

Justice Committee

Abusive Behaviour and Sexual Harm (Scotland) Bill

Written submission from James Chalmers

1. I broadly support the Bill as introduced. I wish to comment in detail only on the provisions relating to disclosure of an intimate photograph or film and the commission of sexual offences elsewhere in the United Kingdom. I have no comments to make in respect of the provisions relating to the domestic abuse aggravator (s 1), the making of non-harassment orders in criminal cases (s 5) or jury directions relating to sexual offences (s 6), other than to note that I support all these provisions. The changes made by s 5 are likely to be of practical use only exceptionally rarely, but that is not a reason to object to their inclusion.

Disclosure of an intimate photograph or film

2. I have three comments to make on this provision, as follows.

3. *Mens rea*. I note that this offence requires proof that A intended to cause fear, alarm or distress to B, or was reckless as to whether B would be caused fear, alarm or distress (section 2(1)(b)). This goes further than the corresponding English offence (Criminal Justice and Courts Act 2015 s 33), which can only be committed where A intended to cause B distress. While, in my response to the *Equally Safe* consultation, I expressed scepticism about going beyond the *mens rea* requirement specified in English law, I think the choice made by the Scottish Government here is a reasonable one. In evaluating the *mens rea* requirement proposed in the legislation, it should be noted that this is a serious criminal offence, with a (proposed) maximum penalty of five years' imprisonment. Conviction will be highly stigmatic, and rightly so. The culpability requirement should correspond to the penalty and stigma associated with the offence.

4. *Consent*. I have some difficulty in understanding the purpose of s 2(4), which distinguishes between "specific" and "general" consent. This seems to be an unhelpful distinction which opens up the possibility of an accused seeking to avoid conviction on the basis of some vaguely defined "general" consent. In fact, consent must *always* be specific: B can consent, for example, to disclosure to the world at large, or a group of people, but they must specifically do so. The law would be clearer were subsection (4) deleted, although some consequential redrafting of 3(a) and (b) might then be helpful in order to emphasise the requirement of specificity (e.g. rewording 3(a) to "B consented to A's disclosure or threatened disclosure of the photograph or film"). I note also that s 2 does not, in contrast to s 15(3) of the Sexual Offences (Scotland) Act 2009, make it clear that consent may be withdrawn at any time.

5. *The definition of "intimate situation"*. "Intimate situation" in section 3 has been drafted by adapting the formulation used to define "private act" in section 10 of the Sexual Offences (Scotland) Act 2009, which defines the latter term for the purposes of the offence of voyeurism. However, the offence of voyeurism includes additional provisions which were inserted into the 2009 Act at a later date to cover the practice

referred to as “upskirting” (s 9(4A)-(4B) of the 2009 Act). Those offences are not defined by reference to a “private act”. As the Bill stands, it is unlikely that images obtained in breach of s 9(4A) or (4B) of the 2009 Act would fall within the scope of the section 2 offence, which seems undesirable in principle.

Commission of certain sexual offences elsewhere in the United Kingdom

6. I support the provisions in sections 7 and 8 but would note three concerns regarding section 8.

7. *Habitual residence.* The proposed section 54A(2) entails that if a person does an act in England which is criminal under Scots law but not English law, they can only be prosecuted in Scotland if they are a habitual resident of Scotland. That is appropriate and is consistent with Scots law’s general approach to extraterritorial jurisdiction over sexual offences (s 55(2) of the Sexual Offences (Scotland) Act 2009). However, section 54A(8) defines habitual resident so as to include someone who becomes a habitual resident of Scotland *subsequent* to the Act taking place.

8. The proposed section 54A(8) seems, therefore, to have a peculiar consequence. Suppose that there is an area of law, whether now or in the future, in which Scots and English law differ slightly. A person, resident in England, does an act in England which is lawful in England but unlawful in Scotland. They are, correctly, not liable to prosecution in either jurisdiction. However, if they later move to Scotland, they become guilty of a criminal offence at the point at which they become a habitual resident. This seems wrong in principle and creates difficulty in terms of article 7 of the European Convention of Human Rights, because it would involve holding someone guilty of a criminal offence on amount of an act which did not constitute a criminal offence when it was committed. That said, I note that the same anomaly arises under the existing sections 54-55 in respect of persons who acquire UK nationality subsequent to the date of committing any alleged offence.

9. *Consultation with the Director of Public Prosecutions.* I note that the proposed section 54B, in requiring only that the prosecutor *consult* the DPP for England and Wales or Northern Ireland, would have the consequence that the Lord Advocate effectively has the power to override a decision of the DPP not to prosecute for a criminal offence which took place within that prosecutor’s own jurisdiction. This seems surprising (although, conversely, I can understand the reluctance to create any requirement that the consent of one of the DPPs is required to bring any proceedings in the Scottish courts).

10. *Cases where the locus of the wrongdoing is uncertain.* Section 5.9 of the *Equally Safe* consultation paper noted that there might be cases in which a victim of abuse was unable to say whether an offence had taken place in Scotland or England. It would seem reasonable that in such cases the Scottish (or, indeed, the English) courts should be able to take jurisdiction, at least where the conduct is criminal in both jurisdictions. Section 8 deals well with the situation where the prosecution wish to bring multiple charges, some in Scotland and some in England, but it does not seem satisfactorily to address the issue of uncertainty canvassed in section 5.9. For example, in a case where A is alleged to have committed a single sexual offence, but it is uncertain whether the conduct took place in England or in

Scotland, the prosecution would be unable to establish that the condition in the proposed section 54B(3(b)(ii) was either satisfied or did not require to be satisfied, and the prosecution would fail.

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