

## Justice Committee

### Abusive Behaviour and Sexual Harm (Scotland) Bill

#### Written submission from the Scottish Human Rights Commission

##### Introduction

1. The Scottish Human Rights Commission (the Commission) welcomes the opportunity to submit comments to the Justice Committee on the Abusive Behaviour and Sexual Harm (Scotland) Bill. The Commission supports the broad policy aim of improving how the Scottish justice system responds to abusive behaviour, including domestic abuse and sexual harm. The Commission considers, however, that the Bill could be strengthened in certain areas.

##### Disclosing, or threatening to disclose, an intimate photograph or film (sec 2)

2. Article 10 of the European Convention on Human Rights protects the right to freedom of expression, which includes the right to communicate through the use of photography and film. Article 10, however, is not absolute; this means that measures limiting the right can be permissible if they are in accordance with the law, are taken for a legitimate aim and are proportionate. One legitimate aim listed in Article 10 is the protection of the reputation and rights of others. Article 10 rights therefore often have to be balanced with other rights protected under the ECHR.

3. Article 8 ECHR, which protects an individual's right to private and family life, is a right that can come into tension with the right to freedom of expression. The European Court of Human Rights (ECtHR) has been clear that Article 8 is of particular importance in deciding whether to control the publication of certain images. In the landmark case of *von Hannover v Germany (no. 2)*, the ECtHR stated: "*Freedom of expression includes the publication of photos...This is nonetheless an area in which the protection of the rights and reputation of others takes on particular importance, as the photos may contain very personal or even intimate information about an individual or his or her family...*"<sup>1</sup> The ECtHR stated that the decisive factor in balancing Articles 8 and 10 lay in the contribution that the photograph made to a debate of public interest. Against this background, the Commission is satisfied that, given the clear intrusion into a person's most intimate private life, coupled with the fact that such images are not disclosed in the public interest, the offence created in section 2 of the Bill represents a proportionate and acceptable inference with the right to freedom of expression.

4. The Commission would, however, draw to the Committee's attention that the ECtHR has held that photographs or images captured in a public place can still infringe on a person's private life.<sup>2</sup> It is not the place the photograph is taken that is determinative, rather it is whether the photograph infringes on a person's private sphere.<sup>3</sup> The Commission therefore questions whether the defence provided for in section 2(5) of the Bill is appropriate as a general defence. Rather, the Commission

<sup>1</sup> *von Hannover v Germany (no.2)* (2012) EHRR 15 at para. 103.

<sup>2</sup> See, for example, *Peck v UK* (2003) 36 EHRR 41.

<sup>3</sup> *von Hannover v Germany (no. 2)*

feels that the individual circumstances of each case should be assessed. It is possible that a photograph or film taken in a public place could still be intimate in nature; in these cases, it is difficult to see why a person who shares such material without consent should benefit from the defence in section 2(5).

### **Jury directions relating to lack of communication about offence / absence of physical resistance or physical force (sec 6)**

5. Article 6 of the ECHR protects an individual's right to a fair trial. Article 6(1) sets out a number of general aspects of a fair trial, such as the requirement for a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Article 6(2)-(3) then sets out minimum rights to be afforded to a person accused of a criminal offence. Further principles not specifically set out in Article 6 are also highly relevant and have been developed by case law; one such principle is equality of arms.<sup>4</sup>

6. The English Court of Appeal has considered the fairness of jury directions of the type envisaged in the Bill. In the 2008 case of *R v D*<sup>5</sup>, the appellant, who was convicted of rape and sexual assault, complained of statements made by the trial judge in the course of his summing up to the jury. The judge made comments to the jury to the effect that the trauma of rape could cause feelings of shame and guilt that might inhibit a person from making a complaint about rape and stressed that they should keep this in mind when considering evidence led by the defence that the victim had failed to report the rapes for some time. The Court of Appeal held that, although in this specific case the judge had gone into too much detail (due to other remarks he made about the psychological effects of rape by a partner), the convictions were safe. In stressing that any comment made to a jury in a summing up must be uncontroversial, the court stated: "*The judge is entitled to make comments as to the way evidence is to be approached particularly in areas where there is a danger of a jury coming to an unjustified conclusion without an appropriate warning.*"

7. The Commission's position is that the jury directions of the type set out in section 6 of the Bill amount to uncontroversial statements which may indeed serve to address misconceptions held by some members of the public around the behaviour of victims of sexual assault. The Commission does not consider that these statements, if delivered appropriately, would prejudice an accused's Article 6 rights. Jurors are expected to approach their task (which is assessing the factual evidence they have heard) with open minds, untainted by preconceptions and prejudices.<sup>6</sup> The Commission's view is that directing jurors in the manner proposed in the Bill should assist to ensure fairness is achieved in seeking to eliminate any preconceptions jurors may have around sexual offences and uphold the right to redress of victims and survivors of abuse or sexual assault.

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<sup>4</sup> *Neumeister v Austria* (1968) 1 EHRR 91.

<sup>5</sup> *R v D* [2008] EWCA Crim 2557.

<sup>6</sup> Jury Manual, Judicial Institute for Scotland, January 2015, at pg. 1.

## Sexual Harm Prevention Orders and Sexual Risk Orders

8. Chapters 3 and 4 of the Bill provide for the making of sexual harm prevention orders and sexual risk orders by an appropriate sheriff in certain defined circumstances. Along with any general prohibitions and restrictions deemed necessary for the protection of the public or, in particular, children and vulnerable adults, both types of order may also contain a prohibition on foreign travel. While sexual harm prevention orders are linked to a conviction (or a finding that a person did commit an offence but was, for example, unable to stand trial), sexual risk orders are not linked to a conviction. It is clear that both orders have the potential to significantly infringe on a person's private and family life.

9. Article 8 of the European Convention on Human Rights protects an individual's right to respect for his or her private and family life, home and correspondence. The scope of Article 8 is wide and has been held by the ECtHR to protect "*a right to personal development, and the right to establish and develop relationships with other human beings and the outside world.*"<sup>7</sup> Given the wide scope of Article 8, it is clear that restrictions on movement and association will interfere with the right. However, like Article 10, Article 8 is a qualified right and certain interferences are permissible if they: are in accordance with the law; pursue a legitimate aim; and go no further than is strictly necessary to pursue that aim.

10. In addition to the requirement of legality, one legitimate aim that can justify an interference with a person's Article 8 rights is if the measure in question is taken for the protection of the rights and freedoms of others. In this regard it is relevant that, under European human rights law, not only is the State under a duty to avoid perpetrating abuses of rights guaranteed under the Convention (referred to as a negative obligation), the State, through authorities such as the Police and the courts, also has a positive obligation to protect its citizens from harm by other private citizens. For example, Article 3 of the ECHR protects against torture, inhuman or degrading treatment or punishment and the ECtHR has held that physical harm, particularly when the victim is very young, can reach the level of severity required by Article 3.<sup>8</sup>

11. Interferences with Article 8, where they are for an established legitimate aim, can only be justified if they are proportionate to that aim; this means the measure must go no further than necessary to achieve the stated aim. Another key aspect of proportionality is that, where there is an alternative, less intrusive measure available which would achieve the stated aim, that is the option that should be used.<sup>9</sup> Under the Human Rights Act 1998, it is unlawful for all public authorities – including courts – to act in a way that is incompatible with a person's rights under the ECHR.<sup>10</sup> This means that, in deciding whether to grant an order, a sheriff will have to consider whether making the order is a proportionate interference with an individual's Article 8 rights. This, in itself, is a clear safeguard against the arbitrary imposition of restrictive orders. Furthermore, the relevant sections of the Bill state that a sheriff

<sup>7</sup> *Pretty v UK* (2002) 35 EHRR 1.

<sup>8</sup> For example, see the case of *A v UK*, 27 EHRR 611, which concerned the State's failure to protect against physical abuse.

<sup>9</sup> See *Campbell v UK* 15 EHRR 137 at para. 62.

<sup>10</sup> s.6 Human Rights Act 1998.

may only make an order if they are satisfied that the person's behaviour necessitates that course of action and the orders are subject to review by appeal.

12. The Commission is therefore of the view that, imposed appropriately in accordance with the Bill and the human rights principles set out above, the civil orders provided for in the Bill can strike the correct balance between the rights of members of the public and the rights of the individual concerned. Notwithstanding the safeguards already present, the Commission believes that the Bill could be further strengthened by including specific references to proportionality and the strict necessity test referred to above. The Commission believes this would better ensure that the correct balance is struck between the rights of the individual concerned and the rights of the wider public.

Scottish Human Rights Commission  
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