Equally Safe – Reforming the criminal law to address domestic abuse and sexual offences

RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Sheriffs' Association

Title **Mr** ☐ **Ms** ☐ **Mrs** ☐ **Miss** ☐ **Dr** ☐ **Sheriff** √ ***Please tick as appropriate***

Surname

O'Carroll

Forename

Derek

2. Postal Address

Sheriff's Chambers		
Airdrie Sheriff Court		
Graham Street		
Airdrie		
Postcode	**Phone**	**Email**

3. Permissions - I am responding as…

Individual ☐ / **Group/Organisation** √

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate ☐ **Yes** ☐ **No**

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available ☐

or

Yes, make my response available, but not my name and address ☐

or

Yes, make my response and name available, but not my address ☐

(c) 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 web site).

Are you content for your ***response*** to be made available?

Please tick as appropriate √ **Yes** ☐ **No**

(d) 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 Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate √ **Yes** ☐ **No**

CONSULTATION QUESTIONS

1. Does the existing criminal law provide the police and prosecutors with sufficient powers to investigate and prosecute perpetrators of domestic abuse? Yes / No (if No, please specify how the existing law should be strengthened)

Yes √ No ☐

Comments:

Whilst the Association agrees that domestic abuse is corrosive and to be combatted, it does not present any elements which ought to be classified as criminal that are not already so classified.

2. One of the ways in which it has been proposed the law could be strengthened is through the creation of a specific criminal offence concerning domestic abuse. Do you agree that this would improve the way the justice system responds to domestic abuse?

Yes ☐ No √

Comments

We find the argument in favour of a specific criminal offence of domestic violence to lack cogency. In support of a new offence, it is argued that it is unclear whether the existing criminal law covers all forms of non-violent behaviour that constitutes domestic abuse as defined by the police and COPFS' working definition: para. 1.22. Yet, that definition comprises any form of abuse which might amount to criminal conduct para. (1.11). If the conduct to be included is that which might be criminal, by definition it is already covered by the existing criminal law.

3. What behaviours which are not currently criminalised should be included within the scope of a specific offence?

Comments

None

4. Should any specific offence of 'domestic abuse' be restricted to people who are partners or ex-partners, or should it cover other familial relationships?

Comments

Yes, it should be so restricted (to partners or ex-partners). Drawing in those with a looser connection to the person affected is likely to have unintended consequences in practice.

5. Are there any other comments you wish to make about the creation of a specific offence of domestic abuse?

Comments

The conduct at which such an offence would be aimed is subtle forms of controlling or coercive behaviour (para 1.24). It is recognised that if domestic abuse is to be prosecuted effectively it is vital to be clear what constitutes criminally abusive behaviour within an intimate relationship (para 1.33). However, there is likely to be much less clarity as to what constitutes these subtle forms of controlling or coercive behaviour, thereby achieving the opposite of the aim sought. The creation of such an offence will have a mainly symbolic rather than a practical rationale, having some value as a statement that Parliament, representing the general population, condemns such conduct. The merits of legislating to emphasise the abhorrence of such behaviour, however, have to be counter-balanced by resistance to the trend towards over-criminalisation, with the result that such a movement requires careful scrutiny in order to assess whether the measure is truly warranted.

6. Do you think that there should be a statutory aggravation that a criminal offence was committed against a background of domestic abuse being perpetrated by the accused? Yes/No if no, please give reasons for your answer

Yes √ No ☐

Comments

A statutory aggravation is an open and transparent mechanism for such a background to be Judicially recognised. This is far preferably to the questionable practice of the Executive adding such a marker administratively as currently happens.

7. If you think that there should be a statutory aggravation of this kind, do you think this should be in addition to, or instead of, a specific statutory offence of 'domestic abuse'? Give reasons

Comments

We consider that this should be instead of a specific statutory offence of 'domestic abuse'.
For the reasons outlined, a separate offence is not favoured. However, the scourge of domestic violence is to be deplored and a statutory aggravator well documents that sentiment.

8. Do you agree that it should be a specific criminal offence to share private, intimate images of another person without their consent? If no, give reasons

Yes ☐ No ☐

Comments

This is primarily a matter of policy on which the Association would not normally express a view and not for the bench. The Association accepts that there are potential difficulties with applying the existing criminal law to some of this sort of activity which may be addressed with the creation of a specific offence.
Our responses to questions 9 – 15 are premised on such an offence having been legislated for.

9. Do you agree with the proposal that the offence should be restricted to images?

Yes √No ☐

Comments

The detailed explanation as to the Government's thinking behind this proposal set out in the consultation document makes a strong case for such a limitation on the application of any new offence and such a restriction seems sensible

10. Should the types of images that should be covered by the offence should be based on the definition of a 'private act' contained at section 10 of the Sexual Offences (Scotland) Act 2009? Or do you think a definition which defines an image as 'private and intimate' if the person featured in the image and the person sharing the image understand it to be such would be more appropriate?

Comments

We favour the adoption an objective test such as that set out in the 2009 Act.

11. Do you agree that the offence should be framed so that a person commits an offence where they share a private image of another person and they knew or ought to have known that its sharing/distribution would be likely to cause that person alarm or distress

Yes ☐ No ☐

Comments

The Association considers that care should be taken in diluting the requirement for men rea. The approach in England and Wales requires this. The proposed offence could be defined in a way similar to that in section 39 of the Criminal Justice and Licensing (Scotland) Act 2010.

12. Do you agree that it should be an offence to threaten to share private, intimate images of another person without their consent?

Yes ☐ No ☐

Comments

Whilst this is essentially a policy matter, we consider that there are sound reasons articulated in the consultation document for such acts being criminalised.

13. What level of maximum penalty do you think should apply for the new offence? Do you have any other comments regarding the penalties for the new offence?

Comments

The range of penalties and forums of proceedings are clearly a matter of policy. The Association observes that as a very wide range of offending behaviour may be covered by the proposed offence it will be important to allow the Court to retain its traditional independence and discretion in determining the appropriate sentence within the selected range.

14. Do you think that there should be statutory defences to the proposed offence of disclosing a private, intimate image?

Yes √ No ☐

Comments
see answer 15

15 If so, what defences do you think should be provided and why do you think they are needed?

Comments
The English defences seem directed primarily at quasi-whistleblowing and journalistic issues. The Association is not aware that that is a significant issue in this jurisdiction and accordingly has reservations about the proposed introduction of such a defence.

There may be scope for statutory defences which mirror or follow the ethos of the defences available for alleged contraventions of sections 38 and 39 of the Criminal Justice and Licensing (Scotland) Act 2010. The proposed new offences are similar in character to those types of offences.

16. Do you agree that there should be statutory jury directions which require the trial judge to make the jury aware that there may be good reasons why a victim of a sexual offence may not report that offence until some time after it has been committed and that this does not, in and of itself, indicate that the allegation is more likely to be false?

Yes ☐ No √

Comments
The Sheriffs' Association's view is that there is danger in creating by legislation an obligation on the presiding judge to give directions on these issues in every sexual assault prosecution where there is evidence of a time lapse between the alleged crime and the reporting of it. The dangers are that the directions might in fact be unnecessary, might create a misconception where none existed and might confuse the jury's task by diverting it from the real matters in dispute. In our view, however, regardless of the lack of hard evidence of a problem, there is clearly an appetite in some quarters for judges at least to feel able to give these directions in appropriate cases, using their discretion. We would suggest that the best vehicle for giving judges the confidence to deliver these directions when the circumstances of the case make it appropriate is the Jury Manual. In the Manual it would be open to the Judicial Institute to devise suggested forms of words for the directions and to explain the reasoning which lies behind them. The suggested directions would have the approval of the senior judiciary. Ultimately whether to give the directions or not would lie

in the discretion of the trial judge but the judge would be best placed to decide if the directions were necessary and could phrase the directions in a form tailored to the circumstances of the case.

It is worthy of comment that, even proceeding on the basis that statutory jury directions are ultimately introduced, the Consultation Paper recognises that the trial judge should decide exactly what to say –

"we consider that it is appropriate to leave the wording of any direction to the jury to the trial judge, who will be best placed to direct the jury in a manner appropriate to the facts and circumstances of the particular case. Subject to the views raised, any actions arising from this part of the consultation would need to be discussed with the judiciary".

The Sheriffs' Association believes that proper exercise of the judge's discretion must include deciding that any direction is unnecessary.

17. Do you consider that the terms of the jury direction used in New South Wales, Australia, requiring the judge to warn the jury that the absence of complaint or delay in complaining does not necessarily mean an allegation is false and that there may be good reasons why a victim of a sexual assault may hesitate in making, or refrain from making a complaint about the assault, is an appropriate model for a similar direction in Scots law?

Yes ☐ No √

Comments

In general terms see the answer to 16 above. In the NSW legislation the trigger for the directions to be given is so widely framed that there is hardly a case in which the directions would not need to be given other than those cases where the complainer makes the allegation instantly. All court practitioners would agree that such cases are a minority. The obligation to give the directions would frequently be triggered by Crown questioning regardless of whether the defence tried to make anything of the supposed "delay". As already stated this would run the risk that the directions might in fact be unnecessary, might create a misconception where none existed and might confuse the jury's task by diverting it from the real matters in dispute. The NSW legislation allows the trial judge no discretion at all. This is undesirable. As explained above the best vehicle for achieving the outcome sought is through the Jury Manual.

18. Do you agree that there should be statutory jury directions which require the trial judge to make the jury aware that there may be good reasons why a victim of a sexual offence may not physically resist their attacker and that this does not indicate that it is false?

Yes ☐ No √

Comments

The Sheriffs' Association's view is, once again, that there is danger in creating by legislation an obligation on the presiding judge to give directions on these issues without taking account of the actual evidence in the particular case and the approach to it of the Crown and the defence. Again the dangers are that the directions might in fact be unnecessary, might create a misconception where none existed and might confuse the jury's task by diverting them from the real matters in dispute.

For example, should the judge be required to give a warning in a case where everyone accepts that the complainer was asleep throughout the alleged assault? No question of physical resistance could possibly arise. Should the judge give a warning where the complainer has given evidence of a very violent assault, resisted by her, yet there is no evidence of any physical injury? The jury might be well be entitled to found a conclusion that the complainer is unreliable and/or incredible only on the lack of evidence of injury. Such a conclusion might be even more easily reached if there is evidence from medical experts that, had the incident occurred as spoken to by the complainer, signs of injury would have been expected.

The Sheriffs' Association believes that whether directions of the type proposed in the Consultation Paper should be given is a matter which should be left exclusively to the discretion of the presiding judge, with appropriate guidance, including suggested forms of directions, to be provided through the Jury Manual.

It is worthy of comment that, even proceeding on the basis that statutory jury directions are ultimately introduced, the Consultation Paper recognises that the trial judge should decide exactly what to say –

"we consider that it is appropriate to leave the wording of any direction to the jury to the trial judge, who will be best placed to direct the jury in a manner appropriate to the facts and circumstances of the particular case. Subject to the views raised, any actions arising from this part of the consultation would need to be discussed with the judiciary".

The Sheriffs' Association believes that proper exercise of the judge's discretion must include deciding that any direction is unnecessary.

19. Do you have any comments on how such a statutory jury direction should be worded?

Comments

See answer to Question 18

20. Do you agree that non-harassment orders should be available to the court where the court is satisfied, following an examination of facts, that a person did carry out the acts constituting the offence with which they were charged?

Yes ☐ No √

Comments

The extension of the availability of a non-harassment order to the disposals available following a finding in terms of section 55 of the Criminal Procedure (Scotland) Act runs contrary to principle and the ethos underpinning the provisions as to examination of facts which were adopted after careful consideration by (the UK) Parliament of the Thomson committee report. Such a 'remedy' is available to a victim by applying to the court sitting as a civil forum and the fact of the relevant person's mental condition would not prevent the granting of such an order.

21. If you do not support extending the circumstances in which the courts can make a non-harassment order in this way, do you have any views on other approaches that would protect victims from harassment or stalking by persons found unfit for trial?

Comments

Although the consultation document does not justify the assertion that pursuing a civil remedy would be burdensome and traumatic by reference to any supporting data the Sheriffs' Association does recognise that proceedings against a mentally incapax defender may be more complex than those against a defender without mental incapacity it would be open to the Scottish Government to make legal assistance available to 'victims'. There should be no significant evidential hurdles if a Criminal Court has already been satisfied beyond reasonable doubt that acts have been committed.

22. Do you agree that the provisions concerning extra-territorial effect of Scots law on sexual offences against children should be amended to enable Scottish courts to prosecute offences committed in other jurisdictions within the United Kingdom?

Yes ☐ No ☐

Comments

The Association considers that this is essentially a matter for policy-makers and does not express a view on the desirability of such a development in principle. That is not a matter for us. We do, however, call attention to certain weaknesses in the use in s55 of the 2009 Act of residence as a basis of jurisdiction.

The weakness which is likely to have the greatest practical importance is the absence of any adequate definition of what constitutes residence. The existing definition of a UK resident, in s55(8) of the 2009 Act, as "a person resident in the United Kingdom" is circular and unhelpful. Although the word "resident" might be thought to be one in ordinary use, and

thus one which is well understood, it has given trouble in other contexts.

"Residence" has been used most often in an international private law context, especially in cross-border family and child law cases, as the "connecting factor" which founds jurisdiction and indicates which law is to be applied. Sometimes it has been a component in the more technical concept of domicile and sometimes "habitual residence" has been used in its own right. Its meaning has, however, proved to be a fertile field for academic discussion. The questions have included whether there is a difference between "residence", "habitual residence" and "ordinary residence". It is thought by some that its meaning might vary according to context. There is fuller discussion of this problem in International Private Law: A Scots Perspective, by Professors EB Crawford and JM Carruthers, 3rd edition, para 6-44.

Residence has rarely been used as a basis for criminal jurisdiction and so there is little case law to assist from that quarter. States do tend to take a lively interest in claims to extra-territorial criminal jurisdiction because they regard the exercise of criminal jurisdiction as an aspect of sovereignty. The nationality of the alleged offender is, in public international law, a well-recognised basis for criminal jurisdiction, on the theory that a State is entitled to expect a certain allegiance from its nationals, which includes obedience to the criminal law. This approach is particularly strong in some continental European States. Nationality is capable of being defined with precision and it is so defined in s54 of the 2009 Act, under reference to the British Nationality Act 1981. Residence has achieved only limited international acceptance as a basis of criminal jurisdiction, largely where it has been of a sort which justifies an obligation of allegiance to the State of residence. This is perceived as an extension of the nationality principle. The clearest example is probably that of William Joyce (Lord Haw-Haw) who, though a US citizen, lived in British territory for many years and, describing himself as a British subject, obtained a British passport and was thus subject to UK (English) jurisdiction for treason (Joyce v DPP [1946] AC 347). Where residence is used as a basis for jurisdiction in the International Criminal Court Acts, it relates largely to offences which are crimes in international law and, as such, subject to universal jurisdiction. Neither the allegiance test nor the universal jurisdiction test seems likely to be of practical help in establishing jurisdiction in the present context .

Accordingly, if legislation made Scottish residence a basis for jurisdiction, we would expect that it would be common for that jurisdiction to be challenged on the basis that the accused was not proved to have been any more than a person who was present in Scotland on a temporary basis, however prolonged. Without a clear definition of residence, the criteria to be applied would have to be developed through case law and we cannot predict the final result. Similar challenges are likely in some cases if the 2009 Act as it stands comes to be used as the basis for a prosecution. It would be helpful if the definition of residence in s55(8) could be given more content.

The second weakness in the s55 use of residence as a basis for jurisdiction relates to the inclusion in the definition of residence of a person who has become resident subsequent to the conduct constituting the alleged offence. As presently enacted, this contemplates the possibility that a person who has no connection whatever with the UK might act in a particular way in his home country but then, at some later date, move to Scotland and find himself facing trial for a Scottish offence which did not apply to him at the time of the alleged conduct. To be sure, it would have to be proved that what he did was, at the time he did it, an offence under the law applicable in the place where it was done. That, however, would not be the law under which he was prosecuted and tried. This raises a number of interesting theoretical issues to do with public international law and sovereignty; but it also raises the practical possibility of a challenge in terms of Article 7 ECHR. Such a challenge would have a reasonable prospect of success, whether the residence at issue was UK residence (as now) or Scottish residence (as may be proposed).

Article 7 expresses the principle that no-one should be convicted and punished except on the basis of law which exists at the time of the conduct. "Law" in the context of Article 7, requires to be accessible and foreseeable – that is, the individual affected must be able to know from the wording of the relevant provision what acts will make him criminally liable and what penalty can be imposed (eg Kafkaris v Cyprus (2009) 49 EHRR 35, paras 137-140). We think that it is arguable that it is not foreseeable that the law which might come to be applied is the law of a jurisdiction to which neither the conduct nor the alleged offender was, at the time of the conduct, subject. So one who misconducts himself in Belfast, later moves to Glasgow and finds himself indicted in Scotland for what he did in Belfast might well argue, with some prospect of success, that he is protected by Article 7.

We doubt if the Scottish Parliament can solve this problem unilaterally. We note that Part 5 of the consultation arose out of an analogy which the Lord Advocate drew with terrorism offences. His remarks to the Public Petitions Committee did not make it clear that the UK – wide jurisdiction which applies in terrorism cases is created by UK legislation (the Counter-Terrorism Act 2008). Following the model to which the Lord Advocate referred, it seems likely that the United Kingdom Parliament could resolve all of the issues for conduct committed in any part of the UK by creating an intra-UK "universal" jurisdiction for specified offences. The terrorism model could not be applied without modification, because terrorism offences are common to all of the UK jurisdictions and sexual offences are neither common nor identical in their content. Nevertheless, it should be possible for UK legislation, applicable to all parts of the UK, to provide that a Scottish court which was trying an offence alleged to have been committed in Scotland could also try an offence alleged to have committed elsewhere in the UK as if it was a Scottish offence. Such legislation would provide an answer to the kind of Article 7 challenge which we have outlined above. Perhaps UK legislation was what the Lord Advocate had in mind.

23. Do you consider that any of the reforms proposed in this paper will have a particular impact - positive or negative - on a particular equality group (e.g. gender, race, disability, sexual orientation)

Yes ☐ No ☐

Comments

The Association has no views on this aspect of the possible impact of the proposed reforms.

24. Are there any other issues relating to equality which you wish to raise in relation to the reforms proposed in this paper?

Comments

No

25. Do you have any comments or information on the likely financial implications of the reforms proposed in this paper for the Scottish Government (police, Scottish court service, prison service, COPFS), local government or for other bodies, individuals and businesses?

Comments

No

26. Do you consider that the any of the proposals would have an impact on island communities, human rights, local government or sustainable development?

Comments

The Association has no views on this aspect of the possible impact of the proposed reforms.

27. Do you have any other comments about the content of this paper?

Comments
No