



**Consultation response 12<sup>th</sup> March 2008**

## **RECOMMENDATIONS OF THE SCOTTISH LAW COMMISSION REPORT ON RAPE AND SEXUAL OFFENCES**

### General Comments

Rape Crisis Scotland welcomes the opportunity to respond to the recommendations of the Scottish Law Commission's report on rape and sexual offences. This is a crucial opportunity for Scotland to update and improve the legislative framework on this issue, and it essential that we take the time to get this complex and difficult area of law right. Scottish Government figures suggest that less than 4% of rapes recorded by the police in Scotland result in a conviction. Complainers of sexual offences do not speak highly of their experience of the Scottish justice system: many women describe their experience of giving evidence in particular as akin to re-traumatisation, or being raped again. It is clear that there is a significant need for reform.

While Rape Crisis Scotland welcomes the modernisation of offences relating to sexual crimes which the SLC bill represents, we need to be very clear that much remains to be done. Very important issues relating to evidence, such as Moorov, have been referred to a new SLC review, and it is crucial that reform to this area of law is prioritised.

One issue not dealt with within the draft bill is that of sexual history and character evidence. A recent evaluation commissioned by the Scottish Government of legislation designed to protect complainers from this type questioning found that 7 out of 10 women in rape trials will be asked about their sexual history or character. It is completely unacceptable that women in Scotland continue to be treated in this way. Rape Crisis Scotland accepts that the Scottish Government has already legislated twice in this area, but there can be no doubt that the provisions to which these efforts have led have failed to protect women in Scotland. It remains unclear whether it is the law itself or the way it has been implemented which is at fault. The Crown Office has issued new guidance on this issue, and it may be that this improves the situation. What is crucial, however, is that this aspect of the law remains under regular review, to determine whether or not further legislation is required. We strongly recommend that a further evaluation of the impact of the legislative provision relating to sexual history and character evidence is carried out in 2009 to ascertain whether or not there has been any improvement in the ability of the law to protect women from intrusive, humiliating and irrelevant questioning. We cannot overstate the importance of this issue: this type of questioning significantly adds to the distress experienced by complainers, it is potentially highly prejudicial for juries and it acts as a deterrent to women coming forward to

report rape in the first place. Often one of the reasons that women give us at rape crisis for not reporting their experience to the police is the prospect of giving evidence in court and their past history being under scrutiny. We would also argue that it represents a breach of women's human rights to be subjected to this type of treatment.

Rape Crisis Scotland also urges the Scottish Government to broaden out the definition of "analogous convictions" (to include other forms of violence against women) which the accused is obliged to reveal if an s.275 application is made in his defence to question the complainer on her sexual history or character. This is in light of the findings that revealed, for example, that a man who had a previous conviction for disfiguring his wife was not obliged to disclose that in the course of his trial for her rape, as it was not considered to be an analogous conviction.

A further concern for RCS is the increase in the frequency with which complainers' medical records are accessed in the course of criminal trials. This is another matter worth legislating on in the context of this Bill. The introduction of such records is a serious breach of women's privacy and can significantly exacerbate the extent to which they are exposed to spurious and idle speculation on many irrelevant (and highly private) aspects of their health, including sexual history and mental health.

Rape Crisis Scotland is still of the view that close examination of the caution currently issued on arrest might have a part to play in restoring the balance of focus in the courtroom as it would potentially have an impact on the accused's decision to give evidence. It is difficult to see how juries can properly examine whether the accused reasonably believed the complainer consented – or consider what steps he took – if he doesn't give evidence. In this context, the approach of the police interview with the accused in relation to questions of consent will be absolutely crucial, as this may be the only opportunity the jury will have to hear the accused's account of this. Further police guidance and training in this area may be helpful prior to the implementation of any legislation.

It is also important that the Scottish Government and Parliament consider what mechanisms may be helpful to put in place to review the operation and impact of any new legislation.

With the provisos set out below, Rape Crisis Scotland welcomes the Scottish Law Commission's Report and Draft Bill to the extent that these propose to amend the law on rape and sexual assault in Scotland. However, we do not anticipate that these changes will make a significant difference to the prospects of rape complainers of obtaining convictions against those who have assaulted them, nor do we expect that on their own they will make the experience of rape complainers in court significantly any less painful or distressing than it is at present.

Rape Crisis Scotland believes that the new Sexual Offences Bill is an important step in improving legal responses to rape in Scotland, but that it can't be seen in isolation from wider changes which are required. This includes issues relating to the laws of evidence which will be considered as part of a further, broader, Scottish Law Commission review. The focus on the specific issues and challenges relating to sexual offences must not be lost within any broader review. The Crown Office & Procurator Fiscal Service is currently implementing 50 recommendations from their review of the investigation and prosecution of rape and sexual offences, and this represents a welcome and important development. Changes within legal responses to rape must, however, be matched by a commitment to challenge attitudes within

Scottish society to women's behaviour and sexuality. Only by effecting a fundamental shift in attitudes to women are we likely to improve significantly the ability of our legal system to provide justice to women surviving rape.

Our specific comments on the recommendations contained in the SLC report are given below.

## **Part 2 - Consent**

1. Do you agree with the SLC's recommendation that – "A constituent element of the offences of rape and other sexual assaults and of offences involving coerced sexual activity should be the lack of consent by the victim."?

**(Paragraph 2.19; Draft Bill, sections 1(1); 2(1); 3(1); 4(1); 5(1); 6(1), (2))**

We agree with this proposal.

2. Do you agree with the SLC's recommendation that – "There should be a definition of consent in respect of sexual offences which involve the lack of consent of any person."?

(Paragraph 2.22; Draft Bill, sections 9-11)

Rape Crisis Scotland strongly supports the development of a statutory definition of consent: given the myths and prejudices which surround female sexuality and rape, it is essential that the law provides as clear a framework as possible as to what is meant by consent.

3. Do you agree with the SLC's recommendation that –
  - “(a) For sexual offences in which the lack of consent on the part of the victim is a part of the offence, there should be a statutory definition of consent.
  - (b) Consent should be defined first by means of a general description of what consent means.
  - (c) Secondly the statutory definition should also provide a non-exhaustive list of situations where consent does not exist.”?

(Paragraph 2.35; Draft Bill, sections 9 and 10)

Agree.

4. Do you agree with the SLC's recommendation that – "**Consent as a constituent element of sexual assaults be defined in general terms as 'free agreement'.**"?

(Paragraph 2.42; Draft Bill, section 9)

Agree.

5. Do you agree with the SLC's recommendation that – "There should be a non-exhaustive statutory list of factual situations which define when a person has not consented to sexual activity. The situations should include the following:

- (a) where the person had taken or been given alcohol or other substances and as a result lacked the capacity to consent at the time of expressing or indicating consent unless consent had earlier been given to engaging in the activity in that condition;
- (b) where the person was unconscious or asleep and had not earlier given consent to sexual activity in these circumstances;
- (c) where the person agreed or submitted to the act because he or she was subject to violence, or the threat of violence, against him or her, or against another person;
- (d) where the person agreed or submitted to the act because at the time of the act he or she was unlawfully detained by the accused;
- (e) where the person agreed or submitted to the act because he or she was deceived by the accused about the nature or purpose of the activity;
- (f) where the person agreed to the act because the accused impersonated someone who was known to the person;
- (g) where the only expression of agreement to the act was made by someone other than the person.”?

(Paragraph 2.59; Draft Bill, section 10)

We support the inclusion within the definition of consent of a list of situations where consent is not present. However, within the list of factual situations, we have serious reservations about potential problems posed by the wording of the first two of these (**Recommendation 5 (a) and (b) & Draft Bill 10, (2), (a) & (b)**), in particular at the reference they make to giving advance consent:

a) where the person had taken or been given alcohol or other substances and as a result lacked the capacity to consent at the time of expressing or indicating consent unless consent had earlier been given to engaging in the activity in that condition;

(b) where the person was unconscious or asleep and had not earlier given consent to sexual activity in these circumstances;

The introduction of the idea of ‘advance’ consent into the law is very problematic, and would seem to go against the theoretical underpinning of the bill, which is that consent is not a contract, and can be withdrawn at any time. We would not, however, support the removal of alcohol and sleeping from this list.

There are several other situations which we believe should be considered for inclusion in the list:

- Where a complainer had been the victim of sexual or physical abuse at the hands of the accused on previous occasions. The inclusion of a provision to allow a pre-existing relationship of violence or a sexual exploitation should form the basis for showing that there was no free agreement or that any belief that the complainer was consenting was not a reasonable one.

- Where a complainer has been subject to behaviour consistent with grooming for the purposes of sexual exploitation

We had initially considered that circumstances where a complainer has been trafficked for the purposes of sexual exploitation should be included in this list. However, we are aware that there are concerns in relation to this with regard to difficulties in proving the accused knew that the complainer had been trafficked. We are also aware of more fundamental concerns about approaching the issue of trafficking separately from prostitution in general, in that it might seem to imply a minimisation of the harm caused to indigenous women involved in prostitution compared to women who are trafficked into prostitution. We have therefore changed our position on this and believe that further work needs to take place more generally on the issue of prostitution. Whilst current legislation deals with prostitution under public order / public nuisance, recognition of the harmful impact of prostitution on women involved, and on gender equality, indicates the need for a national debate on the nature of prostitution and whether or not buying sex should indeed be a sexual offence.

We continue to believe, however, that a rape prosecution should be considered in circumstances where it can be shown that the accused knew or was reckless to the fact that the complainer was being held against her will by a third party.

A further issue which the Scottish Law Commission considered was whether it would be helpful to set out a separate related list of factors which do not in and of themselves indicate consent. This issue is to be considered in the context of problematic social norms in relation to women's sexuality. The SLC rejects setting these out in a statutory list and suggests instead that this function could be dealt with through jury directions. RCS views this as a very helpful way forward. We have significant concerns about the impact of stereotypes and prejudices that jury members might bring to bear on their interpretation of evidence in rape trials, and clear jury directions in relation to this would be welcome.

6. Do you agree with the SLC's recommendation that – "The giving of consent to one sexual act does not by itself constitute consent to a different sexual act."?

(Paragraph 2.84; Draft Bill, section 11(2))

We strongly support this approach, and welcome it being written into the bill. It is a commonly held myth that a woman, having consented to engage in some level of intimate activity, loses the right to refuse consent to sex and it is vital that this is challenged directly within statute as well as elsewhere.

7. Do you agree with the SLC's recommendation that – "A person who has consented to a sexual act may at any time before or up until completion of that act indicate that he or she no longer consents, and if the act continues to take place it does so without that person's consent."?

(Paragraph 2.86; Draft Bill, section 11(3),(4))

Strongly agree, see above.

8. Do you agree with the SLC's recommendation that – "The provisions relating to notice of consent as a defence to a charge of a sexual offence in sections 78 and 149A of the Criminal Procedure (Scotland) Act 1995 should be repealed."?

(Paragraph 2.88; Draft Bill, section 44(2); schedule 4)

Rape Crisis Scotland opposes this recommendation. We don't wholly understand why a requirement to lodge advance notice of a defence of consent would be inconsistent with the new proposed definition of rape when it operates under our current definition of rape, which is also based on lack of consent. Although consent is the defence in the large majority of sexual offence trials, some women do not know, prior to the court case, whether the defence will be consent. Advance notice should mean that complainers will know which defence will be used, and can perhaps prepare themselves emotionally for what this might mean.

### **Part 3 – Sexual Assaults**

9. Do you agree with the SLC's recommendation that – “Sexual assaults should not be subsumed within the general law of assault but should form a separate category of offence.”?

(Paragraph 3.8; Draft Bill, sections 1-2)

Agree.

10. Do you agree with the SLC's recommendation that – “Sexual assaults should not be classified as one general type of offence but should be divided into specific types of offence.”?

(Paragraph 3.9; Draft Bill, sections 1-2)

Agree. RCS is aware that some jurisdictions have moved away from having rape as a distinct category of sexual assault, however we would not support this approach and we are pleased that the Scottish Law Commission has rejected it.

11. Do you agree with the SLC's recommendation that – “The actings which constitute the offence of rape should be defined in terms of the penetration by a person with his penis of the vagina, anus or mouth of another person without that person's consent.”?

(Paragraph 3.29; Draft Bill, section 1)

Agree. We welcome the broadening of the definition of rape to include anal and oral rape. We believe this will bring the legal definition of rape more closely into line with how both men and women experience this crime, and also in line with the understanding of the Scottish public of what constitutes rape.

12. Do you agree with the SLC's recommendation that –  
“(a) **the common law offences of rape and clandestine injury to women should be abolished.**  
**(Paragraph 3.35; Draft Bill, section 40(a))**  
**(b) section 7(3) of the Criminal Law (Consolidation) (Scotland) Act 1995 should be repealed.”?**

(Paragraph 3.35; Draft Bill, section 44(2); schedule 4)

Agree.

13. Do you agree with the SLC's recommendation that – "There should be an offence to be known as sexual assault."?

(Paragraph 3.40; Draft Bill, section 2)

Agree.

14. Do you agree with the SLC's recommendation that – **"Sexual assault is constituted by the following conduct:**

- (a) **A sexually penetrates the vagina, anus or mouth of B without B's consent;**
- (b) **A sexually touches B without B's consent;**
- (c) **A has sexual contact with B without B's consent;**
- (d) **A ejaculates semen onto B without B's consent."?**

(Paragraph 3.40; Draft Bill, section 2(1), (2))

Agree. However RCS is of the view that there should be a separate offence of sexual assault by penetration which is equivalent in seriousness and maximum sentence to rape.

15. Do you agree with the SLC's recommendation that – "For purposes of the law on sexual assault a penetration, touching or contact is sexual if a reasonable person would consider it to be sexual."?

(Paragraph 3.44; Draft Bill, section 2(3))

Agree.

16. Do you agree with the SLC's recommendation that – **"The common law on assault under circumstances of indecency should remain in effect except in relation to any conduct which constitutes the statutory offence of sexual assault or another offence in the Draft Bill."?**

(Paragraph 3.47; Draft Bill, section 40(b))

Agree.

17. Do you agree with the SLC's recommendation that – "It should be an offence for a person to cause another person, without that person's consent, to participate in any sexual activity."?

(Paragraph 3.51; Draft Bill, section 3)

Agree.

18. Do you agree with the SLC's recommendation that – **"It should be an offence for a person, acting for the purpose of obtaining sexual gratification or of humiliating, distressing or alarming another person, to cause that person, without his or her consent, to be present during a sexual activity."?**

(Paragraph 3.61; Draft Bill, section 4)

Agree.

19. Do you agree with the SLC's recommendation that – **“It should be an offence for a person, acting for the purpose of obtaining sexual gratification or of humiliating, distressing or alarming another person, to cause that person, without his or her consent, to look at an image of a sexual activity.”?**

(Paragraph 3.61; Draft Bill, section 5)

Agree. However, at the moment, these would only apply where the Crown Office could prove that the accused's purpose was to obtain sexual gratification, or was for the purpose of humiliating, distressing or alarming someone. We therefore recommend that these provisions be extended to include circumstances where the accused is reckless as to whether his behaviour has this impact.

20. Do you agree with the SLC's recommendation that – **“It should be an offence for a person, acting for the purpose of obtaining sexual gratification or of humiliating, distressing or alarming another person:**
- (a) **to make a sexual communication with that person, without his or her consent, or**
  - (b) **to cause that person, without his or her consent, to see or hear a sexual communication made to someone else.”?**

(Paragraph 3.63; Draft Bill, section 6)

Agree. However, at the moment, these would only apply where the Crown Office could prove that the accused's purpose was to obtain sexual gratification, or was for the purpose of humiliating, distressing or alarming someone. We therefore recommend that these provisions be extended to include circumstances where the accused is reckless as to whether his behaviour has this impact.

21. Do you agree with the SLC's recommendation that – **“It should be an offence for a person to administer a substance to, or cause a substance to be taken by, another person without that person's knowledge where the purpose is to stupefy or overpower that person so as to enable having sexual activity with him or her.”?**

(Paragraph 3.66; Draft Bill, section 8)

Agree.

22. Do you agree with the SLC's recommendation that – **“For any offence which requires that the accused lacked reasonable belief that another person consented, in assessing what was reasonable regard is to be had to the steps, if any, which the accused took to ascertain whether there was consent.”?**

(Paragraph 3.78; Draft Bill, section 12)

Agree. Currently in Scotland there is no requirement that any belief in consent held by the accused in rape or sexual offence trials is reasonable. This has been described as a ‘rapist’s charter’ in that it allows the accused to claim an ‘honest belief’ in consent even when it is not reasonable to hold such a belief. Rape Crisis Scotland strongly supports the move away from the subjective approach currently taken to establish mens rea. We believe that a far greater degree of objectivity is required in examining the degree to which mens rea was present than the law currently provides. We also wholeheartedly support the decision of the Scottish Law Commission to reject the inclusion of the phrase “having regard to all circumstances” in any definition of reasonable belief, as we believe such a move would mean retaining a significant subjective element. We are concerned that it would further open the door to irrelevant and prejudicial sexual history and character evidence i.e. an accused could claim that this belief in consent was reasonable due his knowledge of the complainer’s sexual behaviour with other people.

We are therefore of the firm view that the only test to belief in consent which would go any way to protecting a woman’s sexual autonomy and right to bodily integrity is an objective test.

Rape Crisis Scotland also strongly supports the increased focus on the steps taken by the accused to ensure that consent was given (**Recommendation 22, Draft Bill, Section 12**) and hopes that a more just and appropriate division of courtroom scrutiny will emerge from this provision, to replace the relentless, misleading and distressing attention given to the conduct of complainers which has always characterized rape cases in Scotland until now.

#### **Part 4 – Offences based on a protective principle**

23. Do you agree with the SLC’s recommendation that – “The law on sexual offences relating to children should not make any distinction in terms of the gender of the child or of the perpetrator of such offences.”?

(Paragraph 4.17)

Agree.

24. Do you agree with the SLC’s recommendation that – “There should be special provisions in applying the law on rape and other sexual assaults and coerced sexual activity to children who have not reached the age of 13.”?

(Paragraph 4.25; Draft Bill, sections 14-19)

Agree.

25. Do you agree with the SLC’s recommendation that – “The offences involving rape and other sexual assaults and coerced sexual activity which apply to children under the age of 13 are based on the legal premise that children below that age lack capacity to consent to sexual activity.”?

(Paragraph 4.31; Draft Bill, sections 14-19)

RCS is in full support of this recommendation.

26. Do you agree with the SLC’s recommendation that – “It is not a defence to an offence involving rape or other sexual assaults and coerced sexual activity which apply to children under the age of 13 that the accused believed that the child was 13 or older.”?

(Paragraph 4.39; Draft Bill, section 20)

RCS is in full support of this recommendation.

27. Do you agree with the SLC’s recommendation that – “There should be no defence to offences involving rape or other sexual assaults and coerced sexual activity which apply to children under the age of 13 that the accused was married to, or in a civil partnership with, the child.”?

(Paragraph 4.42; Draft Bill, sections 14-19)

RCS is in full support of this recommendation.

28. Do you agree with the SLC’s recommendation that – “There should be special provisions applying the law on sexual penetration and other sexual assaults and on coerced sexual activity to children aged between 13 and 16 where the conduct involves the consent of the child.”?

(Paragraph 4.51; Draft Bill, sections 21-26)

Agree.

29. Do you agree with the SLC’s recommendation that – “**The offences mentioned in recommendation 28 cannot be committed by a person who has not reached the age of 16.**”?

**(Paragraph 4.57; Draft Bill, sections 21(1); 22(1); 23(1); 24(1); 25(1); 26(1), (2))**

With regard to the proposals around older children, we note that the provisions proposed in this recommendation represent a significant change from the current common law, and also from the Scottish Law Commission’s original position. Rape Crisis Scotland is concerned that the proposed changes (which effectively de-criminalise sex between older children) might potentially reduce the extent to which young people are protected, and might also limit options for prosecutors. If these changes are to be implemented, we would need to be satisfied that there exists sufficient evidence that there are significant problems with the current legal framework in this area, given that there is already a policy of non-prosecution in cases involving consensual intercourse between children aged 13 to 16. If there are problems with current practice, consideration should be given to whether any issues can be addressed through the issuing of new guidelines to police and other relevant agencies.

30. Do you agree with the SLC’s recommendation that – “There should be a ground of referral of a child to a children’s hearing that the child has engaged in sexual activity with another person or has been subjected to sexual activity with another person.”?

**(Paragraph 4.57; Draft Bill, section 29)**

See response to recommendation 29 above. If indeed there is evidence suggesting that there are significant problems with the current approach which would justify legislating to decriminalise consenting sex between 13 and 16 year olds, then we would support the implementation of recommendation 30.

31. Do you agree with the SLC's recommendation that – “There should be a defence to an offence relating to sexual activity with a child aged between 13 and 16 that the accused believed on reasonable grounds that the child was 16 or older.”?

(Paragraph 4.64; Draft Bill, section 27(1)(b))

Agree. However, we are concerned about the proposed removal of an age restriction to this defence. There is substantial research in relation to sexual exploitation of children which indicates that age difference is a key factor in terms of risk (see for example work by Barnardo's who argue that the key point is the age differential and an age gap of over 5 years is a potential indicator of an abusive relationship rather than a peer relationship). The Bichard Inquiry into the Soham murders also identified age difference as a key risk factor. For this reason, we have grave concerns that removing the age limit for someone using a 'mistake in age' defence would result in reduced protection for young people from sexual predators. We are therefore in favour of there being a maximum age for use of this defence. The current age limit of 24 is, in our opinion, too high. We are of the view that 18, or at the oldest, 21, would be a suitable maximum age in relation to this defence. We also note that the SLC is proposing the removal of the restriction on an accused only being able to use a mistake in age defence once. In their discussion paper the SLC considered replacing this restriction with legislation allowing the Crown to raise that the accused had previously been charged with a like offence, but this has been rejected in their final report. The SLC have instead stated that this matter should be left to general rules of admissibility. Our understanding is that this means it would be unlikely that the Crown would be able to raise this. We are concerned about the cumulative effect of the removal in these two restrictions in relation to the protection afforded to young people from serial predators.

32. Do you agree with the SLC's recommendation that – “It should not be a defence to an offence relating to sexual activity with a child aged between 13 and 16 that the accused believed that the child was under 13 years of age.”?

(Paragraph 4.64; Draft Bill, section 27(4))

Agree.

33. Do you agree with the SLC's recommendation that – “There should be a defence to an offence relating to sexual activity with a child aged between 13 and 16 that the accused and the child were married or in a civil partnership recognised as valid under Scots law.”?

(Paragraph 4.70; Draft Bill, section 27(1)(a))

No comment.

34. Do you agree with the SLC's recommendation that – **“The accused should bear an evidential, but not a legal, burden of establishing the defences set out in recommendations 31 and 33 and elsewhere in this Report.”?**

**(Paragraph 4.74)**

We don't feel qualified to comment on the appropriateness of an evidential versus a legal burden beyond stating that in relation to recommendation 33 we would have thought it very straightforward for the accused to be able to prove conclusively that he is married or in a civil partnership with the complainer.

35. Do you agree with the SLC's recommendation that – **“There should be a defence to an offence involving sexual activity with an older child that the accused was less than 2 years older than the child or had at some time earlier engaged in such activity and at that time was less than 2 years older than the child.”?**

**(Paragraph 4.78; Draft Bill, section 28)**

See response to recommendations 29 & 30.

36. Do you agree with the SLC's recommendation that – **“But this defence does not apply to an offence involving penile penetration of an older child.”?**

**(Paragraph 4.78; Draft Bill, section 27(2), (3))**

See response to recommendations 29 & 30.

37. Do you agree with the SLC's recommendation that – **“Where a charge has been brought of a protective offence against a child, and the Crown can establish that at the time of the offence the child was under the age of 16 but cannot establish the child's actual age, then:**

- (a) if the charge is of an offence against an older child, the child will be deemed to have been 13 at that time; and**
- (b) if the charge is of an offence against a young child, the accused will be liable to be convicted of a corresponding offence against an older child.”?**

**(Paragraph 4.82; Draft Bill, section 28)**

Agree.

38. Do you agree with the SLC's recommendation that – **“The crime of lewd, indecent or libidinous practice and behaviour towards children should be abolished.”?**

**(Paragraph 4.87; Draft Bill, section 40(a))**

Agree.

39. Do you agree with the SLC's recommendation that – **“Section 311 of the Mental Health (Care and Treatment) (Scotland) Act 2003 should be repealed.”?**

(Paragraph 4.96; Draft Bill, section 44(2); schedule 4)

Agree.

40. Do you agree with the SLC's recommendation that – **“There should be a definition of the capacity of a person with a mental disorder to consent to sexual activity.”?**

**(Paragraph 4.96; Draft Bill, section 13)**

Agree.

41. Do you agree with the SLC's recommendation that – “There should be offences which impose criminal liability on a person who has sexual activity with another person over whom he or she holds a position of trust.”?

(Paragraph 4.108; Draft Bill, sections 30-35)

Agree.

42. Do you agree with the SLC's recommendation that – **“It should be an offence for a person aged 18 or older to engage in sexual activity with another person aged under 18 where:**

- (a) the parties live in the same household; and**
- (b) there was a relationship of trust between the parties.”?**

**(Paragraph 4.115; Draft Bill, section 31(1), (6))**

Agree.

43. Do you agree with the SLC's recommendation that – “There is a relationship of trust between two people who live in the same household where:

- (a) one person has or exercises parental responsibilities and rights in respect of the other person; or
- (b) one person has in the past had or exercised parental responsibilities in respect of the other person; or
- (c) one person is treating the other person as a child of his family.”?

(Paragraph 4.115; Draft Bill, section 31(6))

Agree.

44. Do you agree with the SLC's recommendation that – “It should be a defence to a charge of abuse of trust between persons sharing the same household that the accused reasonably believed (i) that the other person was 18 or older or (ii) that he was not in a relationship of trust with that person.”?

(Paragraph 4.120; Draft Bill, section 33(1))

Agree.

45. Do you agree with the SLC's recommendation that – **“But it should not be a defence that the accused was married to that person or that the parties were in a sexual relationship prior to the relationship of trust between them.”?**

(Paragraph 4.120; Draft Bill, section 33(2),(3))

Agree.

46. Do you agree with the SLC's recommendation that – “Section 313 of the Mental Health (Care and Treatment) (Scotland) Act 2003 should be repealed.”?

(Paragraph 4.122; Draft Bill, section 44(2); schedule 4)

Agree.

47. Do you agree with the SLC's recommendation that – “It should be an offence for a person to engage in a sexual activity with a mentally disordered person where he or she (a) is providing care services to the mentally disordered person or (b) works in, or is a manager of, a hospital where the mentally disordered person is being given medical treatment.”?

(Paragraph 4.122; Draft Bill, section 34)

Agree.

48. Do you agree with the SLC's recommendation that – “It should be a defence to the offence of sexual abuse of a person with a mental disorder that:

- (a) the person providing the care service did not know, on reasonable grounds, that the other person was mentally disordered;
- (b) the person providing the care service did not know, on reasonable grounds, that there was a relationship of trust with the other person;
- (c) the parties were married to, or in a civil partnership with, each other at the time of the sexual activity;
- (d) a sexual relationship existed between the parties at the time when the relationship of trust between them was constituted.”?

(Paragraph 4.125; Draft Bill, section 35)

Agree.

49. Do you agree with the SLC's recommendation that – “It should be an offence for a person aged 18 or older to engage in sexual activity with another person where:

- (a) the person was in a position of trust in relation to that other person; and
- (b) that other person was under the age of 18.”?

(Paragraph 4.128; Draft Bill, section 30)

Agree.

50. Do you agree with the SLC's recommendation that – “A position of trust should be restricted to the situations set out in section 4 of the Sexual Offences (Amendment) Act 2000 but:
- (a) a position of trust can arise in relation to a person receiving part-time education; and
  - (b) one person looks after another person where he or she regularly cares for, trains, supervises or is in sole charge of that other person.”?

(Paragraph 4.132; Draft Bill, section 31)

Agree.

51. Do you agree with the SLC's recommendation that – “It should be a defence to an offence of sexual abuse of trust in recommendation 49 that:
- (a) the accused reasonably believed that the complainer was 18 or older;
  - (b) the accused reasonably believed that there was no relationship of trust with the complainer;
  - (c) that the accused was married to, or in a civil partnership with, the complainer;
  - (d) that a sexual relationship existed between the accused and the complainer at the time when the relationship of trust between them was constituted.”?

(Paragraph 4.134; Draft Bill, section 33(1),(2),(4))

Agree.

### **Part 5 – Offences based on public morality**

52. Do you agree with the SLC's recommendation that –
- “ (1) There should be an exclusion from liability for incitement or art and part involvement in any offence concerning sexual activity with a child or young person for persons providing counselling, support or treatment on matters of sexual health.
  - (2) The exclusion from liability does not apply where the person acts with the purpose of:
    - (a) obtaining sexual gratification;
    - (b) humiliating, distressing or alarming the child or young person; or
    - (c) causing or encouraging the commission of an offence.”?

(Paragraph 5.5; Draft Bill, section 39)

Agree.

53. Do you agree with the SLC's recommendation that – “Any existing common law offence relating to homosexual conduct should be abolished.”?

(Paragraph 5.10; Draft Bill, section 40(a))

Agree.

54. Do you agree with the SLC's recommendation that – “Except for the provisions relating to procuring and related offences, section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 should be repealed.”?

(Paragraph 5.10; Draft Bill, section 44(2); schedule 4)

Agree.

55. Do you agree with the SLC's recommendation that – “It should be an offence for a person to expose his or her genitals in a sexual manner with the intention of causing alarm or distress to someone else or being reckless as to causing these effects.”?

(Paragraph 5.16; Draft Bill, section 7(1), (2))

Agree.

56. Do you agree with the SLC's recommendation that – **“It should be a defence to a charge of sexual exposure that the accused's actings were done in the performance of a play and conformed to the directions of the presenter or director of the play.**

(Paragraph 5.27; Draft Bill, section 7(3), (4))

No comment.

57. Do you agree with the SLC's recommendation that – **“It should not be the crime of assault for one person to attack another where:**

- (a) **both parties are 16 or older;**
- (b) **the purpose of the attack is to provide sexual gratification to one or other (or both) of the parties, and the parties agree to that purpose;**
- (c) **the person receiving the attack consents to its being carried out; and**
- (d) **the attack is unlikely to result in serious injury.”?**

(Paragraph 5.27; Draft Bill, section 37)

We strongly disagree with this recommendation, and don't view it as appropriate to include within this bill. On a general level there is something inherently uncomfortable in setting out in legislation that it is not a crime to attack someone as long as the purpose is for sexual gratification. A specific and significant concern is the possibility that this may be used as a defence in rape or domestic abuse cases. We would therefore be very concerned if this recommendation were adopted and this clause included in the bill.

58. Do you agree with the SLC's recommendation that – "Consideration should be given to the creation of an offence of unlawful interference remains."?

(Paragraph 5.28)

We are surprised that there is no clarity currently on what offence is being committed when someone 'sexually penetrates' a dead body. Our view is that this is an extremely serious offence and also that crucially it is a sexual offence and therefore should be included in this bill, rather than as a more general offence of interference with human remains. We saw recently a very tragic case where a woman was raped after she was murdered. We view this as rape, and believe that it is important that someone who commits this very serious offence is recognised as a sexual offender.

#### **Part 7 – Miscellaneous issues**

59. Do you agree with the SLC's recommendation that – "**The removal of criminal liability for attacks carried out by persons for the purpose of obtaining sexual gratification should apply in respect of attacks which take place before or after the date on which the relevant provision comes into force but this rule should not affect convictions for assault before that date.**"?

(Paragraph 7.6; Draft Bill, section 37(3))

N/A

60. Do you agree with the SLC's recommendation that – "Where the accused is charged with an offence under the Act and with an offence under the law in force prior to the Act, and the actual date on which the accused's conduct took place cannot be proven, the accused is liable to be convicted of an offence under the Act unless the maximum penalty for the offence under the prior law is less than that for the offence under the Act."?

(Paragraph 7.10; Draft Bill, section 41)

Agree.

61. Do you agree with the SLC's recommendation that – "**The offences of rape and rape of a young child may be tried only in the High Court of Justiciary.**"?

(Paragraph 7.16; Draft Bill, section 44(1); schedule 2, paragraph 5(2), (3))

Strongly agree.

62. Do you agree with the SLC’s recommendation that – **“Where in proceedings against an accused person in respect of one offence, that offence has not been proved, the accused may be convicted of another offence provided:**
- (a) the court or jury are satisfied that he committed that other offence; and**
  - (b) the accused had received notice that he was liable to be convicted of that other offence.”?**

**(Paragraph 7.22; Draft Bill, section 38; schedule 2)**

Agree.

## **ADDITIONAL QUESTIONS ON DEVELOPMENT OF POLICY ON RAPE AND SEXUAL OFFENCES**

### **Equal Opportunities**

1. Do you consider that any of the Scottish Law Commission's recommendations will have a particular impact – positive or negative – on a particular equality group (e.g. gender, race, disability, sexual orientation)

Rape is an issue which predominantly affects women and the current failing of our legal system to protect women from rape is intrinsically a gender issue. The success or not of the provisions in the recommendations relating to rape will disproportionately affect women.

The proposals will have a positive impact in relation to sexuality, in that they will remove current discrepancies in the law.

2. Do you have any comments as to how any legislation should be monitored and evaluated with regard to its impact on equality groups?

It will be essential to ensure that criminal justice data in relation to rape and sexual offences is gender disaggregated. Due to the narrowness of our current definition of rape, this is less of an issue now but will be if a broader definition of rape is adopted. This is likely to be required in relation to the gender equality duty. There is a broader need to improve data in relation to rape and sexual offences and the justice system more generally, as the data currently available is very limited and not entirely reliable. If systems are to be put in place to measure the impact of any new legislation, data collation in relation to attrition in particular will need to be improved.

3. Are there any other issues relating to equality which you wish to raise in relation to the recommendations contained in the Scottish Law Commission's report?

One of the most significant omissions from the recommendations relate to sexual history and character evidence, which overwhelmingly (though not exclusively) affects women. In our view, sexual history and character evidence is designed to appeal to any prejudices that jurors may have about female sexuality and behaviour. It is imperative that a future review of the operation and impact of the current provisions relating to this issue is committed to and undertaken.

### **Financial implications**

4. Do you have any comments or information on the likely financial implications of the Scottish Law Commission's proposals for the Scottish Government (police, Scottish court service, prison service, COPFS)?
5. Do you have any comments or information on the likely financial implications of the Scottish Law Commission's proposals for local government?
6. Do you have any comments or information on the likely financial implications, if any, of the Scottish Law Commission's proposals for other Bodies, individuals and businesses?

**Other impacts**

7. Do you consider that any of the proposals would have an impact on island communities, human rights, local government or sustainable development?
8. Do you have any other comments about the content of the Scottish Law Commission's report?
9. Do you have any other comments about the Scottish Law Commission's draft Bill?

**RESPONDENT INFORMATION FORM  
CONSULTATION: THE SCOTTISH LAW COMMISSION REPORT ON RAPE AND  
OTHER SEXUAL OFFENCES**

Please complete the details below and return it with your response. This will help ensure we handle your response appropriately. Thank you for your help.

Name: Sandy Brindley, Rape Crisis Scotland

Postal Address: 46 Bath Street, Glasgow G2 1HG

1. Are you responding: (please tick one box)  
(b) **on behalf of** a group/organisation

**INDIVIDUALS**

- 2a. Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government website)?

Yes (go to 2b below)   
No, not at all  We will treat your response as confidential

- 2b. Where confidentiality is not requested**, we will make your response available to the public on the following basis (**please tick one** of the following boxes)

Yes, make my response, name and address all available   
Yes, make my response available, but not my name or address   
Yes, make my response and name available, but not my address

**ON BEHALF OF GROUPS OR ORGANISATIONS:**

- 3 The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government website). Are you also content for your **response** to be made available?

Yes

**SHARING RESPONSES/FUTURE ENGAGEMENT**

- 4 We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Government to contact you again in the future in relation to this consultation response?

Yes