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**REPORT ON RAPE AND OTHER SEXUAL OFFENCES TO BE PUBLISHED**

**JUSTICE, CLARITY AND CONSENT: NEW SEX LAWS FOR  
SCOTLAND**

Rape and other serious sexual offences are to be brought up to date and defined in a clear, comprehensible way in recommendations published tomorrow (Wednesday 19 December) by the Scottish Law Commission. Its Report on Rape and Other Sexual Offences marks an important stage in the first ever systematic review of Scots law on sexual offences.

The Commission was asked by the Scottish Ministers, in June 2004, 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.

Following public consultation, based on a Discussion Paper published by the Commission in January 2006, and after analysis of the many responses which were received, the Commission has drawn up a Report with 62 recommendations and a draft Bill. The Scottish Government has already announced that it proposes to introduce a Bill on rape and sexual offences into the Scottish Parliament in 2008.

Launching the Report, 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."

The reform of the law of sexual offences is based on a number of guiding principles:

One of the principles on which the Commission has based its recommended reforms is gender neutrality. The Commission believes that offences should not distinguish between male and female victims nor between male and female perpetrators. "Having sexual offences based on gender distinction is wrong," says Professor Maher. "The law should give

the same protection to men and women, and to boys and girls." Many of the current offences are framed in a way which does not respect the principle of gender neutrality.

Another principle which the Commission has placed at the heart of its recommended reforms is the promotion of sexual autonomy. This means that non-consenting sexual conduct should be criminal, as it represents an invasion of the victim's sexual autonomy. It also means that consenting sexual conduct should not be criminal unless there are powerful reasons for creating an offence. Professor Maher stresses that: "People should be free to follow their own sexual preferences provided that these are based on the genuine consent of everyone involved."

A summary of the main recommendations is attached.

## SUMMARY OF THE MAIN RECOMMENDATIONS

### Redefining rape

The Commission recommends that the crime of rape should be expanded to cover penile penetration of the vagina, anus and mouth without consent. Under the current law rape is limited to penile-vaginal penetration.

This means that, under the Commission's recommendation, both female and male victims will be protected. There was widespread support amongst those who submitted responses to our Discussion Paper for this wider definition of rape. Professor Maher comments: "The existing crime of rape is defined too narrowly. The crime of rape should cover both male and female victims. It should also apply to a much wider form of sexual attack on a victim."

### Other offences

The Commission also recommends creating the offence of sexual assault. This crime will be committed by various kinds of sexual attacks done without the consent of the victim. These include sexual penetrations which do not amount to rape and other forms of sexual touching or sexual contact.

The Commission further recommends that there should be new offences where the victim is coerced into taking part in or seeing sexual activity without their consent. Examples are where a victim is compelled to watch someone else engage in sex or to look at a sexual image. In Professor Maher's view: "Under the existing law it is not at all clear if there is a crime where an adult is coerced into watching sex or receiving indecent communications. These activities are an invasion of the victim's sexual autonomy and the criminal law should penalise them."

The Commission recommends that the maximum sentence for rape, sexual assault and for some types of sexual coercion should be life imprisonment. The Commission recommends also that rape should continue to be tried only in the High Court.

### Clarifying consent

From the outset of this project the Commission has taken 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 consenting sex.

Since a decision of the High Court 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 is in their view the ordinary meaning of the 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 have recommended a detailed definition so that people can know what consent is and what it is not."

The Commission recommends that consent should be defined in statute as meaning 'free agreement'. In addition, the draft legislation annexed to the Commission's Report contains a list of situations in which there is no consent in this sense. The list, which is not exhaustive, includes cases where the victim has been subject to violence, or the threat of violence, where the victim was unconscious or asleep, and where the victim has been deceived as to the identity of the other person.

Another example of a situation where there is no consent is where the victim was so intoxicated by consuming drink or drugs that they lacked the capacity to give consent. As Professor Maher notes: "The law has to make it absolutely clear that just because someone is very drunk they are NOT consenting to having sex."

In addition, the Commission recommends that consent should be required for all sexual conduct. Consent to one activity is not to be taken to be consent to any other activity. Someone who consents to kissing is not consenting to having sexual intercourse.

It is not rape or another sexual crime if the accused had a reasonable belief that the other party consented to the sexual activity (even if there was in fact no consent). However, the Commission recommends that, in this situation, the accused should explain what steps he or she took to ascertain whether there was consent. It will not be enough for the accused simply to say that he thought the other person was consenting.

### **Protection of people who are vulnerable**

The Commission takes as another of its guiding principles the protective principle. This holds that there are certain people who should be protected from all sexual activity, such as young children. In addition, a more limited form of protection should cover those who may be able to consent to sexual activity but who should be protected in view of their relative immaturity or vulnerability.

#### *(i) children*

The Commission recommends the creation of two sets of sexual offences which are aimed at protecting children. The first set applies to children under the age of 13. As Professor Maher explains: "Children under 13 lack the ability to consent to sexual activity. It is a major wrong, which the law should mark out and penalise, when someone involves a young child in sex." There are to be special versions of the offences of rape, sexual assault, and coercing sexual conduct where the victim is under 13. These offences will involve 'strict liability', that is the accused will have no defences (for example, by saying that he thought the child was over 13).

The situation is different in respect of older children (those between 13 and 16). Older children may have the capacity to consent to sexual activity. However the Commission believes that there should still be criminal offences where an adult has sexual activity with an older child, even where that child is consenting. These offences will carry lesser punishment than the corresponding offences against young children. Moreover, the accused would be allowed certain types of defence, for example that he believed, on reasonable grounds, that the child was 16 or older.

Special provision is made where both parties involved in consensual sexual activity are in the 13 to 16 age range. The Commission does not believe that the law should be seen as ignoring or condoning this type of conduct between young people. At the same time, getting the criminal law involved is not the appropriate response where both parties are consenting. The Commission believes that, depending on the facts and circumstances, such children may be in need of appropriate welfare measures. To deal with this situation the Commission recommends that it should be a new ground for referring a child to a children's hearing that the child has engaged in sexual activity.

#### *(ii) people with a mental disorder*

The Commission recognises that those with a mental disorder require protection, but at the same time there is a need to promote their sexual autonomy. Accordingly, the Commission

recommends that there should be a specific statutory provision dealing with a mentally disordered person's capacity to consent to sexual activity. To be capable of giving consent to a sexual activity a mentally disordered person must be able to understand what the activity is, form a decision as to whether to participate in the activity and be able to communicate this decision. In addition, there is protection for those with a mental disorder from people who are in a position of trust over them.

*(iii) other protective offences*

The law currently makes it a criminal offence for someone to have sex with a person where there is a 'position of trust' between them. Those in a position of trust include, for example, medical staff in relation to patients, teachers in relation to students, and adult family members in relation to children living in the same household. The Commission recommends the retention of these criminal offences but has suggested certain minor changes to make the law more uniform and coherent. For example, except in cases involving someone with a mental disorder, the upper age limit for those who are to be protected should be harmonised at 18.

### **Corroboration**

The Commission asked in its Discussion Paper whether the existing rules of corroboration should be removed or relaxed in relation to sexual offences. As Professor Maher states: "We were struck by the response we received on this point. The vast majority of our consultees, ranging over a wide spectrum of interests, were opposed to removing corroboration for sexual offence cases." The Commission has concluded that, if the rules on corroboration need reform, then that issue is better examined by considering corroboration as it applies throughout the criminal law and not just in relation to sexual offences. The present Report therefore makes no recommendation for change to be made to the current position.

## 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 Drummond Young, a Court of Session judge. The other Commissioners are Professor George Gretton, Professor Gerard Maher QC, Professor Joseph M Thomson and Mr Colin J Tyre QC. The Chief Executive is Mr Michael Lugton.
2. Media copies of the report can be collected from the Commission's office at 140 Causewayside, Edinburgh EH9 1PR. It may be purchased from TSO Scotland Bookshop, and electronic copies are available on our website at [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk).
3. Further information can be obtained by contacting Charles Garland at the Scottish Law Commission. Tel: 0131 668 2131. Email: [info@scotlawcom.gov.uk](mailto:info@scotlawcom.gov.uk).