

DISCUSSION PAPER ON RAPE AND OTHER SEXUAL OFFENCES SUMMARY

In June 2004 the Scottish Law Commission received a reference from the Scottish Ministers:

"To examine the law relating to rape and other sexual offences and the evidential requirements for proving such offences, and to make recommendations for reform."

The reference followed two widely-reported High Court cases in 2004, and academic, professional and public concern that the law was in confusion. The Commission had already noted that during consultation for its 7th programme of law reform there had been calls for reform of the law on sexual offences.

The Discussion Paper marks an important stage in the first ever systematic review of sexual offences in Scotland. The Commission has considered reforms over a wide area of law, with four main areas of concern: sexual assaults (including rape); offences based on a protective principle; offences based on public morality; and the law of evidence.

A New Model of Consent

Prior to the decision of the High Court of Justiciary in *Lord Advocate's Reference (No 1 of 2001)*¹ a defining element of rape was that sexual intercourse took place against the will of the victim. To prove that intercourse was against the will of the victim it was necessary for the prosecution to show that the accused used, or threatened to use, force. This understanding of the law changed when in *Lord Advocate's Reference (No 1 of 2001)* the Court held that rape is defined as a man having sexual intercourse with a woman without her consent, regardless of whether or not force was used. However, 'consent' is not defined and juries are expected to apply what they consider to be the ordinary meaning of that word.

The Discussion Paper examines criticisms of consent as a basis for sexual offences, and proposes that a detailed consent model should be introduced. The meaning of consent should be defined in statute and legislation should provide for a detailed model of consent by setting out a list of factual situations which would indicate that there is no consent to sexual activity. The list, which would not be exhaustive, would include:

- (a) where at the time of the act the person was subject to force or violence or the threat of force or violence;
- (b) where at the time of the act the person was subject to force or violence or the threat of force or violence *against another person*;
- (c) where the person was unconscious or asleep;

¹ 2002 SLT 466.



- (d) where the person had taken or been given alcohol or other substances and as a result lacked the capacity to consent;
- (e) where the person was deceived or mistaken about the nature of the activity;
- (f) where the person was deceived into thinking that the other person was someone known to him or her;
- (g) where the person was unlawfully detained;
- (h) where expression of consent was made by someone other than the person.

In addition, it is proposed that the giving of consent to one sexual act should not by itself constitute consent to a different sexual act. Further, consent may be withdrawn. A person who has consented to a sexual act may at any time indicate that consent is withdrawn and if the act continues, it continues without that person's consent.

Sexual Assaults: redefining 'rape'

The Discussion Paper proposes a redefinition of the physical act constituting the crime of rape. It is proposed that the term 'rape' should be retained but its definition should be widened to include penetration with a penis not only of the vagina but also the anus or mouth of another person, without that person's consent.² This would mean that the victim could be male or female.

It is further proposed that there should be offences of sexual assault by penetration and sexual assault by touching. The first of these crimes would be constituted by penetration of the genitalia or anus of another person by anything other than a penis without that person's consent; and the second crime would consist of one person touching, or having contact with, another person in a sexual manner, without consent.

The Commission has also suggested that there should be a new offence of compelling another person to engage in any sexual activity. This offence would cover a wide range of coercive sexual conduct, for example where the victim is compelled to have sex with a third party, or where a woman compels a man to have sex with her without his consent.

The offences described above would be committed when the accused person knew that the victim did not consent or was reckless as to whether there was consent. The Paper considers the question of the 'honest belief' defence, where, although the victim did not consent, the accused person genuinely believed that the victim did consent. A question is put forward for consultation: should the test for the accused's belief that the victim was consenting be (a) the subjective test that he honestly held that belief; (b) the objective test that he held the belief and that there were reasonable grounds for doing so; or (c) the test that he held the belief but subject to the qualification that the belief must be reasonable having regard to all the circumstances (including steps taken by the accused to ascertain whether the victim did consent)?

Offences based on a protective principle

A rich and clearly defined consent model would be able to cover cases where the victim did not have capacity to consent, because of either age or mental incapacity. However, the Paper

² At present in Scotland the only act which constitutes rape is penetration of the vagina by a penis.



suggests that the criminal law should give special protection where there are problems about a person's capacity to consent to sexual activity. Such protection applies to children; persons with a mental disorder; and persons over whom others hold a position of trust or authority.

The protective principle adds to the consent principle: it applies to people who cannot consent to sexual activity (eg young children) and it also applies to people who can give consent but who may be vulnerable and open to exploitation. It is argued that protective offences need not be inconsistent with a general consent model. These offences spell out in detail the application of the consent model to vulnerable people. They also give expression to the principle that certain people should be specifically protected by the criminal law: sexual activity with young children, or with persons with a mental disorder, is wrong and the law should say so explicitly.

With regard to young children, it is proposed that there should be strict liability offences for sexual assaults and coercing sexual activity. There would be no defence of consent, or of mistaken belief as to age, for such offences. The Paper seeks views on whether the offences should apply in respect of victims below the age of 12, or 13.

For older children it is proposed that there should continue to be offences prohibiting consensual sexual activity with a child who is older than 12 (or 13) but younger than 16. There would be a defence to such offences that the accused believed, on reasonable grounds, that the child was 16 or older. The legal burden of establishing the defence would lie with the accused. It is proposed that there should also be a defence that the accused and the child were married or in a civil partnership or analogous relationship (ie a marriage etc contracted abroad which is recognised as valid in Scots law).

The Paper also considers the question of sexual activity between older children. It is proposed that offences against children could be committed by other children, but it is noted that children under 16 are subject to special rules about criminal prosecution (ie it is expected that unless the circumstances are exceptional, offences committed by children would be dealt with by the children's hearing system).

It is further proposed that there should be offences of touching a child in a sexual manner; engaging in sexual activity in the presence of a child; and, for sexual gratification, causing a child to watch a sexual act. It is suggested that these offences would be more precise in scope than the current crime of 'lewd, indecent and libidinous practices and behaviour' which is obscure and vague.

Offences based on public morality

The Discussion Paper also considers the range of offences whose underlying rationale is a social or moral principle. Offences considered under this heading include homosexual offences and incest, as well as indecent conduct offences (formerly falling within the now-abolished offence of shameless indecency).

Applying the principle that the law should not discriminate on the basis of gender or sexual orientation, it is proposed that there is no need for any specific offence relating to homosexual conduct. This would mean that common law and statutory homosexual offences would be abolished, and all non-consensual conduct, or activities covered by the protective principle, would be covered by other offences which were neutral as to gender and sexual orientation.

The Paper also considers whether, in addition to offences based on the consent model and offences based on the protective principle, there is a need for a separate offence of incest.



Arguments for and against the retention of a specific crime of incest are put forward for public consultation.

With regard to public indecency, it is proposed that it should be an offence for a person to expose his or her genitals with the intent of causing alarm or distress to someone else.

Evidence

The Commission has also reviewed rules of evidence which are specific to sexual offences or which have a special significance in proving these offences. The main topics considered are (1) how corroboration applies to cases of rape and other sexual offences; and (2) the use of sexual history evidence in trials for sexual offences.

With regard to corroboration, the Paper explores the need for corroboration in the proof of sexual offences, and sets out arguments for and against retaining corroboration purely for these offences. Although inclined to the view that there should continue to be a requirement of corroboration for proof of guilt in sexual offences, the Commission has not reached a concluded view on this issue and the views of consultees are welcomed.

Within the general issue of corroboration are two areas which may cause problems in practice: (1) corroboration by distress; and (2) mutual corroboration (also known as 'the *Moorov* doctrine').

The current position on the *de recenti* distress of the complainer as corroborative evidence is explained and a question is raised as to whether it is preferable for the courts to develop the common law on this topic or whether the law on corroboration by distress should be set out in statute.

The *Moorov* doctrine is the general rule of the law of evidence that, in certain circumstances, where a person is charged with a series of offences, evidence, even from a single source, in respect of any one of the offences can corroborate the evidence in relation to another of them. The rule is not confined to sexual offences and it is proposed that it should not be reformed solely in respect of these offences. A question arises as to whether it should be subject to legislative restatement.

The Commission has also considered the use of sexual history evidence. It is noted that the provisions on sexual history evidence now contained in the Criminal Procedure (Scotland) Act 1995 were subject to reform in the Scottish Parliament in 2002. The new provisions aim to find an appropriate balance between the complainer's right to dignity and privacy and the accused's right to a fair trial. A research study into the effectiveness of this legislation is currently being undertaken on behalf of the Scottish Executive and it is proposed that further consideration of this topic should await the completion of that research.

The period of consultation runs until 1 May 2006 and a full list of the proposals made and questions asked has been provided at the end of the Paper.



BACKGROUND NOTES

The Scottish Law Commission was set up in 1965 to promote the reform of the law of Scotland. The Chairman is the Hon Lord Eassie, a Court of Session judge. The other Commissioners are Professor Gerard Maher QC, Professor Joseph M Thomson and Mr Colin J Tyre QC.³

Following publication the Discussion Paper may be viewed on our website at www.scotlawcom.gov.uk or purchased from TSO Scotland Bookshop.

³ Professor George Gretton takes up office as a Commissioner on 1 May 2006. The term of office of Professor Kenneth Reid CBE expired on 31 December 2005 but he took part in discussions at Commission meetings about the draft of the Discussion Paper.