

Justice Committee

Abusive Behaviour and Sexual Harm (Scotland) Bill

Written submission from the Mental Welfare Commission for Scotland

1. I am responding on behalf of the MWC to the Justice Committee's call for evidence on the Bill. The Mental Welfare Commission is a statutory body whose responsibility is to protect and promote the human rights of people with mental health problems, learning disabilities and dementia.

2. We regularly provide advice on issues of consent involving these groups, particularly people with learning disabilities, and have published guidance on issues to be considered in managing risks associated with sexual relationships – see *Consenting Adults*¹, as well as a major investigation into how services deal with people with learning disabilities who have been sexually abused – see *Justice Denied*²

3. We also have an interest in how the criminal justice system treats offenders who are categorised as having a mental disorder.

4. Our response focuses on Part 1 of the Bill.

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

5. Our principal concern here is whether enough has been done in the Bill to clarify how lack of consent to disclosure of an image or film is established, where the subject may be vulnerable because of a mental disorder.

6. There is a long history of the sexual abuse of adults with learning disabilities not being effectively prosecuted because it has been felt to be difficult to establish that the adult did not consent. While it is important to respect the rights of adults with learning disabilities to choose to enter into sexual relationships, it is also important to recognise that they can be targeted for abuse.

7. Part 2 of the Sexual Offences Act 2009 makes clear that consent is not the same as acquiescence, and means 'free agreement'. Consideration should be given to similar provisions in this Bill. However, we suggest that such provisions should draw on the provisions of s311 of the Mental Health (Care and Treatment) (Scotland) Act 2003, which have been replaced by the 2009 Act.

8. Both Acts make it clear that a person who cannot understand an act or form a decision about the Act cannot consent. Section 311 goes further, and sets out in s311(3) that:

“a person shall be regarded as not consenting if the person purports to consent as a result of –

a) Being placed in such a state of fear; or

¹ http://www.mwscot.org.uk/media/51782/updated_consenting_adults.pdf

² <http://www.mwscot.org.uk/media/51943/Justice%20Denied%20Ms%20A.pdf>

- b) Being subjected to any such
 - i) threat;
 - ii) intimidation
 - iii) deceit; or
 - iv) persuasionas vitiates that person's consent."

9. It appears to us highly plausible that a person with learning disabilities could be persuaded, intimidated or deceived into appearing to consent to disclosure of intimate images, and it should be beyond argument that this is still an offence.

Section 5: making of non-harassment orders in criminal cases

10. This section gives effect to the Government's proposal that non-harassment orders should be available where an offender has been found to have committed acts constituting an offence of harassment, but is insane in bar of trial or unfit to plead. When the Government consulted on this proposal we agreed, on balance, that this should be possible, but expressed considerable scepticism about the value of this new disposal. If anything, our scepticism has increased, and we are sympathetic to the concerns expressed by the Law Society of Scotland in their response to the Committee³.

11. In general, we believe it is reasonable to afford courts a wide discretion to make appropriate disposals, provided certain important principles are maintained. In relation to mental ill-health, these include that people should not be subject to punishment if they are not responsible for their behaviour, and that the courts should not impose requirements on people which they are not able to fulfil, and which cannot realistically be enforced.

12. We accept that the first of these tests is met, in that this is not a punitive disposal. We have serious concerns about the second test – a person who is so unwell as to be unable to be tried is unlikely to be well enough to follow the requirements of a non-harassment order.

13. In theory, there may be situations where someone is currently acutely unwell but a recovery is anticipated. But we find it hard to imagine a set of circumstances where this would in practice be the most appropriate option.

14. The new offence appears to be a response to the case of HMA v GM, which attracted considerable publicity because of the profile of the victim. We fully accept that the behaviour of the accused was highly distressing and inappropriate, and any possible gap in the law in addressing such behaviour must be taken seriously. But it is doubtful that the provision is the right response to the issues that arose in that case.

15. It appears from the statement by Sheriff Smart on 1 May 2015⁴ that, at the time of the first trial, the extent of the accused's illness was not fully appreciated, and

³ http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/ABSH5_LSS.pdf

⁴ <http://www.scotland-judiciary.org.uk/9/1429/Statement-following-acquittal-of-the-accused-in-HMA-v-Graeme-McNaught>

so an appropriate mental health disposal was not imposed. It is not clear that the proposed order would have been imposed, even if it had been available, and it seems clear that what should have happened was for more intensive intervention to be put in place to ensure the accused received appropriate medical care.

16. If there are cases where a formal mental health disposal is not indicated, a supervision and treatment order is already available to the court and would generally appear to be more appropriate, in that there will be someone who is supporting and supervising the person, making compliance much more likely.

17. We would also point out that the numbers of such cases will be vanishingly small. Of over 100,000 penalties in Scotland in 2013-14, only 19 appear to have involved an insanity, hospital or guardianship order⁵, and most of these will have had nothing to do with harassment.

18. We would be happy to provide the Committee with further information or comment is that would be helpful.

Colin McKay
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⁵ Table 7, Criminal Proceedings in Scotland 2013-14
<http://www.gov.scot/Resource/0048/00481722.pdf>