

Justice Committee

Abusive Behaviour and Sexual Harm (Scotland) Bill

Written submission from Police Scotland

The Abusive Behaviour and Sexual Harm (Scotland) Bill; hereafter referred to as the Bill; proposes the introduction of further legislative provision in respect of abusive behaviour and sexual harm, with the overall objective of improving how we, collectively, respond to abusive behaviour, including domestic abuse and sexual harm and to help improve public safety from those who pose a risk of sexual harm. As the portfolio holder for Major Crime and Public Protection within Police Scotland, I welcome the opportunity to respond to the Scottish Parliament's Justice Committee's call for evidence as follows:-

Part 1

Abusive Behaviour

1. Provision of A 'Domestic Abuse' Aggravator

- 1.1 Police Scotland welcomes the introduction of a new specific aggravator in relation to offences committed against partners and/or ex-partners.
- 1.2 Section 1 of the Act is clear and concise, with content that is, in part, reflective of existing 'tried and tested' legislation, such as Section 74, Criminal Justice (Scotland) Act 2003, and Sections 1 and 2, Offences (Aggravation by Prejudice) (Scotland) Act 2009 particularly with regard to sentencing outcomes and evidence from a single source.
- 1.3 It is noted within both the Explanatory Notes and Policy Memorandum that the offence itself does not have to be committed against a partner or ex-partner, with the example describing an assault on an ex-partners child with the intention of causing psychological harm to their ex-partner. Police Scotland welcomes and fully supports this inclusion.

2 Disclosing, or threatening to disclose, an intimate photograph or film

- 2.1 Section 2 is silent in relation to whether or not any relationship or previous relationship exists or existed between 'A' and 'B'. While it would be helpful if this position was clarified, Police Scotland response is provided in the belief that this section extends to any unauthorised disclosure, or threatened disclosure, of such intimate footage.
- 2.2 Police Scotland fully supports a specific criminal offence of disclosing or threatening to disclose an intimate photograph or film of another person without their consent.
- 2.3 Similar legislation has been introduced in England and Wales under terms of Section 33, Criminal Justice and Courts Act (CJCA) 2015. The legislation

proposed in the Bill is generally reflective of the CJCA 2015 content, albeit Police Scotland recognises the terminology is slightly different with reference to '*Private sexual photographs and films*' in the CJCA 2015 and '*Intimate photograph or film*' in the Bill.

- 2.4 Of significant difference, and of paramount importance, is the inclusion of 'threatening to disclose' in the Bill. The threat to expose intimate images can often be used to gain control over a victim or prevent a victim from terminating a relationship. This can be as debilitating as the actual sharing of images.
- 2.5 Police Scotland also supports the inclusion of the element of recklessness given the devastating and sometimes tragic consequences of intimate images being disclosed.
- 2.6 Notwithstanding the above, Police Scotland would wish to suggest either an additional clause, perhaps within subsection 2(1) (a) or insertion of an additional section – which creates an offence for:
A person ("A") to disclose or threaten to disclose an intimate photograph or film which shows, appears or purports to show another person ("B") in an intimate situation along with other information, links or material identifying or alluding / purporting to identify B.
- 2.7 Such wording would cover situations where the disclosed image, in itself, could not be identified as being of a particular individual. A has however added comments, another photograph or film, information or links to personal profiles or details of B.
- 2.8 The proposed legislation does not appear to have any age limitations in relation to 'Person B'. While Police Scotland welcomes this, the current legislative framework under Section 52 and 52A of the Civic Government (Scotland) Act 1982 broadly covers the making, possession and distribution of indecent images of children. It would be helpful if there was clear guidance as to the interpretation of 'intimate' compared to that of 'indecent'.
- 2.9 Section 2(3) provides for a number of defences available to 'A'.
- Part (b) relates to when there was a reasonable belief that 'B' consented to the photograph or film being disclosed. It is noted that there is no definition provided for the term 'reasonable belief'. Section 16, Sexual Offences (Scotland) Act (SOSA) 2009 provides '*In determining, for the purposes of Part 1 [SOSA 2009], whether a person's belief as to consent or knowledge was reasonable, regard is to be had to whether the person took any steps to ascertain whether there was consent or, as the case may be, knowledge; and if so, to what those steps were*'. It is suggested this definition could be reflected in the Bill.
 - Part (c) relates to disclosure for the purposes of prevention; detection, investigation or prosecution of crime. It is suggested that reference should be made to the disclosure being to a relevant law enforcement agency, prosecutor or solicitor.

- Part (d) relates to disclosure for a public interest. Police Scotland accepts that on a small number of occasions the intimate actions of a person may be of public interest. That said, while such cases may be worthy of report, Police Scotland questions whether the disclosure of any intimate image such as a person's genitals, could ever be considered of public interest. If such a defence is enacted, a clear definition for '*public interest*' would be crucial.
- 2.10 Further, Section 2(5) provides defences to 'A' when 'B' was in a place to which members of the public had access, whether or not on payment of a fee, and members of the public were present. While Section 2(3) provides clarity in relation to consent to disclose, this key component is absent from Section 2(5), which appears to suggest that 'B' consents to disclosure of a photograph or film, simply by virtue of an 'intimate situation' having occurred in a place accessible to, and in the presence of, members of the public.
- 2.11 While it is accepted that 'B' may have consented to; been indifferent to or simply unaware of the presence of one or more members of the public at the time of any intimate act. Notwithstanding, it is suggested this should not automatically be considered as implied consent for the disclosure of a photograph or film, potentially to a worldwide audience, via social media. We suggest that Section 2(5) appears to focus purely on the availability of a defence for 'A' without any consideration of 'B' and the key issue of consent.
- 2.12 Section 3(1) (a) provides interpretation of '*intimate situation*'. It is of note that Section 10, SOSA 2009 provides a definition for a '*private act*', the majority of which is replicated within the Bill. Police Scotland, in response to the 'Equally Safe' consultation, offered, and now reiterates, the following comment '*Police Scotland agrees a definition which defines an image as 'private and intimate' if the person featured in the image and the person sharing the image understands it to be such*' would be more appropriate.
- 2.13 While Police Scotland is supportive of the proposed legislation, mention must be made of its constraints. In response to the '*Equally Safe*' consultation, Police Scotland, along with a high number of other respondents, requested consideration be given to the inclusion of other materials and media such as sound files of an intimate nature and written word, for example texts or emails, which can be equally as disturbing as photographs or film. We note the comments in the Policy Memorandum as to why such media have not been included.
- 2.14 Interpretation of an 'intimate situation' includes reference to where '*the person's genitals, buttocks or breasts are exposed or covered only with underwear*'. Police Scotland has reservations that the term 'underwear' may be overly prescriptive with resultant unintended consequences.
- 2.15 In addition, it is gratifying the Bill includes altered images to films ('*a moving image in any form, whether or not the image has been altered in any way*') or photographs ('*a still image in any form, whether or not the image has been*

altered in any way'), however it is unclear whether or not superimposed images would be considered for prosecution.

3 Making of non-harassment orders (NHOs) in criminal cases

- 3.1 The provision of an NHO (in the described circumstances) is fully supported by Police Scotland. We particularly welcome any solution which reduces any financial burden on a victim and the possible trauma caused of having to having to initiate a separate legal process to obtain a civil NHO. The provision of criminal courts having the authority to grant an NHO in the described circumstances demonstrates a robust and consistent approach to the granting of NHO's in Scotland and negates the possibility of (domestic abuse) victims enduring further unnecessary and prolonged court proceedings.
- 3.2 Section 5(2)(1B) provides a non-harassment order is an order requiring the person to refrain for such period (including an indeterminate period) as may be specified in the order from conduct in relation to the victim as specified in the order. Police Scotland would wish to highlight that a review mechanism had to be established in relation to offenders indefinitely subject to the notification requirements of the Sexual Offences Act 2003 to ensure ECHR compliance. We would welcome assurance that consideration has been given to a similar review mechanism in relation to this section.

Part 2

4 Sexual Harm - Chapter 1

- 4.1 Police Scotland has placed a clear and consistent focus on preventing rape, sexual crime and child abuse since inception in April 1013. This has complimented concerted efforts to drive up reporting of such crimes through increasing confidence in a victim focused approach and continuing to improve the professional approach of investigators. Understandably rape and sexual crime remains a very emotional and sensitive topic, with social attitudes influenced by what people hear, watch, read and ultimately, believe. Jury members, as members of the public, are equally exposed to such influence.
- 4.2 The proposals within the Bill provide opportunities to enhance awareness of the complexities of sexual crime, highlighting that there is no such thing as a 'typical' rape victim or a 'typical' action or response by a victim. Police Scotland strongly welcomes the intention of further addressing some of these negative perceptions across society that may unfairly influence justice outcomes.
- 4.3 Section 288 DA, (1) (2) (a) applies, where in a trial on indictment for a sexual offence, evidence which suggests or implies a delay by the victim informing anyone, or a particular person, or delayed reporting to any or a particular investigating agency, will require a Judge to charge the jury with the advice that (a) there can be good reasons for not telling/reporting and (b) this does not necessarily indicate that *an allegation is false*.

- 4.4 While supportive of the intention of this section, there are plentiful academic and legal journals detailing the impact that rape and serious sexual crime has on victims and why many victims refrain from reporting. This is supported by medical opinion in relation to trauma, which is now an integral part of Police Scotland's training for Sexual Offences Liaison Officers and Senior Investigating Officers. We do, however, appreciate that many members of the public, and in turn jury members, may be unaware of the varied reasons why victims delay in reporting. The risk is that these perceptions could be judged in a legal context to the detriment of justice.
- 4.5 Preconceived notions are acknowledged to present a challenge in many aspects of the criminal justice process and were highlighted by the Rt Hon Dame Elish Angiolini's *'Report of the Independent Review into The Investigation and Prosecution of Rape in London'* published on the 30th April 2015. Within her report she stated *'As well as being one of the most serious crimes and one of the most challenging to investigate and prosecute, rape also remains the most misunderstood. The general perception that rape is predominantly a crime undertaken by a stranger somewhere out in the open, and that the complainant will have sustained some form of injury and resisted the rape, still persists. Many in our community will also expect that someone who has experienced a rape will call the police immediately and will tell the officer exactly what has happened in a consistent fashion and want the offender prosecuted. However, experience in London and elsewhere shows otherwise'*.
- 4.6 Similarly Alison Levitt QC, a Principal Legal Advisor to the Director of Public Prosecutions, was noted within the report as stating *'In other words, the prosecutor should proceed on the basis of a notional jury which is wholly unaffected by any myths or stereotypes of the type which, sadly, still have a degree of prevalence in some quarters'*
- 4.7 Police Scotland's Rape Prevention campaign *'We can Stop It'* reiterates that in many areas societal misconceptions of rape remain, including why victims delay reporting, which could potentially influence the deliberations and findings of a jury.
- 4.8 Police Scotland therefore recommend that regardless of whether a question, statement or implication is made during a trial in relation to delay the jury should, as practice, be informed to dismiss any preconceived opinion that they may have within this area. As outlined above, there is no such thing as a 'typical' rape victim, a 'typical' action or response by a rape victim or an acceptable time period where one would expect a report to be made.
- 4.9 Section 288 DA (2) (b) provides *'this does not, therefore, necessarily indicate that an allegation is false'*. While Police Scotland acknowledges that such a comment may be well intended, we have concerns that by introducing the notion of falsehood this could inadvertently suggest that such reporting is common place. Crime statistics indicate that false reporting of rape is negligible. Accepting that the purpose of this section is to address a crucial area, lacking within common law and statute, the use of the word **false** not

only conjures up a factor that may not have even been considered by a jury, but also diminishes the subsection introduced to provide guidance on why victims delay in reporting. Falsehood is not regarded as one of those reasons and as such Police Scotland would caution against such reference and suggest the statement is removed.

- 4.10 In addition we would suggest that further consideration is given to situations where evidence is led or implied within court that the reporting of the rape was false. It is suggested that jury direction should also include reference to there being no such thing as a 'typical' rape victim or a 'typical' action or response by a victim and therefore juries should discount any perception of how a victim should respond.
- 4.11 Subsection 4 provides the definition of an 'investigating agency' with reference to a police force for the area where the offence is alleged to have been committed. It is Police Scotland's position that a victim should be allowed to report to any police force whether it is for the area where the offence was committed or otherwise.
- 4.12 Section 288 DB 1 subsection (2) details circumstances where evidence is given which implies that the sexual activity took place without physical resistance on the part of the victim while subsection (4) details circumstances where evidence is given which implies the sexual activity took place without the accused using physical force to '*overcome the will*' of the victim. While subsections 2 and 5 provide an obligation on the judge to advise the jury in relation to both of these scenarios that '**good reasons**' may exist as to why the victim did not provide physical resistance or indeed why physical force was not required. Police Scotland is of the view that the number of rapes that would fall into this category will be high and therefore suggest that regardless of whether evidence is inferred, juries are charged accordingly. The perception of the 'stranger' type rape being the most common crime type or an assumption that victims will 'fight' remain common myths. We believe jury direction to this effect would assist outcomes not being unduly influenced by personal views.
- 4.13 Section 288DB (7) provides details of the sexual offences where Jury direction could be applied, specifically:-
- (a) rape (whether at common law or under section 1(1) of the Sexual Offences (Scotland) Act 2009
 - (b) indecent assault
 - (c) sodomy
 - (d) clandestine injury to women
 - (e) an offence under section 2 of the Sexual Offences (Scotland) Act 2009 (sexual assault by penetration)
 - (f) an offence under Section 3 of that Act (sexual assault)
 - (g) an offence under Section 4 of that Act (sexual coercion)

- 4.14 It is noted that the listed offences relate specifically to adults. While the general perception may be a young child would be less capable of offering physical resistance, it would require less physical force to overcome their will and young children are more readily influenced, less capable and more fearful of reporting, Police Scotland has concern that myths and stereotypes still prevail in relation to sexual offences committed against children, especially involving older children who have been sexually exploited. As such, Police Scotland strongly suggests that sexual offences committed against all children are included in jury direction.
- 4.15 It is noted that the word 'alleged' is commonly referred to throughout the proposals. While not ordinarily a contested word, nor a required legal term, it has been Police Scotland's practice not to use this word within any document or guidance in relation to rape. This is in recognition that the words 'alleged' or 'allegation' automatically and passively questions credibility and further, it appears not to feature within other statutes attributed to other crime types. It is requested that consideration is given to replace 'alleged' and 'allegation' with 'report' or 'reported' which, Police Scotland believes, would provide a suitable, neutral alternative.

Chapter 2

5 Sexual acts elsewhere in the United Kingdom

- 5.1 Police Scotland wish to identify an opportunity to address a 'gap' in existing legislation concerning the grooming of children and sharing of indecent images with a child, which the Bill may afford an opportunity to address.
- 5.2 Currently legislation contained in the Sexual Offences Scotland Act 2009 only allows an offence to be committed against a child where it is proved the victim was a child under the age of 16. If a police officer is online conducting a covert operation posing as a child and is contacted by a perpetrator who is engaging in sexual conversation or other indecent behaviour whereby, if the police officer had indeed been a child, would have constituted a criminal offence.
- 5.3 The fall back during this type of covert deployment is Section 1 (1)(c)(ii) of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (grooming) where this allows for the victim to be 'a child **or a constable**' but only where there is a clear intention by the perpetrator to meet the 'child'.
- 5.4 The inclusion of 'a child or a constable' would provide a significant additional mechanism for police to intervene as early as possible against those seeking to exploit children online. It is of note that legislation in England and Wales allows for the prosecution of individuals who have interacted in sexualised chat/grooming with a constable purporting to be a child even without arranging a 'meet'.
- 5.5 Police Scotland would also wish to highlight officers undertaking online covert investigations often evidence the possession and procurement of 'paedophile

training manual' that instruct perpetrators on how to carry out abuse of a child. Possession of such an article is not an offence in Scotland and we would opine that there can be no lawful purpose of the possession of such an article.

6 Incitement to commit certain sexual acts outside Scotland, and Commission of certain sexual offences elsewhere in the United Kingdom

- 6.1 Police Scotland would query whether Part 1 and Part 2 headings of Schedule 4 of the Sexual Offences (Scotland) Act 2009, which currently read '*Incitement to commit certain sexual acts outside the UK*' and '*Offences committed outside the UK*' should be amended to read '*Incitement to commit certain sexual acts outside Scotland*' and '*Offences committed outside Scotland*' respectively.

Chapter 3

7 Sexual Harm Prevention Orders

- 7.1 Section 9 defines 'sexual harm', from a person, as meaning physical or psychological harm caused –
- (a) by the person committing one or more of the offences listed in schedule 3 of the 2003 Act (Sexual Offences Act 2003), or
 - (b) (in the context of harm outside the United Kingdom) by the person doing, outside the United Kingdom, anything which would constitute an offence listed in schedule 3 of the 2003 Act if done in the United Kingdom.
- 7.2 Section 13 outlines the definition of a '*Qualifying offender: conviction etc., elsewhere in United Kingdom*'. While Sections 10, 11 and 12 relate to Schedule 3, Section 13 identifies relevant offences within England, Wales and Northern Ireland and those listed in Schedule 3 or Schedule 5 of the 2003 Act.
- 7.3 While those routinely involved in the management of relevant offenders in Scotland will be familiar with the implications of Schedule 5, which relates to violent offences, the application for a SHRO specifically requires 'sexual harm' as defined within Section 9 above. Police Scotland would wish clarification of the intention and parameters in relation to a qualifying offender by virtue of a Schedule 5 conviction i.e. the offence would only be relevant where there was a significant sexual aspect and a Sheriff would have to be so satisfied.
- 7.4 Section 14 outlines the definition of a '*Qualifying offender: conviction etc. outside United Kingdom*'. Subsection 2(b) identifies an 'equivalent offence' as an offence which would have constituted an offence listed in Schedule 3 (other than Paragraph 60) or Schedule 5 of the 2003 Act if it had been carried out in any part of the UK. Paragraph 60 relates specifically to conviction for an offence which is not specifically a sexual offence, but with a significant sexual aspect present and committed in Scotland.

- 7.5 It appears the section indicates that where an individual has been convicted of a violent offence abroad, which would constitute a Schedule 5 offence if committed within the United Kingdom, may be an equivalent offence if there was a significant sexual aspect. However, it would appear that conviction for an offence with a significant sexual aspect, which if it had taken place in Scotland and would constitute a paragraph 60 offence within Schedule 3, would not be considered an equivalent offence.
- 7.6 Section 12(1) (a) clearly includes paragraph 60 of Schedule 3 for convictions in Scotland. As such, Police Scotland would welcome further clarification of the intention and parameters in relation to the above.
- 7.7 Section 15 (3) specifies that a SHPO order has effect for a fixed period of not less than 5 years. Section 15 (8) specifies that the order will cease to have effect, if it has not already done so, when all of the prohibitions or requirements contained in it have ceased to have effect. Clarification is requested concerning the interpretation of these sections, which appear slightly ambiguous.
- 7.8 Section 22 outlines the requirement for clerk of court to serve order etc. on the person against whom the order has effect. The section is silent in relation to the clerk of court providing formal notification of the making, variance or renewal of a SHPO or SRO to the Chief Constable of the Police Service of Scotland.
- 7.9 Section 19 and 29 refer to the variation, renewal and discharge of SHPOs or SROs. While the terminology within these sections clearly relates to previously granted orders, Police Scotland would welcome clarification in relation to all subsequent requests by the Chief Constable of the Police Service of Scotland. Given resource and financial implications, Police Scotland would welcome a subsequent submission to be treated as a modification to the original application as opposed to a 'new' separate application to the court. The written notes following an appeal in 2013 contain the following *'the court agrees with the Sheriff and Sheriff Principal that an interpretation that requires separate summary applications, and related processes, would introduce a multiplicity of actions and complexity in procedure, which it is the purpose of summary application procedures to avoid. It should not lightly be assumed that Parliament so intended'*.
- 7.10 Section 24(1) provides a definition of a 'vulnerable adult' as a person who is 18 or over whose ability to protect himself or herself from physical or psychological harm is significantly impaired through physical or mental disability or illness, through old age, or otherwise. Police Scotland would suggest this definition is amended by removing the words 'through old age or otherwise'.
- 7.11 Section 26(2) states that an appropriate sheriff may make a sexual risk order only if satisfied that a respondent has.....'done' an act of a sexual nature. Police Scotland would suggest replacing the word 'done' with 'committed'.

Chapter 4

8 Sexual Risk Orders

- 8.1 While the proposed reforms to replace Risk of Sexual Harm Orders with Sexual Risk Orders are welcomed by Police Scotland, we wish to highlight that, currently, there is no recognised national multi-agency information sharing framework or evaluated risk assessment tool to assist the comprehensive risk assessment of those subject to Risk of Sexual Harm Order's, and subsequently Sexual Risk Orders.
- 8.2 Police Scotland would, therefore, welcome further dialogue with Scottish Government regarding the development of an appropriate risk assessment tool and legislative amendment to enable persons subject to such orders to be managed through the Multi Agency Public Protection Arrangements (or similar framework).

In conclusion, Police Scotland's key priorities include the protection those who are at risk of harm and, as far as possible, ensure those who present the greatest risk of harm are prevented from doing so. This is carried out in partnership and we work with our statutory partners, non-government organisations and communities across Scotland to keep people safe. Police Scotland welcomes the intentions contained within the Abusive Behaviour and Sexual Harm (Scotland) Bill and the opportunity to provide comment which I hope will assist in the development of necessary, effective, clear, coherent and accessible legislation.

Malcolm Graham
Assistant Chief Constable
16 November 2015