

PE1773/B

Crown Office and Procurator Fiscal Service submission of 25 February 2020

I am writing in response to your request for views regarding Petition 1773 “*calling on the Scottish Parliament to urge the Scottish Government to update the Sexual Offences (Scotland) Act 2009 to include the offence of a man being raped by a woman.*”

I understand this to mean extension of section 1 of the Sexual Offences (Scotland) Act 2009 to include circumstances in which a woman compels a man to have penetrative sexual intercourse with her without his consent.

The Crown does not offer a view on the policy; but would like to set out the current legal position and the background.

In Chapter 3 of its ‘Report on Rape and Other Sexual Offences’ published in December 2007, the Scottish Law Commission examined the construction of the crime of rape, which is highly relevant to your consideration of this petition. I recommend examination of that part of the report and highlight, in particular, that the SLC formed the view that penile penetration of the complainer’s body should continue to be a key component of the crime of rape¹.

At paragraph 3.50, the SLC detailed its position on the specific issue that is raised in this petition and concluded that, as the complainer’s body was not being penetrated, such conduct should not be treated as ‘rape’:

3.50 “One such type of conduct is so-called ‘female rape’, that is where a woman compels a man to have penetrative intercourse with her without his consent. Our proposed definition of rape restricts the commission of offence to a person who has a penis. Where a woman compels a man to penetrate her, although there is intercourse obtained without consent, it is not the victim’s body which has been penetrated. This is undoubtedly a violation of the victim’s physical integrity and sexual autonomy, but it is questionable whether it can properly be described as ‘rape’. The wrong in this situation is that a person has been compelled into taking active steps to engage in sexual activity without his consent. This is a different type of violation from the victim’s own body being penetrated and should not be classified as rape but as coerced sexual conduct.”

It is apparent from examination of the original version of The Sexual Offences Bill, the accompanying Policy Memorandum and the final version of The Sexual Offences (Scotland) Act 2009 that both the Scottish Government and the Scottish Parliament agreed with the SLC’s recommendations regarding the appropriate construction of the crime of rape. Penile penetration (including penetration by a surgically constructed

¹ Paragraphs 3.12, 3.20, 3.24 & 3.28 of The Scottish Law Commission’s ‘Report on Rape and Other Sexual Offences’, December 2007

penis) of the complainer's body was enshrined in the legislation as a key element of the offence.

In terms of the current law, as set out in The Sexual Offences (Scotland) Act 2009, the situation in which a woman compels a man to have penetrative sexual intercourse with her without his consent is not classified as 'rape'. However, such conduct can be prosecuted in terms section 3 (sexual assault) or section 4 (sexual coercion) of the 2009 Act, as envisaged by the SLC in 2007. In that respect, there is no lacuna in the law; the conduct referred to in this petition is criminalised by the 2009 Act.

The maximum penalty that can be imposed on a person convicted of a charge in terms of sections 1, 3 and 4 of the 2009 Act on indictment is 'life imprisonment'. These offences are all specified in Schedule 3 of the Sexual Offences Act 2003 as offences which can trigger the 'notification requirements' in Part 2 of the 2003 Act. Similarly, offences in terms of sections 1, 3 and 4 are all specified under section 210A of the Criminal Procedure (Scotland) Act 1995, as offences which can result in the imposition of an 'Order for Lifelong Restriction'. In this respect, the exclusion of the conduct described in the petition from section 1 of the 2009 Act does not restrict the powers of the Court in dealing with accused persons found guilty of such conduct.

A charge in terms of section 1 of the 2009 Act necessitates proceedings in the High Court of Justiciary. A charge in terms of section 3 or 4 can be prosecuted in either the High Court or the Sheriff Court. It is for the prosecutor to determine the appropriate forum based on his or her assessment of the case.

Were a woman to act in concert with (e.g. by assisting) a man in penetrating the vagina, anus or mouth of another person with the man's penis, without that other person's consent and with no reasonable belief that the other person is consenting, then both could be prosecuted and convicted for 'rape' in terms of section 1 of the 2009 Act.

I hope that this information is of assistance.