

ISSUED ON BEHALF OF THE SCOTTISH LAW COMMISSION  
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### **CONSULTATION BEGINS ON SEXUAL OFFENCE REFORMS**

Sexual offences such as rape are on the path to reform as public views are sought on proposals issued for consultation today. The Scottish Law Commission publishes its Discussion Paper on Rape and Other Sexual Offences, marking an important stage in the first ever systematic review of Scots law on sexual offences.

The Commission was asked by the Scottish Ministers to examine the law on rape and other sexual offences and the evidential requirements for proving these offences. This request followed two widely-reported High Court cases in 2004, together with concern among the general public, and professionals working in this field, that the law was in confusion.

Launching the consultation period today, Professor Gerry Maher QC, the lead Commissioner on the project, stressed the need for clarity:

"The law on rape and other sexual offences must be clear. People must be able to know what types of sexual conduct the law prohibits and what types are legal."

Professor Maher also emphasised that the paper is not aimed only at lawyers:

"This paper is not concerned with a technical area of the law. Rather it deals with issues which are of concern to the public at large. Our Discussion Paper, which can be accessed on our website, is part of our public consultation on reforming the law on rape and other sexual offences. We hope that anyone with views on the issues covered in the paper will send us their response."

Following consultation, the Commission aims to publish a final Report, including draft legislation, next year. The key issues covered in the Discussion Paper are redefining rape to cover male and female victims, as well as a wider range of sexual acts; enhancing the protection of the vulnerable, including young people, from exploitative sexual activity; and defining in statute the meaning of consent to sex. The paper emphasises the need for the law to apply equally to men and women, and it asks whether the requirement for corroboration for proof of sexual offences should be retained or removed, and, if it were removed, for which offences.

A summary of the main proposals is attached.

## SUMMARY OF THE MAIN PROPOSALS

### Redefining Rape

The Discussion Paper proposes that the term 'rape' should be retained because it expresses a common understanding of a particular type of crime. However, its meaning should be widened. Professor Maher says "The existing crime of rape is defined too narrowly. Our recommendation is that rape should cover both male and female victims. In addition, the sort of sexual attack which rape involves should be widened."

The definition of rape would include penetration with a penis not only of the vagina but also the anus or mouth of the victim, without consent. This would mean that the victim could be male or female. At present in Scotland only vaginal penetration with a penis can be called 'rape'.

There would be offences of 'sexual assault by penetration' and 'sexual assault by touching'. The first of these crimes would be constituted by penetration of the genitals or anus by an object (other than a penis) without consent; and the second would consist of touching, or having contact with, the victim in a sexual manner, without consent.

The Commission also suggests 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.

### Protection of Vulnerable People

The Commission has considered the extent to which the law gives protection to those who are vulnerable to sexual exploitation, for example children and people with a mental disorder. In principle, protection should be given not only to those who cannot consent to sexual activity (eg young children) but also to people who have a limited capacity to consent and may still be open to exploitation. "The law should continue to give full protection against the sexual abuse and exploitation of children and other vulnerable people," explains Professor Maher. "For example, we make proposals designed to deal with sexual activity within family settings which involves misuse of positions of trust and authority."

There should be strict liability offences for sexual conduct with young children (ie those below the age of 12 or 13). There would be no defence of consent, or of mistaken belief as to age, for such offences. There should also continue to be offences prohibiting consensual sexual activity with a child who is older than 12 (or 13) but younger than 16.

The Paper also considers the question of sexual activity between older children. Offences against children could be committed by other children, but the paper notes that children under 16 are already subject to special rules about criminal prosecution. The Commission expects that unless the circumstances are exceptional, offences committed by children would be dealt with by the children's hearing system.

There should also be statutory offences of touching a child in a sexual manner; engaging in sexual activity in the presence of a child; and causing a child to watch a sexual act.

## **Clarifying Consent**

The Commission takes the view that an important underlying principle is that the law should protect everyone's right to make their own sexual choices. Compelling someone to take part in a sexual act denies this right, as does preventing someone from engaging in fully consensual sex.

Since a High Court decision in 2001, rape has been 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. Professor Maher's view is that guidance is needed: "No one should have to be involved in sexual activity unless they consent to it. Yet the present law does not say what consent means. We are recommending a detailed definition of what consent is and what it is not. The law should make clear, for example, that anyone who has sex because of threats of violence has not given consent."

The Commission proposes that the meaning of consent should be defined in statute: legislation should also 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 situations where the victim was subject to violence, or the threat of violence, including violence against a third party; and where the victim was unconscious or asleep, or lacked the capacity to consent because of alcohol or other drugs.

## **Gender Neutrality**

The Discussion Paper also stresses the need for the law to apply equally to men and women. "Having sexual offences based on gender distinction is wrong," says Professor Maher. "The law should give the same protection to men and to women, and to boys and girls. People should also be free to follow their own sexual preferences provided that these are based on the genuine consent of everyone involved."

Wherever possible, the law would not be specific to men or women, either as perpetrators or victims. Common law and statutory homosexual offences would be replaced by offences which were neutral as to gender and sexual orientation.

## **Proof of Offences**

The paper also reviews the rules of evidence applying to the proof of sexual offences. The main topics considered are corroboration and sexual history evidence. Professor Maher explains that public views are sought on issues such as corroboration: "One reason why rape and other sexual offences may be difficult to prove is the need for evidence to corroborate the complainer's own evidence. In the paper we consider the arguments for and against having a requirement for corroboration for these crimes. We do not make a direct proposal but we do seek responses to the question whether the need for corroborating evidence should be removed, and, if so, for which types of sexual offence."

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.

## NOTES TO EDITORS

1. The Scottish Law Commission is a non-political independent body 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.<sup>1</sup> The Chief Executive is Mr Michael Lugton.
2. Media copies of the paper can be collected from the Commission's office at 140 Causewayside, Edinburgh EH9 1PR. The paper may be purchased from TSO Scotland Bookshop. Electronic copies of the paper are available on our website at [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk).
3. Further information can be obtained by contacting Alastair Clyde at the Scottish Law Commission. Tel: 0131 668 2131. Email: [info@scotlawcom.gov.uk](mailto:info@scotlawcom.gov.uk).

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<sup>1</sup> 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.