

## PE1773/A

Scottish Government submission of 24 February 2020

I am writing to provide the Public Petitions Committee with a response to petition PE1773.

The petitioner calls for the criminal law to recognise that a man can be raped by a woman. The petitioner does not elaborate on the specific conduct sought to be criminalised by an offence of “female rape”.

In general terms, the petitioner considers there is no existing law that fairly represents men who are victims of sexual crime by female perpetrators and therefore the petitioner feels female perpetrators are not punished in the same way or held to account to the same standards as male perpetrators.

The SPICe briefing for the Committee provides a useful commentary on current sexual offences law as set out in the Sexual Offences (Scotland) Act 2009 (“the 2009 Act”).

The 2009 Act created a statutory framework for sexual offences in Scots law, clarifying and modernising the previous mix of common law and statutory provision in this area. Its development was informed by the Scottish Law Commission’s (SLC) 2007 Report on Rape and Other Sexual Offences, which can be found at the link below, and which provides useful background for the Committee’s consideration of the present petition.

SLC Report: <https://www.scotlawcom.gov.uk/files/4712/7989/6877/rep209.pdf>

The 2009 Act widened the previous common law definition of rape. Prior to the 2009 Act, rape involved the penetration of the vagina of one person by the penis of another person but did not include any other form of penile penetration. This had the effect that only a man could commit rape and only a woman could be raped. Following commencement of the 2009 Act the definition of rape was expanded in accordance with the recommendation of the SLC to include penile penetration of the victim's mouth or anus. Gender neutral phrasing was adopted in the framing of the statutory provisions and the effect of the offence of rape contained in section 1 of the 2009 Act is that any person who has a penis can commit rape and any person – including a man - can be a victim of rape.

The SLC explained in its report the reason behind its recommendation that the offence of rape should be confined to penile penetration is as follows:

*“We do not think that rape should be defined too widely to include, for example, all forms of sexual penetration; we consider that it should be confined to penile penetration. We take this view for the reason that since the penis is a sexual organ, penile penetration constitutes a special type of wrong which is not present in other types of penetration.”<sup>1</sup>*

The SLC further noted, “...putting all types of sexual penetration or indeed all sexual assaults under the heading of rape fails to bring out what is the specific wrong involved in penile penetration.”<sup>2</sup>

It is important, though, to highlight the issue of ‘female rape’ was specifically considered by the SLC when considering the parameters of the offence of rape and what offence(s) should

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<sup>1</sup> Scottish Law Commission *Report on Rape and Other Sexual Offences*, at paragraph 3.24,

<sup>2</sup> *Ibid*, at paragraph 3.27

capture the many other types of non-consensual sexual conduct to which the victim did not consent. The SLC remarked:

*“One such type of conduct is so-called ‘female rape’, that is where a woman compels a man to have penetrative intercourse with her without his consent. Our proposed definition of rape restricts the commission of the offence to a person who has a penis. Where a woman compels a man to penetrate her, although there is intercourse obtained without consent, it is not the victim’s body which has been penetrated. This is undoubtedly a violation of the victim’s physical integrity and sexual autonomy, but it is questionable whether it can properly be described as ‘rape’. The wrong in this situation is that a person has been compelled into taking active steps to engage in sexual activity without his consent. This is a different type of violation from the victim’s own body being penetrated and should not be classified as rape but as coerced sexual conduct.”<sup>3</sup>*

Accordingly, there are important reasons why the offence of rape remains restricted to penile penetration (with the effect only a man may commit rape). However, the existing law is quite clear that the forcing of a man to engage in sexual activity by a woman is a criminal offence and crucially the maximum penalty for such offending behaviour is the same as that of rape, namely life imprisonment. In this regard, I have laid out some of the other relevant offences contained in the 2009 Act below.

### Sexual coercion

The offence of sexual coercion is contained in section 4 of the 2009 Act and may be committed by any person. It provides that the offence is committed if the perpetrator intentionally causes the victim to participate in a sexual activity without the victim’s consent and without any reasonable belief that the victim was consenting.

The maximum penalty for sexual coercion is the **same** as that for rape, namely life imprisonment.

### Sexual assault

The offence of sexual assault is contained in section 3 of the 2009 Act and may be committed by any person. It is defined in terms of specific types of sexual activity, which include non-penile penetrative assaults; touching the victim in a sexual way; and having any other sexual physical contact with the victim, whether directly or through clothing, and with a body part or implement.

The maximum penalty for sexual assault is the **same** as that for rape, namely life imprisonment.

### Sexual assault by penetration

The offence of sexual assault by penetration is contained in section 2 of the 2009 Act and may be committed by any person. It provides that a person commits the offence of sexual assault by penetration by intentionally or recklessly sexually penetrating the victim’s vagina or anus, in circumstances where the victim does not consent, and the accused has no reasonable belief that the victim is consenting to the penetration. There is an overlap between the conduct which constitutes sexual assault by penetration under this section, and that which constitutes rape under section 1 of the Act. This is deliberate and intended to cover circumstances where the

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<sup>3</sup> *Ibid*, at paragraph 3.50

victim knows that he or she was penetrated, but is unable to say whether penetration was penile or with e.g. an object or other body part (for example, due to being blindfolded).

The maximum penalty for sexual assault by penetration is the **same** as that for rape, namely life imprisonment.

The petitioner also expresses concerns about a lack of support available for male victims of sexual crime. As signposted in the SPICe briefing, the relevant Scottish Government webpage acknowledges it may be difficult for men to talk about what has happened because of the common view that men should be 'strong' and able to protect themselves, and contains a comprehensive list of specialist support services for male victims, at <https://www.mygov.scot/rape-assault/support-for-male-victims/>

I hope that this reply is helpful to the Committee's deliberations.