FACULTY OF ADVOCATES

EQUALLY SAFE – REFORMING THE CRIMINAL LAW TO ADDRESS DOMESTIC ABUSE AND SEXUAL OFFENCES

RESPONSE BY THE FACULTY OF ADVOCATES TO THE SCOTTISH GOVERNMENT CONSULTATION PAPER

JUNE 2015

EQUALLY SAFE – REFORMING THE CRIMINAL LAW TO ADDRESS DOMESTIC ABUSE AND SEXUAL OFFENCES

RESPONSE BY THE FACULTY OF ADVOCATES TO THE SCOTTISH GOVERNMENT CONSULTATION PAPER
JUNE 2015

PART ONE: AN OFFENCE OF 'DOMESTIC ABUSE'

QUESTION 1

DOES THE EXISTING CRIMINAL LAW PROVIDE THE POLICE AND PROSECUTORS SUFFICIENT POWERS TO INVESTIGATE AND PROSECUTE PERPETRATORS OF DOMESTIC ABUSE?

Yes.

QUESTION 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?

See question 3 below.

QUESTION 3

WHAT BEHAVIOURS WHICH ARE NOT CURRENTLY CRIMINALISED SHOULD BE INCLUDED WITHIN THE SCOPE OF A SPECIFIC OFFENCE?

Whether a specific offence of domestic abuse would improve the justice system response to domestic abuse is difficult to answer when no definition of

the suggested crime is given. The official definition of domestic abuse in Scotland, developed by the National Strategy to Address Domestic Abuse (2000) contains behaviours that are not criminalised but are evidenced as being common in abusive relationships, for example, withholding money. Criminalising the actions that make up the individual components of domestic abuse, as defined, outwith the context of a relationship which is defined by coercive control would be difficult to effectively enforce and would not achieve the policy aim which is presumably reducing the incidence of, and improving the criminal justice response to, domestic abuse. The Faculty is of the view that the most effective law reform should be informed by the academic research that has drawn a distinction between common couple violence and coercive control (Stark, E., (2007) Coercive Control (Oxford University Press; Johnson M., P., (2008) A Typology of Domestic Violence (Northeastern)). If policy and law reform focus on policing and punishing coercive control whilst recognising a distinction between common couple violence and coercive control, this will facilitate the justice system response to domestic abuse being more effective and allow the resources of police and prosecution to be focussed appropriately. In the context of domestic abuse, this would involve not only criminalising particular actions but focussing on whether those actions are part of ongoing coercive control within a relationship. The Faculty is of the view that embodying this distinction in a workable definition of a crime would be extremely challenging as it would necessitate departing from the standard approach in criminal law of a narrow lens on a particular event or chain of discrete events. In essence, if the policy aim is to criminalise abusive behaviours that are underpinned by coercive control, this will be extremely difficult to codify into a crime.

QUESTION 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?

Any offence of domestic abuse should be restricted to partners or ex-partners. This is necessary to keep the offence consistent with the definition developed

by the National Strategy (2000) and other legislative provisions such as domestic abuse interdicts.

QUESTION 5

OTHER COMMENTS?

No.

QUESTION 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?

The Faculty believes that a statutory aggravation of domestic abuse will be more difficult to draft and apply than other aggravations such as race, where the motivation of the perpetrator will be more readily apparent. The Faculty's view is that a statutory aggravation will not address any gap in legal provision but could impact on sentence. The Faculty is of the view, that when sentencing, courts should seek to differentiate between relationships that involve common couple violence, or one off incidents from those where the abuse occurs against a background of coercive control. Such a distinction may be obvious from the evidence led at trial, however, where it is not we recommend that criminal justice social work reports be used more routinely to gain information on the context of the offending. A presumption in favour of gaining such reports should be introduced. This should in turn lead to more appropriate disposals being employed by the court. Research has shown that monetary penalty and admonishment are common disposals employed in sheriff court cases involving domestic abuse. Improved resourcing of perpetrator programmes and use of criminal justice social work reports should result in disposals being given that focus on rehabilitation and may encourage the granting of non-harassment orders to ensure that the victim has the

protection of a civil protection order without further court proceedings being necessary.

PART TWO: NON-CONSENSUAL SHARING OF PRIVATE, INTIMATE IMAGES

QUESTIONS 8 -15

The Faculty **agrees that it should be a specific criminal offence to distribute certain images of another person without the consent of that other person, in certain circumstances.**

The Faculty is keen to ensure that such new offence clearly specifies the circumstances in which the offence may be committed.

The Faculty agrees with the proposal that the offence should be restricted to images. The Faculty considers that the offence ought to apply equally to video and still images. In this regard, the Scottish Government may wish to have regard to the definitions of "photograph" and "film" in section 52(8) of the Civic Government (Scotland) Act 1982.

The Faculty considers that the offence should relate to "images of private acts" only, as such images will normally be taken in circumstances where there is an expectation of privacy. The relevant acts might usefully be defined as images of acts falling within section 10(1) of the Sexual Offences (Scotland) Act 2009.

The Faculty does not consider it necessary to specify a *mens rea* for the offence. The Faculty considers that the new offence may be formulated as follows:

A commits an offence where A shares or discloses an image of a private act done by B, without B's consent and without any reasonable belief by A in B's consent to such sharing or disclosure.

In assessing whether B consented, regard ought to be had to the circumstances in which the image was taken (eg. modelling images where there may be an expectation of publication, or implied consent to publication).

The Faculty considers that statutory defences similar to those contained within section 33 of the Criminal Justice and Courts Act 2015 should apply.

The Faculty considers that a further statutory defence should apply, namely that it shall be a defence for A to show that the distribution by him was, in the particular circumstances, reasonable. A similar statutory defence is contained

within section 39 of the Criminal Justice and Licensing (Scotland) Act 2010. The Faculty notes that A and B may often be in a personal relationship; the Faculty considers that such a flexible, yet objectively-assessed defence is desirable to take account of the dynamic personal relationship which may exist between A and B in certain cases.

The Faculty makes no recommendations in relation to maximum penalty.

PART 3: JURY DIRECTIONS IN SEXUAL OFFENCE CASES – HOW A JURY SHOULD APPROACH CONSIDERATION OF THE TIME TAKEN IN REPORTING A CRIME BY THE VICTIM, THE ABSENCE OF RESISTANCE BY THE VICTIM AND THE ABSENCE OF USE OF FORCE BY THE PERPETRATOR

QUESTION 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?

The Faculty does not agree that there should be such statutory jury directions. The need for particular directions in any given case is best left to the judge or sheriff presiding over the trial. They have heard all the evidence and are best placed to determine the issues in dispute and what directions are best suited to those circumstances.

The Faculty shares the Government's concern that ill-founded preconceptions about sexual offences should be addressed, but it considers that this is best done through evidence and discretionary directions. It would be best left to the Judicial Institute to develop possible directions for such cases and include these in the Jury Manual to assist judges in particular cases.

Under section 275C of the Criminal Procedure (Scotland) Act 1995, the Crown is entitled, and as a matter of routine in appropriate cases does, lead expert evidence about delayed reporting. In our experience, agreement by way of joint minute of the general principle that a delay in reporting does not of itself indicate falsehood is not uncommon. In such cases the jury is bound to accept that as proven fact, rendering proposed direction unnecessary.

In any trial where the defence chooses to challenge expert evidence, perhaps by leading contrary expert evidence, then the issue is properly one for the jury

to determine based on their assessment of the evidence. In such circumstances, a requirement for the judge to provide a direction which would favour one expert's evidence over the other would interfere with the jury's exclusive role as fact finders. The case law about the type of directions which judges should give in cases with expert evidence is well developed.

QUESTION 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 sexual assault may hesitate in making, or refrain from making a complaint about the assault, is an appropriate model for similar direction in Scots law?

No. Please see answer above.

QUESTION 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?

The Faculty does not agree that there should be such statutory jury directions. The need for particular directions in any given case is best left to the judge or sheriff presiding over the trial. They have heard all the evidence and are best placed to determine the issues in dispute and what directions are best suited to those circumstances.

The Faculty considers that the definition of consent in the Sexual Offences (Scotland) Act 2009 allows the trial judge, in appropriate cases, to address in his directions the concerns about ill-founded preconceptions of physical resistance and use of force. Directions include an explanation of the meaning of "free agreement" as freely chosen, willing, active co-operation. In terms of

common law offences, should it be thought that the usual directions on the meaning of “without consent” and on the use of force and *mens rea* are ineffective in addressing the concern, then it is best left to the Judicial Institute to develop further directions.

The Faculty observes that in Scottish courts, trial judges do not sum up the evidence. There is a concern that, absent a culture of the trial judge rehearsing the evidence for both sides, mandatory directions may be wrongly perceived as indicating support for the Crown case.

QUESTION 19

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

No. Please note the answers to questions 16 and 18.

PART 4: COURT DISPOSALS AVAILABLE TO PROTECT A VICTIM WHERE AN ACUSED IS UNFIT TO STAND TRIAL DUE TO A MENTAL OR PHYSICAL CONDITION

QUESTION 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?

See question 21 below.

QUESTION 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?

Before a non-harassment order (NHO) could usefully be granted in respect of a mentally disordered offender, the judge would require to be satisfied that the subject of the order understood the terms of the order and had the capacity to obtemper the order. If this was not the case, prosecution in the event of breach would be difficult. Where the accused appears to have capacity, the use of a NHO, is a means whereby the court could seek to control subsequent behaviour. It should be noted that “An Evaluation of the Protection from Abuse (Scotland) Act 2001” (Cavanagh K., et al) reported on police and prosecution responses to breached NHOs granted in respect of current and former partners. Of the 13 breached NHO reported by police to the procurator fiscal, 4 case were marked no proceedings and of the remaining nine, four were subsequently deserted at trial. Of the three accused that pled guilty, two received monetary penalties and one received probation. This research reports that dealing with breached NHOs is complex due to the requirement

for sufficient corroborating evidence and securing the attendance of witnesses at court. If NHOs are to be used to improve the safety of victims of abuse, improved enforcement of such orders and response to breaches will be necessary.

PART FIVE: EXTRA-TERRITORIAL JURISDICTION OF SCOTS LAW ON SEXUAL OFFENCES: EXTENSION TO THE REST OF THE UK:

QUESTION 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.

The Faculty agrees that the provisions concerning extra-territorial effect of Scots law on sexual offences against children should be amended to enable Scottish courts to have jurisdiction over the prosecution of offences committed elsewhere within the United Kingdom, but only in certain limited circumstances.

The Faculty considers that if territorial jurisdiction of the Scottish courts is to be extended in this way, especially in relation to sheriff court jurisdiction, there must be some clearly demonstrable nexus between the alleged offence and Scotland.

The Faculty considers that where there is an alleged course of conduct, involving sexual offending against children in Scotland and elsewhere within the UK, that whole course of conduct should be capable of prosecution within Scotland as if it had wholly occurred within Scotland. The Faculty understands this to be what is suggested at paragraph 5.8 of the Consultation Paper. The Faculty sees no reason in principle why such prosecutions should be restricted to those involving a single child complainer.

Having regard to paragraph 5.9 of the Consultation Paper, the Faculty considers that where a child complainer, or child complainers, cannot say whether offences were committed in Scotland or elsewhere in the UK, then the offending behaviour may be prosecuted within Scotland as if it had wholly occurred within Scotland. However, the Faculty considers that such prosecution should only take place where there is reasonable cause to suspect that the offences may have occurred wholly or partly in Scotland, thereby expressly excluding cases suspected to have been committed wholly out-with Scotland.

Beyond the circumstances set out at paragraphs 5.8 and 5.9 of the Consultation Paper, which raise very specific jurisdictional issues, the Faculty does not consider that there should be extra-territorial jurisdiction of the sort envisaged. The Faculty is concerned to ensure that offences which ought properly to be prosecuted in other parts of the UK are prosecuted in those other jurisdictions; and similarly, that offences which ought to be prosecuted in Scotland are indeed prosecuted in Scotland. The Scottish courts should not have jurisdiction over conduct occurring elsewhere within the UK which has little or no connection with Scotland. The Faculty considers the mere fact that a UK national has been present in Scotland prior to committing a child sexual offence elsewhere within the UK does not sufficiently connect that offence to Scotland. The sorts of conduct against children which it is envisaged to be covered by the extended jurisdiction are already offences within the other UK jurisdictions. Those jurisdictions have robust policing arrangements but the prosecutorial thresholds for commencing proceedings vary; the reasons for not commencing a prosecution in another UK jurisdiction may be highly relevant to the fairness or otherwise of a prosecution in Scotland for the same conduct.

The Faculty is unaware if the UK government intends to similarly extend the jurisdiction of courts elsewhere within the UK over certain offences alleged to have occurred wholly or partly in Scotland. The Faculty considers that, as a matter of general principle, criminal conduct occurring in one of the jurisdictions of the United Kingdom ought to be investigated, prosecuted and judged according to the criminal law, evidence and procedure of that jurisdiction, rather than according to the law elsewhere in the UK which may differ.

Questions 23-27

The Faculty do not believe that the proposals raise particular equality, human rights, or other impacts. The Faculty have no comments on the financial implications of the proposals.