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The Scottish Government
Riaghaltas na h-Alba

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SCOTLAND

Christine Grahame MSP
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Scottish Parliament
Edinburgh

By email

26th January 2016

Dear Christine,

Thank you for the Justice Committee's Stage 1 report on the Abusive Behaviour and Sexual Harm (Scotland) Bill. Ahead of the Stage 1 plenary debate on Thursday 28 January, I enclose details in the annex of the Scottish Government's response to the recommendations made in the report.

I look forward to continuing to work with the Committee and the wider Parliament in making the Bill as effective as it can be to help minimise abusive behaviour and sexual harm within our communities.

I hope this is helpful.

Best wishes

MICHAEL MATHESON

ANNEX

SG response to Justice Committee's Stage 1 report recommendations

(For ease of reference, the Committee's comments are shown in **bold** and our responses are shown in *italics*)

DOMESTIC ABUSE AGGRAVATOR

The Committee supports proposals for a domestic abuse aggravator as set out in the Bill. We agree with the bulk of evidence received that this provision will help underline that the criminal justice system should treat any case of partner abuse with the seriousness that it deserves.

Scottish Government response

We note the Committee's support for this provision.

Whilst we see advantages in the aggravation being introduced with a focus on partner abuse, rather than other forms of abusive relationships, we note evidence that it would be fairer to include other types of domestic abuse, for instance, abuse of an elderly family member, within the definition. We would not, however, wish the Scottish Parliament to legislate in haste on this issue, as the wider implications of any such proposals would require consideration. We invite the Scottish Government to maintain an open mind as to the possibility of extending the definition of the aggravation in the light of experience, should the Bill be passed.

Scottish Government response

We note the Committee's view that there may be a case for extending the domestic abuse aggravation to cover other kinds of abusive relationships.

It may be helpful to explain that the approach adopted in the Bill reflects the definition of domestic abuse used by Police Scotland and COPFS which defines domestic abuse as being committed by a perpetrator against their partner or ex-partner.

We consider that there is a particular dynamic to abuse perpetrated by someone against their partner or former partner which differs from the kind of abuse that may be committed by adult family members against other relatives. In sentencing any individual cases, a court is able to take account of the full facts and circumstances of a particular case, including where there is a particular abuse of trust between, say, a parent and a child, or other familial relationship between perpetrator and victim.

Notwithstanding this, however, we are happy to consider, over the longer term, whether there is a case for extending the scope of abusive relationships to which the aggravation can be applied.

The Committee notes that the aggravation would not require any evidence of a past pattern of abusive behaviour. We do not oppose this, as we would not wish prosecutors to be denied sufficient flexibility to make appropriate use of the aggravator, but would expect prosecutors to have regard to the principle of proportionality in each individual case where it appears possible to attach the

aggravation to a criminal charge. The Lord Advocate may wish to consider the appropriateness of guidance to prosecutors on this issue.

Scottish Government response

We note the Committee's comments.

It is worth highlighting that the aggravation requires the court to be satisfied that, in committing the offence, the accused intended to cause the victim physical or psychological harm or else was reckless as to the causing of such harm. As such, it is not sufficient for the aggravation to be proven that the victim was simply the partner or ex-partner of the accused.

It is for the Lord Advocate to consider whether it would be helpful to provide guidance to prosecutors with regards to when it is appropriate to libel the aggravation where a person is charged with an offence against their partner or ex-partner. In deciding whether to libel the aggravation in any given case, it is of course the case that prosecutors will consider whether there is sufficient evidence in order to satisfy the statutory requirements.

The Committee notes that the Scottish Government is consulting on proposals for a discrete offence of domestic abuse that might enable conviction following proof of coercive control within a relationship. The Committee invites the Scottish Government to note the significant body of opinion manifested during Stage 1 in support of introducing the offence.

Scottish Government response

We note the support for the creation of a specific offence concerning domestic abuse from many of those who gave evidence to the Committee. As you note, we are currently seeking views on a draft offence through a public consultation which runs until 1 April 2016. The consultation can be found at https://consult.scotland.gov.uk/criminal-law-and-sentencing-team/criminal-offence-domestic-abuse.

In his foreword to the consultation document, the Cabinet Secretary for Justice states:

> *"... I urge all those with an interest to take the time to consider and offer your views so that the Scottish Government can seek to introduce into the Scottish Parliament a domestic abuse offence that has a broad consensus of support and that will make a real improvement in how our criminal justice system is able to respond in dealing with the scourge of domestic abuse."*

NON-CONSENSUAL SHARING OF IMAGES OFFENCE

The Committee supports the introduction of a new offence of the non-consensual sharing of intimate images, as set out in section 2 of the Bill. The behaviour the offence would address can be enormously hurtful and humiliating, and treating it as criminal is not disproportionate. Indeed, we note evidence that some of the conduct encompassed in the proposed offence may already be criminal. We do not see this as eliminating the need for the new offence, as some such conduct may *not* currently be criminal, or may not be subject to sufficiently stringent sanctions under existing law. The drafting of a new law provides an opportunity to set out the parameters of the offending behaviour with greater clarity and consistency. It also sends a clear message about the unacceptability of conduct that modern technology has rendered disturbingly easy to undertake, and may therefore have a deterrent effect.

Scottish Government response

We note the Committee's support for this provision.

The Committee notes differing views in evidence as to whether the proposed restriction of the section 2 offence to photographs or film is appropriate. Some witnesses considered it important that the focus of the offence remain on images of the body which, they considered, had particular power to humiliate. Others saw merit in including, for instance, text or voice recordings of intimate conversations. A clear majority of the Committee supports the approach set out in the Bill, and is mindful of the risks of unintended consequences if the Bill takes too wide an approach. We do, however, ask the Scottish Government to keep an open mind on this issue, in the light of the evidence we received.

Scottish Government response

We note the various views offered by witnesses on the proposed scope of the offence. It is worth emphasising that the Scottish Government decided to restrict the offence to the sharing of intimate images as almost all the cases which we are aware of have involved the sharing of images and the sharing of images, which may enable a complete stranger to identify the victim, is in our view especially likely to cause distress. However, we are happy to continue to monitor this as the offence is implemented to assess whether there is a need to reconsider the scope of the offence in the future.

It should be noted that it will remain possible for prosecutors to use existing laws in relation to the sharing of written or recorded material by using, for example, the Communications Act 2003 offence or the offence of threatening or abusive behaviour, in appropriate cases.

The Committee supports the inclusion of recklessness within the *mens rea* of the new offence of the non-consensual sharing of images. Making the new offence an "intention-only" crime risks making the offence too narrow, potentially allowing conduct that may properly be considered criminally irresponsible and humiliating to escape prosecution. However, the Committee does invite the Scottish Government to reflect on the evidence we have received indicating that the interplay between the Bill's definition of "intimate image" (which includes non-sexual images) and the inclusion of recklessness within the *mens rea* has, at the very least, the potential for a wider category of behaviour than may have been intended to be included within the scope of the offence. If so, we ask the Scottish Government and, as appropriate the Lord Advocate, to consider whether this requires to be addressed either in the legislation itself or in guidance to prosecutors.

Scottish Government response

We note the views of the Committee.

We consider that the inclusion of the requirement that a person who shares an intimate image of another person must be reckless that the sharing of the image would cause the person fear, alarm or distress helps ensure that the conduct can only be prosecuted where it is appropriate to do so. If a person shares an image which is of such a nature or in such circumstances that the court is satisfied that they could not reasonably have anticipated that the sharing of the image would be likely to cause fear, alarm or distress to the person(s)

featured in the image, then we note that the person's behaviour would have lacked the necessary recklessness and as such they would not be committing the offence.

Guidance to prosecutors in relation to prosecutorial policy for the new offence is a matter for the Lord Advocate. We have drawn these comments to the attention of COPFS.

The Committee notes concerns that the behaviour of children and young people may be caught by the new section 2 offence, perhaps disproportionately compared to older age groups. However, we also note a significant body of evidence, including from charities and advocacy groups for children, that the solution is not to exempt young people who have passed the minimum age of criminal responsibility from the scope of the offence, as this could result in the offending behaviour not being adequately addressed, and in victims (often children) not finding in law the remedy they deserve. The same evidence also argued that in the vast majority of cases, the correct forum for addressing this behaviour is Children's Hearings and not criminal courts. The Committee shares these views.

Scottish Government response

We note the views of the Committee.

As highlighted in your report, COPFS guidance on cases involving communications sent by social media provides that "... particular regard must be had by prosecutors where the accused is a child or young person. Given their extensive use of the internet and social media networks, children and young people are likely to be significantly affected by the laws which target behaviour on-line. The age and maturity of accused persons should be given significant weight, particularly if they are under the age of 18".

We understand that COPFS is in the process of formulating guidance in respect of intimate image abuse which we understand will contain guidance to prosecutors on the approach to be taken in relation to children and young people.

The Lord Advocate has issued guidelines in relation to children which makes clear that it will only be in exceptionally serious cases that prosecution will be appropriate for those under the age of 16.

Our justice system recognises that it is not usually appropriate to prosecute children in the adult criminal courts. Where a child under the age of 16 is suspected of having committed a criminal offence, they would more usually be referred to the Children's Reporter.

If there is sufficient evidence that the child has committed an offence, the Reporter has a duty to examine the child's circumstances to allow them to determine the best course of action for the individual child or young person. This includes obtaining reports from schools, social work or other agencies involved with the child or their family, such as doctors and health visitors.

It is also crucial that the criminal reforms set out in this part of the Bill are accompanied by a campaign of education and information, so that children and young people are made aware of the effect of the behaviour the new offence is targeting; not only the criminal legal effect but also the emotionally harmful effect that it may have on others. The Committee would be grateful for information from the Scottish Government as to what work it proposes to do on this matter.

Scottish Government response

We note the views of the Committee.

In November 2013 the Scottish Government published 'Guidance on Developing Policies to Promote the Safe and Responsible Use of Mobile Technology in Schools' which promote the safe and responsible use of mobile technology in schools.

The guidance provides advice for local authorities and schools on how to develop appropriate policies that encourage safe and responsible use whilst protecting staff, children and young people from harassment and abuse which can arise from the misuse of such technology.

In addition, the Scottish Government is working with Police Scotland and Local Authorities to review advice and support to schools around self-generated images. The Scottish Stakeholder Group on Child Internet Safety is due to consider what further action may be necessary in 2016.

We keep these matters under review and are of course happy to consider ideas as to what more may be needed in this area. Ahead of implementation of the new offence (if approved by Parliament), we will in particular consider what further activity may be necessary to ensure awareness is raised as regards the new offence both in terms of how the offence operates and why it is important to address the behaviour constituting the offence.

The Committee agrees that it is necessary to set out statutory defences to the section 2 offence, to clarify when conduct that would otherwise be considered criminal may be excused by particular circumstances. However, we invite the Scottish Government to consider evidence set out in this report indicating that some aspects of the defences may be too wide. In particular, we invite the Government to reflect on evidence that the Bill goes too far in providing a defence in relation to images taken in a public place, and may provide an insufficient protection of an individual's right to a private life, as set out in human rights law.

Scottish Government response

We note the views of the Committee.

The statutory defence contained within the offence that an intimate film or photograph was taken in a public place and members of the public were present is intended to ensure that this offence does not criminalise a person who distributes or shares photographs or films of, for example, a 'naked protest' or a 'streaker' at a sporting event as such images cannot reasonably be considered to be 'intimate'. If a person engages in a sexual act of a kind not ordinarily done in public or is undressed, or wearing only underwear, in a public place where members of the public are present, we consider there is not the same reasonable expectation of privacy that pertains to intimate images taken in private.

We note the Committee has highlighted concerns that the effect of this defence is that the offence would not cover the sharing of 'voyeuristic' photographs taken of people in public places. As the Committee is aware, the taking of voyeuristic photographs is a criminal offence under the Sexual Offences (Scotland) Act 2009, and the maximum penalty on conviction on indictment is 5 years imprisonment. We are not aware that the sharing of such images is a major issue; especially given anyone who shares such an image will most likely have taken the image in the first place and therefore would be liable to prosecution under the

2009 Act offence. We are however happy to consider further once the new offence, if approved by Parliament, is implemented to see if there is a need to widen the scope of the criminal law through changes to the 2009 Act.

The Committee also invites the Scottish Government to note evidence led before the Committee in relation to consent, or belief as to consent, as a defence to the section 2 offence. Again, views were expressed that the Bill may provide too wide a defence. We note views that modelling a definition of consent on previous legislation (where consent is referred to in terms of "free agreement") may not only provide greater legal clarity and consistency, but also provide some assurance that the defence will not unwittingly compromise the protection from manipulative behaviour that the law should afford to young people or vulnerable adults.

Scottish Government response

We note the views of the Committee.

It is worth noting that the definition of "consent", as "free agreement", which is used in the Sexual Offences (Scotland) Act 2009 was specifically developed to apply in respect of consent to sexual activity. We are not clear that it could be adapted in such a way that it would provide clarity as to what constitutes consent in quite a different context i.e. consent to share an intimate image within the context of the offence in the Bill. In any event, we consider that the courts will be able to interpret the term "consent" in an appropriate way so as to, for example, take account of manipulative behaviour directed at young people or vulnerable adults.

With regards the concern that the defence as currently provided for could compromise the protection afforded to young people from manipulative behaviour, it is worth noting that "intimate images" of children under the age of 18 will very often also constitute indecent images of a child, and the possession and distribution of such images are criminal offences under sections 52 and 52A of the Civic Government (Scotland) Act 1982, irrespective of whether or not the child consented to the sharing of the images.

The Committee invites the Scottish Government to clarify its intentions as to the aim of schedule 1 to the Bill, in relation to "information society services" and the section 2 offence. We also invite the Government to respond to evidence that the schedule may lack legal effect. We are concerned by evidence from the Cabinet Secretary to the effect that the Scottish Government in most cases, is likely to lack legal powers to prevent internet platforms hosting images that this section of the Bill seeks to render illegal. We would welcome further clarification from the Scottish Government as to what measures it could take (unilaterally or in partnership with other jurisdictions) to ensure that platforms adhere to relevant domestic laws and are placed under a positive duty to remove unlawful images.

Scottish Government response

We note the views of the Committee.

Schedule 1 to the Bill makes provision restricting the liability of information society service providers, which would include companies that run websites. It provides that they are not liable for conviction for the offence in relation to certain aspects of their services. This restriction in liability is a requirement of EU law (the E-Commerce Directive) and the Scottish Government is required to legislate in this manner.

The effect of the restriction relates to internet service providers acting as mere conduit (where an internet service provider provides access to websites), caching (keeping a local copy of a website to enable ease of access) and hosting (storing information on behalf of others).

In relation to "hosting" services, internet service providers are not liable if they have no actual knowledge that an intimate image in terms of the offence is being stored on their server or if, once they have knowledge of it, they remove it or disable access to it. If however they fail to remove or disable access, our understanding is that they could be prosecuted for the offence in the Bill.

We consider that an internet service provider could be found to have committed the offence recklessly if, having been informed of the presence of an intimate image on their server capable of causing the person featured in the image to suffer fear, alarm or distress, they fail to take down the image timeously. Schedule 1 is considered necessary for the Bill to be fully compliant with the relevant EU law. This approach is consistent with that taken in legislation concerning the extreme pornography offence in the Criminal Justice and Licensing (Scotland) Act 2010 and with the intimate image offence recently created in England and Wales under section 33 and Schedule 8 of the Criminal Justice and Courts Act 2015.

More generally, we would note that regulation of the internet is a reserved matter. Whilst it is acceptable for the Scottish Parliament to make provision limiting the liability of internet service providers in accordance with EU law and in the context of an offence of general application, we consider it likely would not be within legislative competence for the Parliament to legislate for a specific "take-down" offence aimed at the internet.

NON-HARASSMENT ORDERS

The Committee recognises that the primary purpose of section 5 of the Bill, which extends the circumstances in which the criminal courts may grant non-harassment orders, is to extend the protections available to victims of abuse. We note evidence that the granting of an NHO enables the police to intervene to arrest a person who is breaching its terms. However, in the case of the section 5 reform, a consequence of an arrest is likely to be the arrested person re-entering the criminal justice system, despite previously having been found unfit for trial. Some individuals subject to NHOs under the reform may find it difficult either to fully understand the terms of an NHO granted against them or to modify their behaviour in response to it.

Accordingly, whilst we do not doubt the good intentions of the proposed reform, we are sceptical as to its utility. We note evidence that, in some cases, other forms of disposal may be a more appropriate way to deal with the behaviour the NHO seeks to address. We invite the Scottish Government to reflect on these comments and on the evidence on which they are based.

Scottish Government response

We note the comments of the Committee.

We fully accept that there is a clear possibility that, in some cases, a person who is found unfit to stand trial in respect of the offence for which the NHO was imposed might similarly be found unfit to stand trial if they are at a later date charged with a criminal offence for

breaching the terms of that NHO. However, we do not consider that this negates the usefulness of an NHO being able to be imposed.

Having an NHO in place makes it easier for the police to intervene to protect the victim of harassment at an early stage in the event of on-going harassment by the subject of the order, as certain behaviour which is contrary to the terms of the NHO (e.g. approaching the person named in the order) would not otherwise constitute a criminal offence and therefore the police would not have power to intervene.

We consider that where a person does indeed breach a NHO and is subsequently found to be unfit for trial, it will provide the court with an opportunity to consider anew whether a different mental health disposal may be appropriate given the new facts and circumstances that have taken place since the court last considered the person subject to the NHO. As noted in evidence, this further consideration might lead to a different approach being taken by the court e.g. imposing a supervision and treatment order.

Maintaining the existing law would also mean that the onus would be placed on the victim to seek a civil non-harassment order to provide the necessary protection. Our view is that this would be less than ideal.

In respect of other forms of disposal being considered as a more appropriate way to deal with the behaviour the NHO seeks to address, we are not clear what other forms of disposal would provide the necessary protection for the victim that the NHO is designed to do. In offering this view, we note that the NHO is not a punishment on the person upon whom it is imposed, but rather a preventative disposal designed to protect the victim who has been subject to harassment.

While we accept the provision in the Bill will likely only impact on a small number of cases, we consider the provision is, for the reasons noted above, helpful and should be maintained in the Bill.

JURY DIRECTIONS RELATING TO SEXUAL OFFENCES

The Committee has not come to a common view on the introduction of the proposed two statutory jury directions set out in the Bill. However, a clear majority of the Committee supports their introduction on the ground that they would appear to do no more than ensure that judges provide relevant factual information to juries to inform their deliberations and, in so doing, help ensure that these directions are delivered more consistently than is currently the case. The minority considers that jury research on use of the directions is necessary before any decision is taken to introduce the directions by statute. The Committee is unanimous in agreeing that introducing the directions by statute should not lead to any reduction in the use of expert evidence as to victims' reactions to sexual trauma in cases where it is considered that such evidence could be material to the outcome of the case.

Scottish Government response

We note the views of the Committee. As highlighted during evidence in Stage 1, nothing in the Bill will affect the ability of expert evidence to be led where it is considered appropriate in a relevant case.

The Committee notes evidence that the propositions set out in the two directions set out in the Bill could be regarded as being part of judicial knowledge. The mechanism

by which any matter could be deemed to have "become" judicial knowledge, and what role if any Parliament would have in that process, is not currently clear to the Committee. To that end, the Committee would welcome clarification from the Scottish Government.

Scottish Government response

We note the views of the Committee. Whether a matter forms part of 'judicial knowledge' is something the Scottish Government is not involved with in any way nor is it something that Parliament has previously legislated on.

The approach taken in the Bill reflects the Scottish Government's intent to deal with the underlying issue in what we consider to be the most appropriate means available to us and Parliament.

SEXUAL ACTS ELSEWHERE IN THE UK

The Committee welcomes provisions in the Bill to extend the jurisdiction of the Scottish courts to include sexual offences against children committed in the rest of the UK. The Committee notes the potential benefit to the complainer and to witnesses in making it possible for multiple offences of a similar nature occurring in Scotland and elsewhere in the UK to be prosecuted on a single charge. We do, however, expect that these provisions would only be used where there appears to be a clear public interest in the Scottish courts assuming jurisdiction.

Scottish Government response

We note the Committee's support for the provision. Prosecution decisions in individual cases are a matter for COPFS. However, we expect that in the vast majority of cases, it will continue to be appropriate to prosecute such offences in the jurisdiction in which they were committed and it will only be in a small number of cases involving offences committed in both jurisdictions, where it would be in the public interest for all the alleged offences to be tried on a single indictment in the Scottish courts.

We invite the Scottish Government to note and respond to evidence expressing some concerns about the appropriateness of the definition of Scottish "residency" in the Bill. The Committee also seeks from the Scottish Government clarification as to the policy behind the requirement on Scottish prosecutors to "consult" the relevant Director of Public Prosecutions before proceeding with the prosecution.

Scottish Government response

We note the concerns raised in evidence about the appropriateness of the definition of Scottish "residency" and in particular, that a person could become criminally liable for acts they had done in another jurisdiction of the UK if they became habitually resident in Scotland after the acts were done. We are not aware of any significant differences between sexual offence law in Scotland and the other countries in the UK, therefore in practice this is unlikely to result in a person being prosecuted for an act which was not criminal (in the other UK jurisdiction) when it was committed. However, we will consider carefully whether amendments are required at Stage 2 to address this.

The requirement for Scottish prosecutors to consult the relevant Director of Public Prosecutions in the jurisdiction in which an offence is alleged to have been committed is

intended to ensure that the relevant prosecution service is aware of the intention to prosecute the conduct in question in Scotland, avoiding the risk that proceedings will be raised against the accused in both jurisdictions and providing an opportunity for prosecutors to agree in what jurisdiction the case should be tried.

We are aware that the Committee heard concerns in evidence that an accused person could be prosecuted in Scotland after being told by the prosecutor in the jurisdiction in which the offence is alleged to have been committed that they would not be prosecuted. The requirement for COPFS to consult with the relevant Director of Public Prosecutions ensures that they could consider the fact that an accused person had been told by the local prosecutor that no further action would be taken in deciding whether it was in the public interest to prosecute. However, we consider that there may be exceptional cases where, in view of allegations that the accused committed similar offence in Scotland, it is in the public interest to bring a prosecution in respect of all the alleged offences in the Scottish courts, notwithstanding the fact that the accused had been told by the prosecutor in the other jurisdiction that they would not be prosecuted.

SEXUAL HARM PREVENTION ORDERS

The Committee broadly welcomes provision in the Bill reforming the system of civil orders available to reduce the risk of individuals committing sexual offences, noting some evidence that orders may currently be being underused. We note that the provisions have been introduced without full consultation and that a number of concerns about detailed but sometimes important aspects of the reforms have arisen in evidence. These have arisen particularly in relation to proposed new sexual risk orders, which could be imposed without evidence of criminal wrong-doing.

We invite the Scottish Government to respond to evidence suggesting that the criteria for imposing an SRO appear to be quite broad and that the right of the person against whom the order is being sought to make representations to the court should be made expressly clear. We also invite the Scottish Government to comment on evidence that there should be more flexibility set out in the Bill as to the duration of the new orders and more clarity as to the reasons for granting interim orders.

Scottish Government response

We note the views of the Committee.

Criteria for imposition of the SRO

In respect of how the SRO can be imposed, a court needs to be satisfied that the proposed subject of the SRO has done an 'act of a sexual nature', and, that as a result of that act it is necessary for an order to be made to protect a person from harm. 'Act of a sexual nature' is not defined in the Bill, and will depend to a significant degree on the individual circumstances of the behaviour and its context. It will be for the court to determine in a case by case basis.

Noting that the list below is not exhaustive or prescriptive, and will depend on the circumstances of the individual case, an indication of examples of such behaviour might include the following:

- *causing or inciting a child to watch a person engaging in sexual activity or to look at a moving or still image that is sexual;*

- *giving a child anything that relates to sexual activity or contains a reference to such activity;*
- *communicating with a child, where any part of the communication is sexual;*
- *acts that do not involve children, but may generate a risk of harm to adults, especially vulnerable adults;*
- *forcing young women to have sex with multiple gang members as a means of initiation.*

In interpreting the term 'act of a sexual nature', the court will have the discretion to consider, in all the circumstances of a particular case, whether behaviour which may in other contexts have innocent intentions, should be considered an "act of a sexual nature" because of the motives or intentions of the perpetrator.

For example, and again depending on the particular circumstances of the case, a court may consider that certain grooming or exploitative activities come within the ambit of "act of a sexual nature" e.g. contacting a child via social media, spending time with children alone, inviting young people to social gatherings that involve predominantly older men, providing presents, drink, and drugs to young people, persuading young people to do things that they are not comfortable with and which they had not expected.

We hope this is helpful in explaining the position.

Right of the subject of the order to be heard

It is our policy intent that anyone subject to these orders will have the right to be heard before an order would be imposed.

It should be noted that Sexual Harm Prevention Orders (SHPOs) may be granted at the sentencing stage of criminal proceedings, in which case the offender will have had an oral hearing in the form of a plea-in-mitigation. However, SHPOs can also be granted in civil proceedings, and SROs can only be granted in civil proceedings. In civil cases, the procedure governing applications for these orders will be specified by the Scottish Civil Justice Council. Courts are required, of course, to comply with ECHR fair trial rights.

However, to ensure our policy intent is met, we are intending to lodge appropriate Stage 2 amendments which will put beyond doubt that the individual subject to the order is able to make oral representations to the court before a decision is made whether to impose the order.

Duration of orders

The fixed periods of time set down in the Bill relative to SHPOs and SROs largely mirror the minimum duration periods for SOPOs and RSHOs currently provided for in legislation in Scotland. These periods are also found in the equivalent legislation which applies in England and Wales.

We are not aware that the issue of minimum duration of orders has been raised previously in relation to the operation of the existing system and we would note the safeguard of the ability of the subject of the order to apply to the court at any time to have an order lifted does already provide flexibility. We will consider further whether there is a clear justification for providing more flexibility in relation to minimum durations of orders.

Interim orders

It may be helpful to explain that the purpose of an interim order is to allow restrictions and requirements to be placed on the person as soon as possible, in cases where there is an urgent requirement to protect. Where the chief constable considers that an interim order would be appropriate, an application for an interim order can be made either at the time of the application for a full order or in the time between making the full application and the determination of that application.

In terms of the existing civil order regime, which the new orders replace, it is currently possible to apply for interim Sexual Offences Prevention Orders and interim Risk of Sexual Harm Orders (see section 109 of the Sexual Offences Act 2003 and section 5 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005).

Whilst recognising that the subject of the order must be allowed adequate time to prepare, interim orders are a recognised part of Scots law, allowing the court to take immediate steps to ensure no harm during the period where it properly considers a case. Interim orders require as a matter of existing law to be reviewed on a regular basis and cannot be used as a substitute for a formal order. An interim order can therefore be used in this instance to provide a degree of public protection pending the determination of the main application.