. There are two potential problems:

- The legal gender of the transsexual person. For example, where a transsexual woman who has had genital gender reassignment surgery, but has not yet obtained a gender recognition certificate (and is therefore legally a man) is raped, it may be that the court would rule that a charge of rape does not apply, because her legal gender is male.
- Even where the gender of the transsexual person is not an issue, it is unclear whether the court would accept that an act of rape involving surgically constructed genitalia could constitute the crime of rape at present.

Again, these anomalies were dealt with in English law by the Sexual Offences Act 2003.

¹ Two years, under section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995

² Ten years, under section 6 of the 1995 Act

³ Section 13(4) of the 1995 Act

Principle of non-discrimination

Sexual orientation

At paragraph 1.29, the Scottish Law Commission (SLC) report states, “A further guiding principle is that the law on sexual offences should not involve distinctions based on sexual orientation ...” We welcome this principle, and strongly support it. It is consistent with the equality commitments of the Scottish Government and Parliament, with the need to respect human rights, and with the direction of Scottish policy and legislation since devolution.

In particular, the SLC report notes at paragraph 1.31(3) that the European Convention on Human Rights prohibits sexual orientation discrimination in the enjoyment of Convention rights. Article 14 of the convention prohibits discrimination⁴ when any other article is engaged, and it is well established that article 8 (right to respect for private and family life) can be engaged by issues of sexual offences law⁵.

Consistent with their stated non-discrimination principle, and the ECHR imperative, the SLC state at paragraph 1.33, “We recommend that existing laws prohibiting consenting homosexual conduct should be abolished or repealed”. We welcome this.

Transgender identity

We note that, in the cases of *Goodwin v. UK* and *I. v. UK* (2002), the European Court of Human Rights found that the UK’s then failure to recognise the gender identity of transsexual people breached articles 8 and 12 of the Convention. We consider that any failure of sexual offences law to properly protect transsexual people could breach article 8, or article 14 in conjunction with article 8.

Although the SLC have not explicitly stated a principle of non-discrimination on grounds of transgender identity, they have effectively applied such a principle in their detailed proposals. We therefore welcome the effect of the SLC’s proposals, which is that transgender people will be fully covered by the proposed legislation.

⁴ Including on grounds of sexual orientation, e.g., *Salgueiro da Silva Mouta v. Portugal*, 1999

⁵ E.g., *L. & V. v. Austria*, 2003; *A.D.T. v. UK*, 2000

Rape

We very much welcome the extension of the scope of the crime of rape to include penile penetration, without consent, of the vagina, anus or mouth. We equally welcome the proposal that the law of rape should be gender neutral.

These changes will mean that:

- for the first time, rape of a man will be included in the scope of the crime, and
- rape of, or committed by, a transsexual person will be included regardless of the person's legal gender.

We also welcome the clarification, set out in paragraph 3.31 of the report and section 1(4) of the draft bill, that surgically constructed genitalia are included in the definitions of penis and vagina (for all purposes in the draft bill). This will further ensure that there is no bar to the application of appropriate offences to cases involving transsexual people.

However, we do not think that the language used in section 1(4) of the draft bill is entirely satisfactory. Parts of the body that have been reconstructed by surgery, whether limbs, genitals or any other part of the body, would not normally be referred to as "artificial". That term is usually reserved for prosthetic parts made of plastic or other materials, such as an artificial leg.

The term "artificial" is therefore not appropriate, we think, to describe surgically constructed genitalia. We note that the equivalent English provision, section 79(3) of the Sexual Offences Act 2003, uses the phrase "a part surgically constructed", and does not use the word "artificial".

We recommend that the word "artificial" be removed from the references in the draft bill to surgically constructed genitalia.

Penetration other than with the penis

The draft 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 as a less serious crime than rape, just as indecent assault is now. That perception is reinforced by the rule that rape, but not sexual assault, can only be prosecuted in the High Court.

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

We note, for example, that 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.

We note that English law includes an 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 penetration, without consent, of the vagina or anus with any part of the body or with anything else. This offence should be prosecuted in the High Court only.

This would also have the advantage of dealing better with the situation where a person is raped, but it cannot be proved whether this was with the penis or with something else.

“Homosexual offences”

We welcome the proposal, in paragraph 5.9 of the SLC’s report, that “all existing offences which relate to homosexual conduct should be removed”. This is consistent with the principle of non-discrimination set out by the SLC and discussed above.

We note that recommendations 53 and 54 of the SLC report implement this proposal, but with one omission, which we discuss below.

Recommendation 53 results in the abolition of the common law offence of sodomy. This is entirely appropriate. Sodomy is a gender specific crime, which is replaced by the new offences of rape, rape of a young child and intercourse with an older child.

Recommendation 54 results in the repeal of most of section 13 (“Homosexual offences”) of the Criminal Law (Consolidation) (Scotland) Act 1995. Again, this is entirely appropriate. All the offences repealed are gender specific, and are replaced with other crimes including rape, sexual assault, a range of sexual offences against children, and public indecency.

We are very concerned, however, that recommendation 54 excludes the provisions of section 13 which relate to prostitution. This is because prostitution was specifically excluded from the scope of the SLC’s study. This has resulted in a glaring anomaly, where a small part of the section 13 (“Homosexual offences”) legislation is left on the statute book by the repeals in schedule 4 to the draft bill.

Specifically, section 13(9) and (10) would remain, together with section 13(4) which provides a definition for use in subsections (9) and (10). Subsection (9) deals with pimping and procuring for the purposes of male prostitution, while subsection (10) extends the definition of brothel used in sections 11 and 12 of the Criminal Law (Consolidation) (Scotland) Act 1995 to include brothels used for male prostitution.

Retaining subsections (4), (9) and (10) of section 13 is highly unsatisfactory. It is contrary to the non-discrimination principle, because different laws would continue to apply to some aspects of male and female prostitution. It also means the retention of the highly offensive definition of “homosexual act” in section 13(4) – a definition in terms of “sodomy”, “gross indecency” and “shameless indecency”.

The absurdity of this is highlighted by the fact that, if the SLC’s proposals for change are adopted, all three parts of the definition in section 13(4) will refer to abolished crimes: sodomy and gross indecency which are abolished by the draft bill, and shameless indecency which was abolished by the High Court judgment in *Webster v. Dominick* in 2003.

It is right that prostitution law should cover male and female prostitution, and the law should cover them equally. We note that the prostitution legislation dealing with soliciting, in section 46 of the Civic Government (Scotland) Act 1982, and the Prostitution (Public Places) (Scotland) Act 2007, covers male and female prostitution equally.

The provisions of sections 13(9) and (10), dealing with male prostitution related pimping, procuring and brothels, could similarly be consolidated into the relevant legislation in the Criminal Law (Consolidation) (Scotland) Act 1995 dealing with female prostitution.

We therefore recommend that the remaining parts of section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 (that is, subsections (4), (9) and (10)) should be replaced, by either:

- **amending the legislation in the same Act on pimping, procuring and brothels, in relation to female prostitution, to extend it to cover male prostitution, or**
- **replacing section 13 with a new section 12A which extends the legislation in the Act on pimping, procuring and brothels, to cover male prostitution, and which does so without using the outdated and discriminatory language of “homosexual offences”, “sodomy”, “gross indecency” and “shameless indecency”.**

Other proposals

We welcome that the proposals on “protective principle” laws follow the principle of non-discrimination, as set out in paragraph 4.17 of the report, and remove the current inconsistencies in the protections for girls and boys.

We welcome that the offence of public indecency, defined by the High Court in *Webster v. Dominick* in 2003 and discussed in paragraph 5.11 of the report, will continue to be a public order offence that is gender and sexual orientation neutral.