

PE1773/C

Law Society of Scotland submission of 27 February 2020

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee refers to the letter dated 31 January 2020 addressed to Lorna Jack, Chief Executive of the Law Society of Scotland.

Thank you for inviting us to consider Petition PE1173 calling for reform of the rape law by updating the Sexual Offences (Scotland) Act 2009 (2009 Act) to include the offence of a man being raped by a woman.

We outline the current position and then consider the two issues which the Petition raises regarding widening the definition of "male" rape and support for male victims of crime.

Current position

The 2009 Act, when introduced, effectively codified sexual offences in Scotland. The 2019 Act followed the Scottish Law Commission's Report on Rape and Other Sexual Offences¹ where the question of rape and what that offence should comprise were fully examined prior to the reforms undertaken in the 2009 Act. The relevant offences as far as this Petition is concerned, comprise:

- Rape is the most serious sexual offence under Section 1 of the 2009 Act. That section reformed the common law of rape by the offence requiring penile penetration of the vagina or penile penetration of the anus or mouth of a victim of either sex.
- Section 2 of the 2009 Act includes sexual assault by penetration. Penetration includes situations where the accused sexually penetrates the complainer's vagina or anus. Penetration may be, by way of example, fingers or something else such as a prosthetic vagina.

¹ <https://www.scotlawcom.gov.uk/files/4712/7989/6877/rep209.pdf>

- Section 3 of the 2009 Act covers sexual assault. The offence covers other types of conduct which a reasonable person considers to be sexual.

As far as penalties are concerned, all three statutory offences can be prosecuted in the High Court where the maximum custodial sentence can be life imprisonment.

The High Court has exclusive jurisdiction for section 1 offences reflecting the seriousness of these offences. The other two statutory offences can be prosecuted under solemn or summary procedure which will affect the available sentence.

The question of the court forum is of course a matter for the Crown Office and Procurator Fiscal Service's discretion. They prosecute in the public interest and will allocate the prosecution of the relevant offence(s) to the appropriate forum.

Definition of rape

The Petition reflects on the issue of widening exactly what conduct should comprise the offence of rape. The Petition would seem to seek removal of the distinctive elements of the crime.

Before outlining how the rape question was determined through the passage of the 2009 Bill then to become the 2009 Act, there may be some scope to widen section 1(4) of the 2009 Act to include an artificial penis worn by, for example, a transgender man who is yet to have the surgery to create a surgically constructed penis (though section 2 offences will cover such conduct) .

In determining what comprises rape, we refer to Paragraph 59 of the Justice Committee's Stage 1 Report on the Bill was that:

“rape” should include any (intentional or reckless) sexual penetration of the vagina, anus or mouth without that person’s consent, regardless if this penetration is made by penis, other parts of the body or an object.”

The Bill's Policy Memorandum, while accepting that there may be merit in that argument recognised that:

“there [was] no doubt that the violent nature of some sexual attacks involving penetration with an object is such that they can be amongst the most brutal sexual assaults. From this perspective there is a strong argument for widening the definition of rape to include such attacks.”

However, the Bill considered this would exclude some:

“violent sexual assaults which do not involve penetration. To catch these the definition of rape would need to be widened further, to take account of the level of violence involved. That would be difficult to accomplish and would move further away from what is traditionally taken to be the crime of rape.”

The definition for the offence of rape was developed as discussed above. The Scottish Parliament consciously chose to develop rape in line with what it considered to be a

traditional understanding of the term, in other words, any sexual assault involving the non-consensual sexual penetration of an individual's body by a penis. That is not to say that men cannot be sexually assaulted by women. The 2009 Act recognises that such crimes occur and provides for offences so that they can be appropriately punished.

Importantly, what the 2009 Act recognises is that there may be an overlap in offending behaviour that may comprise all or any aspects of the offences under sections 1-3 of the 2009 Act.

We would suggest that the potential reform of the 2009 Act, as envisaged in this Petition, would only be appropriate if there were suggestions that there was any failure to prosecute offending sexual behaviour affecting male complainers. We do not consider this to be the case. Sexual assaults occurring against men can and will be prosecuted under the appropriate provisions of the 2009 Act where offending conduct can and will be prosecuted involving all or any of the offences under the 2009 Act.

Associated closely with the question of prosecution for offending behaviour would be the issue of sentencing. If the behaviour is serious, sentencing may include life imprisonment where the condemnation by the State could not be more serious. There seems to be no suggestion that judges are not sentencing appropriate to the level of offending.

Support for male victims of crime

We echo what has been said previously that sexual offending affects everyone. The 2009 Act makes it easier to identify what comprises offending behaviour and makes it possible to prosecute and be punished. Support is available for all victims of crime through helplines such as those outlined on the Scottish Government website under Domestic abuse.²

Conclusion

Sexual offending should be prosecuted and punished. Support should be provided for the complainer, irrespective of the gender of either the complainer or the accused.

We believe that the 2009 Act provides a comprehensive framework in which sexually inappropriate behaviour may be punished. We suggest promoting better awareness of the sources of advice and assistance available might help to destigmatise the experiences of male victims and understand that others are affected. Public awareness campaigns can assist in this regard as can dedicated support services. More knowledge about the sources of help and knowledge of the 2009 Act such as understanding the issue of consent might do much to assist in the complainers' understanding that sexual offending prosecuted under sections 1-3 of the 2009 Act is serious and will be dealt with appropriately.

² <https://www.mygov.scot/domestic-abuse/support-for-male-victims>