

Equally Safe – Reforming the criminal law to address domestic abuse and sexual offences



RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Title Mr Ms Mrs Miss Dr *Please tick as appropriate*

Surname

Forename

2. Postal Address

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3. Permissions - I am responding as...

Individual <input checked="" type="checkbox"/>	/	Group/Organisation <input type="checkbox"/>
<i>Please tick as appropriate</i>		

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate Yes No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate Yes No

CONSULTATION QUESTIONS

1. Does the existing criminal law provide the police and prosecutors with sufficient powers to investigate and prosecute perpetrators of domestic abuse? Yes / No (if No, please specify how the existing law should be strengthened)

Yes No

Comments: I am answering this consultation only in respect of Parts 2-5.

2. One of the ways in which it has been proposed the law could be strengthened is through the creation of a specific criminal offence concerning domestic abuse. Do you agree that this would improve the way the justice system responds to domestic abuse?

Yes No

Comments Not applicable: see 1 above.

3. What behaviours which are not currently criminalised should be included within the scope of a specific offence?

Comments Not applicable: see 1 above.

4. Should any specific offence of 'domestic abuse' be restricted to people who are partners or ex-partners, or should it cover other familial relationships?

Comments Not applicable: see 1 above.

5. Are there any other comments you wish to make about the creation of a specific offence of domestic abuse?

Comments Not applicable: see 1 above.

6. Do you think that there should be a statutory aggravation that a criminal offence was committed against a background of domestic abuse being perpetrated by the accused? Yes/No if no, please give reasons for your answer

Yes No

Comments Not applicable: see 1 above.

7. If you think that there should be a statutory aggravation of this kind, do you think this should be in addition to, or instead of, a specific statutory offence of 'domestic abuse'? Give reasons

Comments Not applicable: see 1 above.

8. Do you agree that it should be a specific criminal offence to share private, intimate images of another person without their consent? If no, give reasons

Yes X No

Comments I have no comment to make in response to this question.

9. Do you agree with the proposal that the offence should be restricted to images?

Yes X No

Comments The consultation paper does not identify any problem in relation to items other than images which an offence would seek to address. Such an offence could give rise to particular difficulties, particularly if the other elements of the offence were broadly defined. The negligent disclosure of medical records or other personal information, for example, might well be very distressing to the individual concerned. There would be a danger of creating a broad offence of criminal infringement of privacy without proper consideration being given to the difficulties such an offence would create.

10. Should the types of images that should be covered by the offence should be based on the definition of a 'private act' contained at section 10 of the Sexual Offences (Scotland) Act 2009? Or do you think a definition which defines an image as 'private and intimate' if the person featured in the image and the person sharing the image understand it to be such would be more appropriate?

Comments Neither. The points in the consultation paper about the uncertainty of a "private and intimate" image are well made. I would add that the use of "intimate" rather than "sexual" could leave the offence particularly broad – much medical imaging, for example, might be "intimate" but not "sexual", as might a photograph of a chaste kiss or even a hug.

There is a perfectly good definition in section 35 of the Criminal Justice and Courts Act 2015 which could be used here. I understand the reluctance simply to import English provisions, but section 10 of the 2009 Act is itself an English import (from section 68 of the Sexual Offences Act 2003). Better to import an appropriate English provision directly than an inappropriate one second-hand!

The section 10 definition is inappropriate here, because it is concerned with whether the *occasion* is private, whereas the relevant question here is whether the *image* is private. Consider, for example, a couple who have engage in a sexual act in a public place, and choose to photograph the act. The act will not be caught by section 10 of the 2009 Act, because they are not in a place that would reasonably be expected to provide privacy. But

distribution of the image might well be humiliating – perhaps even in part *because* the location was not private – and such an image should be caught by the legislation. Section 35 of the 2015 Act would catch such an image, and rightly so.

11. Do you agree that the offence should be framed so that a person commits an offence where they share a private image of another person and they knew or ought to have known that its sharing/distribution would be likely to cause that person alarm or distress

Yes No

Comments No. The fault element set out in section 33 of the English legislation is appropriate. The paper refers to the fact that this would “place the burden on the Crown to *prove* the motivation of the accused person in sharing the images”. The burden of proof on the prosecution is, however, a feature of our system, not a bug to be designed out in this way. In any case, the consultation paper suggests (para 2.3) that existing offences already permit prosecution, but that this offence may be justified for reasons beyond the need to prosecute itself (para 2.4) in which case designing the offence for ease of prosecution is not a convincing argument.

The consultation paper has chosen repeatedly to use the term “revenge porn” to describe this proposed offence (page 7, page 16, page 18). It is not appropriate to describe an offence as one of “revenge” and then prescribe that it can be committed by negligence alone. Conviction for this offence is likely to be highly stigmatic, and rightly so, and this demands that an appropriate level of fault be proven on the part of the accused before conviction.

12. Do you agree that it should be an offence to threaten to share private, intimate images of another person without their consent?

Yes No

Comments This conduct is surely clearly caught by the statutory offence of threatening or abusive behaviour (in discussing the existing law, the consultation paper refers at para 2.28 only to the common law offence of “blackmail”, which should read “extortion”). A new offence would add nothing to the criminal law and might require prosecutors to prove specific narrow points (such as the nature of the images) which they would not need to prove in a prosecution for threatening or abusive behaviour.

13. What level of maximum penalty do you think should apply for the new offence? Do you have any other comments regarding the penalties for the new offence?

Comments The 2 year maximum provided for in the corresponding English legislation seems appropriate.

14. Do you think that there should be statutory defences to the proposed offence of disclosing a private, intimate image?

Yes No

Comments See question 15.

15 If so, what defences do you think should be provided and why do you think they are needed?

Comments The defences specified in section 33 of the English legislation seem appropriate.

I note that the consultation paper appears to express some scepticism about the defence related to journalism, stating that “it is only in very limited circumstances that legitimate journalism in the public interest would involve the publication of intimate private images without the subject’s consent”.

However, I do not think that is the purpose of the journalistic defence. It may in some circumstances be appropriate to disclose images of the sort caught by the offence to a journalist. This does not mean that the journalist has a license to publish them. For example, if A alleges that B has sent A sexual images of C, there may be a legitimate public interest in a newspaper reporting A’s allegations. But a journalist would have to satisfy themselves that B’s allegations were honest and accurate, and it is difficult to see how that could be achieved without disclosure in some form. None of this would actually permit the newspaper concerned to publish the images.

16. Do you agree that there should be statutory jury directions which require the trial judge to make the jury aware that there may be good reasons why a victim of a sexual offence may not report that offence until some time after it has been committed and that this does not, in and of itself, indicate that the allegation is more likely to be false?

Yes No

Comments I express no view on this question or questions 16-19, except to suggest that the government might consider commissioning at least a literature review on such evidence as exists in relation to jury directions, or consider whether this might be incorporated into any programme of research, or work on jury directions, following on from the Post-Corroboration Safeguards Review. There may be a danger that mandatory jury directions could in some cases give undue prominence to certain facts and so have an effect contrary to that which would be intended by any such change.

17. Do you consider that the terms of the jury direction used in New South Wales, Australia, requiring the judge to warn the jury that the absence of complaint or delay in complaining does not necessarily mean an allegation is

false and that there may be good reasons why a victim of a sexual assault may hesitate in making, or refrain from making a complaint about the assault, is an appropriate model for a similar direction in Scots law?

Yes No

Comments See above.

18. Do you agree that there should be statutory jury directions which require the trial judge to make the jury aware that there may be good reasons why a victim of a sexual offence may not physically resist their attacker and that this does not indicate that it is false?

Yes No

Comments See above.

19. Do you have any comments on how such a statutory jury direction should be worded?

Comments See above.

20. Do you agree that non-harassment orders should be available to the court where the court is satisfied, following an examination of facts, that a person did carry out the acts constituting the offence with which they were charged?

Yes X No

Comments I see no problem with permitting this, but note that it is likely to be of assistance only in very rare cases.

21. If you do not support extending the circumstances in which the courts can make a non-harassment order in this way, do you have any views on other approaches that would protect victims from harassment or stalking by persons found unfit for trial?

Comments Not applicable.

22. Do you agree that the provisions concerning extra-territorial effect of Scots law on sexual offences against children should be amended to enable Scottish courts to prosecute offences committed in other jurisdictions within the United Kingdom?

Yes X No

Comments

I have two comments to make in relation to this proposal.

First: why only sexual offences? In a short article published in 1995 ("Murder in England or murder in Scotland?" (1995) 54 Cambridge Law Journal 488-491), Michael Hirst drew attention to a difficulty which might have arisen in the 1994 trial (in Newcastle) of Robert Black for murder. Two of his victims, Caroline Hogg and Susan Maxwell, had been murdered at places unknown which might have been either in Scotland or in England. Had the jurisdictional issue been argued at Black's trial (it was not) it might have prevented Black's convictions in respect of their deaths.

The same problem arises under Scots law. Section 11(1) of the Criminal Procedure (Scotland) Act 1995 gives the Scottish courts jurisdiction over murder or culpable homicide committed by British citizens or subjects outside of the United Kingdom. The problem noted at para 5.9 of the Consultation Paper could therefore arise in respect of homicide as well as sexual offences, and it would seem appropriate to consider a similar reform for homicide cases.

Secondly, some further work is required on the criteria to exercise jurisdiction. The Sexual Offences (Scotland) Act 2009 gives the Scottish courts jurisdiction over sexual offences committed by UK nationals and residents committed abroad. That is potentially slightly odd, as it permits the Scottish courts to exercise jurisdiction over someone with no connection to Scotland (other than via Scotland's place in the United Kingdom) but such cases are relatively rare and do not give rise to practical difficulties. If, however, these provisions were simply extended to cover other areas of the United Kingdom, the Scottish courts would be taking jurisdiction over almost every sexual offence committed anywhere in the entire UK. In due course, it might be expected that individuals unhappy that the CPS had decided that there was insufficient evidence to prosecute in a case in England and Wales, or that it was not in the public interest to do so, might campaign for Crown Office to bring a prosecution in the Scottish courts. Some limiting factor such as residence in Scotland (perhaps on the part of either the accused or the complainer) would seem necessary to make this exercise of jurisdiction legitimate and avoid the difficulties which might arise from an excessively broad provision.

23. Do you consider that any of the reforms proposed in this paper will have a particular impact - positive or negative - on a particular equality group (e.g. gender, race, disability, sexual orientation)

Yes No

Comments I have no comment to make in response to this question.

24. Are there any other issues relating to equality which you wish to raise in relation to the reforms proposed in this paper?

Comments No.

25. Do you have any comments or information on the likely financial implications of the reforms proposed in this paper for the Scottish Government (police, Scottish court service, prison service, COPFS), local government or for other bodies, individuals and businesses?

Comments No.

26. Do you consider that the any of the proposals would have an impact on island communities, human rights, local government or sustainable development?

Comments I have no comment to make in response to this question.

27. Do you have any other comments about the content of this paper?

Comments No.