



**Home Office**

BUILDING A SAFE, JUST  
AND TOLERANT SOCIETY

# SETTING THE BOUNDARIES

Reforming the law on sex offences



VOLUME I

July 2000



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# Foreword by the Home Secretary

This consultation paper represents the completion of the first stage of a review of sex offences. The review has been conducted independently of Ministers. The paper therefore sets out recommendations to Ministers. Before, however, the Government comes to any firm conclusions on how this most sensitive area of the law should be developed, we want to know the views of the public on all of the proposals in this report.

Rape and other sexual offences of all kinds are dreadful crimes which deeply affect the lives of victims and their families, and whole communities. Modernising and strengthening the law can make a direct contribution to our aim of creating a safe, just and tolerant society. We give particular priority to the protection of children, and welcome the emphasis the review has given to increasing this protection and also that of vulnerable people.

Last year I set up the review to consider the existing law on sex offences, and to make recommendations for clear and coherent offences that protect individuals, especially children and the more vulnerable, from abuse and exploitation, and enable abusers to be appropriately punished. Their recommendations also had to be fair and non-discriminatory in accordance with the European Convention on Human Rights and the Human Rights Act. This is their report.

The review was an open, consultative process which involved many people and drew in many strands of opinion. The review group approached their task in a careful way and started from first principles. They have recommended proposals for change and set out the reasoning behind them.

We are continuing that open and consultative process by seeking the views of the public and of interested organisations on all of the recommendations as well as the individual consultation points set out in the text. The review has recommended changes to us. We now need to consider how well these will work, whether they would increase protection, whether they would apply fairly, equitably and with justice and whether there would be any effects or consequences not yet identified.

The report recommends what is in effect a new code of sex offences to take us into the new century, raising important questions of social and legal policy. The report is only the beginning of a debate on the way forward. I await the response with interest.



**Jack Straw**



# Introduction

## Home Secretary

This is the report of the review of sex offences that you announced on 25 January 1999. We have met on 35 occasions over the past 16 months, held 8 conferences and seminars and attended a range of other meetings and conferences. We have listened, thought, argued and discussed until we have developed a set of proposals for sex offences which are fair, just and fit for the twenty first century.

In developing these proposals we have taken full account of the findings of research, of the views of victims and survivors and of the experiences of other countries in law reform. We have drawn on the knowledge of practitioners in the criminal justice field and those who work with victims, children and the most vulnerable people in our society.

Undertaking this review has been challenging and often moving. There are grave problems in our society which the law does not tackle well at present and we have identified ways to improve that. We were impressed by the dedication of many committed people who do their best to ensure that it does deliver justice at present.

The members of the review have given unstintingly of their time, their expertise and their wisdom. Without them none of this would have been possible. Many hundreds of other people have also taken time and effort to inform our work, in person or in writing, and they too made an essential contribution. Colleagues and friends around the world also have given us time, information and wise advice from places as diverse as Canberra, California, Ottawa, Hobart, Wellington, Stockholm, Brussels, Washington, Melbourne and Sydney. And the Internet has provided us with a tool for searching, and occasionally finding, information and for communicating around the world. I am grateful to all of them.

And finally, this enterprise would never have got off the ground without Su McLean-Tooke who was in from the beginning, and Haydee Scarsbrook who joined us in June 1999.

Betty Moxon

April 2000



# Executive Summary

**0.1** The sex offences review was set a challenge – to examine the most personal and contentious area of the criminal law and recommend how it should be structured to deliver protection and help achieve a safe, just and tolerant society.

**0.2** Why did the law need reviewing? It is a patchwork quilt of provisions ancient and modern that works because people make it do so, not because there is a coherence and structure. Some is quite new – the definition of rape for example was last changed in 1994. But much is old, dating from nineteenth century laws that codified the common law of the time, and reflected the social attitudes and roles of men and women of the time. With the advent of a new century and the incorporation of the European Convention of Human Rights into our law, the time was right to take a fresh look at the law to see that it meets the need of the country today.

**0.3** The terms of reference of the review were:

“To review the sex offences in the common and statute law of England and Wales, and make recommendations that will:

- provide coherent and clear sex offences which protect individuals, especially children and the more vulnerable, from abuse and exploitation;
- enable abusers to be appropriately punished; and
- be fair and non-discriminatory in accordance with the ECHR and Human Rights Act.”

**0.4** The process we used was open, inclusive and evidence based:

- a review structure that included key stakeholders on both the Steering Group and the advisory External Reference Group;
- a public consultation exercise with over 160 responses telling us what was wrong with the law and how it should be reformed;
- consultation conferences with criminal justice practitioners, academics, those who work with victims/survivors, children and vulnerable people, parliamentarians, faith groups and many other organisations and individuals including men’s and women’s groups;
- looking at evidence from research and from the experiences of other countries in reforming their law.

**0.5** We also took full account of the European Convention on Human Rights and the implications of its incorporation into our law. The ECHR provided us with a dynamic policy making framework that enabled us to look at the role of the state in protecting its citizens, particularly the more vulnerable, from harm; the need to ensure a fair trial and that the interests of justice were upheld (Article 6), the right to a private life (Article 8) and the right to non-discrimination in the enjoyment of ECHR rights (Article 14).



0.6 The law on sex offences is the part of the criminal law which deals with the most private and intimate part of life – sexual relationships – when they are non-consensual, inappropriate or wrong. As such it embodies society’s view of what is right and wrong in sexual relations. Our guiding principle was that this judgement on what is right and wrong should be based on an assessment of the harm done to the individual (and through the individual to society as a whole). In considering what was harmful we took account of the views of victims/survivors and of academic research. The victims of sexual violence and coercion are mainly women. They must be offered protection and redress and the law must ensure that male victims/survivors are protected too. The law must make special provision for those who are too young or otherwise not able to look after themselves, and offer greater protection to children and vulnerable people within the looser structures of modern families. In order to deliver effective protection to all, the law needs to be framed on the basis that offenders and victims can be of either sex. We have recommended offences that are gender neutral in their application, unless there was good reason to do otherwise.

0.7 Our other key guiding principle was that the criminal law should not intrude unnecessarily into the private life of adults. Applying the principle of harm means that most consensual activity between adults in private should be their own affair, and not that of the criminal law. But the criminal law has a vital role to play where sexual activity is not consensual, or where society decides that children and other very vulnerable people require protection and should not be able to consent. It is quite proper to argue in such situations that an adult’s right to exercise sexual autonomy in their private life is not absolute, and society may properly apply standards through the criminal law which are intended to protect the family as an institution as well as individuals from abuse. In addition to this, the ECHR ensures that the state must uphold its responsibility to provide a remedy in law so that a complainant can seek justice.<sup>1</sup>

0.8 We also thought it was vital that the law was clear and well understood, particularly in this field of sexual behaviour where there is much debate about the ground-rules. There is no Highway Code for sexual relations to give a clear indication of what society expects or will tolerate. The law should ensure respect for an individual’s own decisions about withholding sexual activity and protect every person from sexual coercion and violence.

0.9 In looking at the law on rape and sexual assault we recommend that these offences should be redefined in the following way:

- that rape be redefined to include penetration of the mouth, anus or female genitalia by a penis;
- a new offence of sexual assault by penetration to deal with all other forms of sexual penetration of the anus and genitalia;
- rape and sexual assault by penetration should be seen as equally serious, and both should carry a maximum penalty of life imprisonment;
- a new offence of sexual assault to replace other non-penetrative sexual touching now contained in the offence of indecent assault.

0.10 The review did consider whether there should be a lesser degree of offence to deal with acquaintance rape (sometimes called ‘date rape’), but was unanimous in rejecting this proposal. The evidence placed before the review was that rape by an acquaintance could not only be as traumatic as stranger rape, but that the betrayal of trust involved could cause further long-term psychological damage to the victim/survivor.

0.11 Both rape and sexual assault by penetration are dependant on lack of consent, as rape is at present, but this concept is so important that we recommend:

- consent should be defined as ‘free agreement’; and

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<sup>1</sup> X and Y v The Netherlands.

- the law should set out a non-exhaustive list of examples of when consent/free agreement is not present.

We recognise that both offences can be carried out intentionally by knowing that the complainant has not consented, or recklessly by not caring less whether consent has been given, and our recommendations are that:

- rape and sexual assault by penetration may be committed with intent or recklessly; and
- the definition of recklessness in sex offences should include the lack of any thought as to consent which can be described as ‘could not care less about consent’.

In response to the many submissions that the review received, and the evidence how legislation in other countries operated, the review has made recommendations to limit the use of the defence of ‘honest belief’ in consent. A defence of honest belief in free agreement should not be available:

- if the accused did not take all reasonable steps in the circumstances to ascertain free agreement at the time; or
- where the defendant was in a state of self-induced intoxication at the time of the offence; or
- if the defendant was reckless as to free agreement.

These proposals will not affect the burden of proof or the presumption of innocence for the defendant, which is the ‘golden thread’ of English justice: the prosecution will have to prove beyond reasonable doubt that there was no free agreement. The final proposal in this area is to make the law clearer:

- we also suggest standard judges’ directions to clarify the meaning of free agreement.

**0.12** Other recommendations relating to rape and sexual assault by penetration include:

- a new offence of assault to commit a serious sex offence; and
- an offence of abduction with intent to commit a serious sex offence.

The review has also recommended an offence to replace burglary with intent to rape with:

- a new offence of trespass with intent to commit a serious sex offence.

Some of the existing offences which the review thought should be retained have been recast in more modern and effective terms and include:

- an offence of obtaining sexual penetration by threats or deception in any part of the world; and
- an offence of administering drugs etc., with intent to stupefy a victim in order that they may be sexually penetrated.

**0.13** The age of consent is an important issue, and it was a matter of policy to endorse the age of consent at 16. We also believed that it was important, especially in the context of a national sexual health strategy and concerns about teenage pregnancy, not to deter those giving help, advice, treatment and support to children and young people in matters of sexual health or the young people from seeking such help. We considered whether there was an age below 16 which marked a level of development where children could not give recognised agreement in fact as well as in law to sexual activity and where such activity should be regarded as more serious. We decided:



- the age of consent should remain at 16;
- below the age of 13 (i.e. up to the 13th birthday of the child) children should not be able to consent in fact or in law.

0.14 In order to give further protection to children we recommend:

- a serious new offence of adult sexual abuse of a child to apply to all adult (over 18) sexual acts with a child under the age of consent (16);
- that unlike the offence of unlawful sexual intercourse, there should be no time limits to hinder prosecution of adult sexual abuse of a child;
- a limited defence of mistake of fact in age should be available.

We recognise the many international agreements in force respecting the right to honour the validity of a marriage in another jurisdiction, but recommend that:

- the defence of a belief in marriage should not be retained where a child is under the age of 13.

We were well aware of the evidence relating to adults who target children for their sexual gratification, and this is one of the reasons why we have proposed:

- an offence of persistent abuse of a child to reflect the course of conduct.

0.15 It is, however, a fact of life that some older children do agree to sexual activity and indulge in sexual experimentation, while others are actually abusive to other children. In order to maintain the age of consent and to deal with abusive behaviour by children we recommend:

- a more minor offence of sexual activity between children to apply to those under the age of 18 who have sex with children under the age of 16.

Where such activity was not coercive or abusive we thought that rather than becoming involved in the criminal justice system, children should be offered help and advice. The criminal law needs to be able to deal appropriately with children who coerce and abuse others. We recommend that:

- sentencing decisions should reflect specialist assessment of risk and the potential for longer term offending, and include treatment options.

0.16 The evidence placed before us of the commercial sexual exploitation of children was compelling. We recommend new offences to bear down heavily on those who use and abuse children in this way. These include:

- buying the sexual services of a child; or
- recruiting, inducing or compelling a child into commercial sexual exploitation; or
- participating in, facilitating or allowing the commercial sexual exploitation of a child; or
- receiving money or other reward, favour or compensation for the commercial sexual exploitation of a child.

We also thought that the protection of the law from commercial sexual exploitation should apply to those under the age of 18, who are defined as children in law.

0.17 We were profoundly moved by the extent of sexual abuse against vulnerable people and felt that the law needed considerable strengthening to tackle this while respecting the ability of those who could consent to sexual activity to have a private life. We recommend that:



- those who cannot understand the nature or potential consequences of sexual activity should not be able to consent to sex, and that a definition of capacity to consent be set out in law;
- sexual activity with a person without capacity to consent should be an offence and the seriousness of this offence should be reflected in the sentence available;

Where vulnerable people have some capacity to consent, we sought to establish their right to a private life whilst protecting them from exploitation by setting up a new offence of a breach of a relationship of trust. We have invited views as to which forms of care and to whom such an offence should apply. We recommend:

- a revised offence to prohibit sexual relations between those receiving treatment at hospital (whether as an in-patient or out-patient), or in residential care, and members of the staff (whether paid or unpaid) of those establishments;
- a new offence to prohibit sexual relations between those in the community who are in receipt of certain care services and people providing that care;
- a new offence to prohibit sexual relations between medical practitioners or any other who provides medical or therapeutic services and a patient or client in their care.

The latter offences should have a statutory defence for a pre-existing relationship, but only where there was some degree of capacity to consent. We also considered whether there should be a further offence for those in a position of authority over people who are confined in particular closed residential settings, such as prisons, secure units and detention centres. We felt that we did not have sufficient evidence to draw any conclusions and have invited comment.

**0.18** The review was very concerned that the law did not deal adequately with sexual abuse that occurs in the family, particularly where there are changing partners and informal relationships, which can pose a greater risk for children. We recommend:

- replacing the old offence of incest with a more modern offence that would prohibit sexual relations between children under 18 and their blood relations, adoptive parents and siblings, step-parents, foster carers and those in a position of responsibility in the family;
- sexual relations between blood relatives and adoptive parents and their children should never be lawful.

**0.19** We looked at the way the law treats gender issues and those of differing sexual orientation. We thought that the law should offer protection to men and women, boys and girls and recommend:

- the criminal law should offer protection from all non-consensual sexual activity. It should not treat people differently on the basis of their sexual orientation. Consensual sexual activity between adults in private that causes no harm to themselves or others should not be criminal.

We therefore felt that the law did not need to make particular provision for any same sex behaviour and recommend that:

- the offences of gross indecency and buggery should be repealed; those aspects of the offences providing protection for children, vulnerable people and animals would be replaced by our other proposals.
- other specific offences such as sections 4 and 16 of the Sexual Offences Act 1956 and s4 of the Sexual Offences Act 1967 will no longer be necessary and should be repealed.



On that same basis we thought that the law on soliciting should apply equally to men and women, and be similar to the way in which street prostitution is regulated and recommend:

- section 32 of the Sexual Offences Act 1956 should be repealed.

**0.20** We were not looking at the legal basis for the regulation of prostitution, or in what circumstances it could or should be legal, but we did look at the offences of sexual exploitation of individuals in prostitution. We recommend:

- new offences for the sexual exploitation of adults which includes an offence for anybody in England and Wales to recruit people for sex work anywhere in the world; and
- a new offence of trafficking for the purposes of sexual exploitation.

**0.21** We thought it important that the law should be able to deal with problems caused by inappropriate sexual behaviour in public places, including public toilets. We recommend:

- a new public order offence to enable the law to deal with sexual behaviour that a person knew or should have known was likely to cause distress, alarm or offence to others in a public place.

**0.22** We considered a number of types of sexual behaviour that are at present, or could in future be, against the law. We recommend:

- a new, replacement, offence of bestiality;
- a new, replacement, offence of indecent exposure;
- a new offence of voyeurism to deal with the observation of people without their knowledge or consent when they have a reasonable expectation of privacy;
- a new offence of compelling others to do sexual acts; and
- a new offence of sexual interference with human remains.

**0.23** Finally, we have thought about some of the implications of our proposals and we recommend a penalty framework for the offences we put forward. We discuss the parameters which could govern the requirement to register under the Sex Offenders Act 1997. We also consider the use of sex offender treatment and alternative verdicts.

**0.24** We have thought long and hard about how a law fit for the next century should be framed. We have sought to balance many conflicting views to ensure that our proposals are fair, increase the protection of the law and meet the needs of a changing society. In some cases we have also set out some particular issues on which we specifically invite views, and these consultation points are set out in the main report. But all the recommendations we make are new and it is vital that they are considered in detail by the public. We would like views on any or all of our proposals, by **1 March 2001**.

**0.25** The full report and supporting evidence is available on the Home Office website. Copies of the report and, on request, the substantial volume of supporting evidence, are available from:

Haydee Scarsbrook  
Sex Offences Review  
Sentencing & Offences Unit  
50 Queen Anne's Gate  
London SW1H 9AT  
020 7273 3443

0.26 Please write to us with your comments at the same address, or e-mail us at:

sex\_offences\_review.ho@gtnet.gov.uk

Your comments should be received by **1 March 2001**.



# List of Recommendations and Consultation Points

## Recommendations:

- 1: The offence of **rape** should be retained as penile penetration without consent, and extended to include oral penetration.

This should be defined as penetration of the anus, mouth or genitalia to the slightest extent, and, for the avoidance of doubt, surgically reconstructed male or female genitalia should be included in the definition in law. (Para 2.8.5)

- 2: **Rape** should not be subdivided into lesser or more serious offences. (Para 2.8.8)

- 3: There should be a new offence of **sexual assault by penetration** to be used for all other penetration without consent.

This should be defined as penetration of the anus or genitalia to the slightest extent, and, for the avoidance of doubt, surgically reconstructed genitalia should be included in the definition.

In circumstances where the means of penetration is not clear, the offence of sexual assault by penetration would apply. (Para 2.9.2)

- 4: **Consent** should be defined in law as “**free agreement**”. (Para 2.10.5)

- 5: The law should set out a **non-exhaustive list of circumstances** where consent was not present. (Para 2.10.6)



6: The law should include a non-exhaustive list of **examples of where consent is not present** such as where a person:

- submits or is unable to resist because of force or fear of force;
- submits because of threats or fear of serious harm or serious detriment of any type to themselves or another person;
- was asleep, unconscious, or too affected by alcohol or drugs to give free agreement;
- did not understand the purpose of the act, whether because they lacked the capacity to understand, or were deceived as to the purpose of the act;
- was mistaken or deceived as to the identity of the person or the nature of the act;
- submits or is unable to resist because they are abducted or unlawfully detained;
- has agreement given for them by a third party.

(Para 2.10.9)

7: There should be a **standard direction** on the meaning of consent and consideration should be given as to whether this should be placed in statute. (Para 2.11.6)

8: **Rape/sexual assault by penetration** may be committed **intentionally or recklessly** and the definition of recklessness in sex offences should include the lack of any thought as to consent; this can be described as “could not care less about consent”. (Para 2.12.6)

9: A defence of **honest belief in free agreement** should not be available where there was self induced intoxication, recklessness as to consent, or if the accused did not take all reasonable steps in the circumstances to ascertain free agreement at the time. (Para 2.13.14)

10: There should be a new offence of **sexual assault** to cover sexual touching (defined as behaviour that a reasonable bystander would consider to be sexual) that is done without the consent of the victim. (Para 2.14.4)

11: There should be a new offence of **assault to commit rape or sexual assault by penetration**. (Para 2.15.3)

12: A new sex offence of **trespass with intent to commit a serious sex offence** should replace burglary with intent to rape. (Para 2.16.3)

13: There should be a new offence of **abduction with the intent to commit a serious sex offence**. (Para 2.17.2)

14: There should be an offence of **obtaining sexual penetration by threats or deception** in any part of the world. (Para 2.18.7)

15: An offence of **administering drugs** (etc.) with intent to stupefy a victim in order that they are sexually penetrated should be retained. (Para 2.19.3)

16: There should be new offences of **compelling another to perform sexual acts**, with several levels of seriousness depending on the nature of the compelled acts. (Para 2.20.4)

17: As a matter of public policy, the **age of legal consent** should remain at sixteen. (Para 3.5.7)

18: The law setting out specific offences against children should state that **below the age of 13 a child cannot effectively consent** to sexual activity. (Para 3.5.11)

19: There should be an offence of **adult (over 18) sexual abuse of a child (under 16)**. The offence would cover all sexual behaviour that was wrong because it involved a child; it would complement other serious non-consensual offences such as rape, sexual assault by penetration and sexual assault. (Para 3.6.5)

20: There should **no time limit** on prosecution for the new offence of adult sexual activity with a child. (Para 3.6.6)

21: A **mistake of fact in age** should be available as a defence, but with the following restrictions: that it should be limited to honest and reasonable belief and that the defendant has taken all reasonable steps to ascertain age. (Para 3.6.13)

22: The **use of the defence** of mistake of fact in age should be limited to raising the defence in court on one occasion only. (Para 3.6.14)

23: In principle, the defence of mistake of fact in age should remain **limited by age of defendant**. (Para 3.6.16)

24: **Belief in marriage** should remain a defence to offences involving sex with a child, but this should not apply where the child is below the age of 13. (Para 3.6.21)

25: An offence of the **persistent sexual abuse of a child** reflecting a course of conduct should be introduced. (Para 3.7.3)



26: Those recognised as giving help, advice, treatment and support to children and young people in **matters of sexual health** should not be regarded as aiding and abetting a criminal offence, nor should the children and young people who seek help and advice about sexual health matters, including contraception. (Para 3.8.1)

27: There should be an offence of **sexual activity between minors** to replace the existing offences of unlawful sexual intercourse, buggery, indecency with children and sexual activity prohibited for children. It should apply to children under the age of 18 with those under the age of consent. (Para 3.9.13)

28: We recommend that further consideration be given to **appropriate non-criminal interventions** for young people under 16 engaging in mutually agreed under-age sex who are not now, and should not in future, normally be subject to prosecution. (Para 3.9.19)

29: The criminal law needs to have measures in place which can be used to deal with **children who sexually abuse** other children. Sentencing decisions should reflect specialist assessment of risk and potential for longer term offending and include treatment options. (Para 3.10.7)

30: There should be a statutory definition of **capacity to consent** which reflects both knowledge and understanding of sex and its broad implications. We recommend adoption of the definition proposed by the Law Commission. (Para 4.5.13)

31: There should be a specific offence relating to **sexual activity with a person with severe mental disability** who would not have the capacity to consent to sexual relations. (Para 4.6.5)

32: There should be offences of a **breach of a relationship of care** to prohibit:

- sexual relationships between a patient with a mental disorder, whether inpatient or outpatient, and any member of staff, whether paid or unpaid;
- sexual relationships between a person in residential care and a member of staff, whether paid or unpaid;
- sexual relationships between a person receiving certain care services in the community and designated care providers whether paid or unpaid;
- sexual relationships between doctors and their patients, and therapists and clients.

(Para 4.8.15)

33: There should be a **defence** of a pre-existing sexual relationship for the offence of breach of a relationship of care where there is some degree of capacity to consent. (Para 4.8.17)

34: There should be a specific offence of **obtaining sex with a mentally impaired person by threat or deception**. (Para 4.10.2)

35: There should be an offence of **familial sexual abuse** to reflect the looser structure of modern families which will replace and extend the existing offences of incest. (Para 5.5.6)

36: For the purposes of the offence of familial sexual abuse, the prohibition on sexual relations with a child should apply **until the child is 18**. (Para 5.5.7)

37: The offence of familial sexual abuse should apply to the sexual penetration of a child by all of those relations included in the existing offence of incest with the **addition of uncles and aunts who are related by blood**. (Para 5.5.13)

38: **Adoptive parents** should be treated on the same basis as natural parents for the purposes of the offence of familial sexual abuse. (Para 5.6.2)

39: Sexual relations between **adoptive siblings** should be prohibited until the age of 18. (Para 5.6.3)

40: There should be a **defence of marriage** for adoptive siblings over the age of 16. (Para 5.6.4)

41: The offence of familial sexual abuse should apply to **step-parents and foster-parents**. If that relationship has ended, a prohibition should still apply until a child is 18. (Para 5.6.6)

42: The offence of familial sexual abuse should apply to sexual penetration with or of a child by any **other person who is living in the household and in a position of trust or authority** over that child. (Para 5.6.12)

43: Sexual penetration between **adult close family members** (defined as certain blood and adoptive relationships) should continue to be forbidden by law.

In the light of evidence about the early onset and abusive nature of incestuous relationships started in childhood, the responsibility for any offence should sit with the person who was adult at onset. (Para 5.8.8)





44: The criminal law should not treat people differently on the basis of their sexual orientation. It should offer **protection from all non-consensual sexual activity**. Consensual sexual activity between adults in private that causes no harm should not be criminal. (Para 6.5.3)

45: The present offences of **buggery and gross indecency** should be repealed, with separate provision made for the protection of children and animals and for regulating sexual behaviour in public. (Para 6.6.10)

46: **S4, and S16 of the Sexual Offences Act 1956** and S4 of the Sexual Offences Act 1967 will no longer be necessary and should be repealed. (Para 6.6.11)

47: Section 32 of the Sexual Offences Act 1956 should be repealed. (Para 6.6.17)

48: Consideration should be given to the **regulation of soliciting by men** for the purposes of prostitution under section 1 of the Street Offences Act 1959 on the same basis as soliciting by women. (Para 6.6.17)

49: There should be a **specific trafficking offence**. This offence could involve bringing or enabling a person to move from one place to another for the purposes of commercial sexual exploitation or to work as a prostitute (e.g. knowingly facilitating transportation), for reward. (Para 7.5.14)

Any such new offence should have attached powers to trace assets overseas.

50: The review considers that the **commercial sexual exploitation of children** should be dealt with by specific offences in which 'child' should refer to any person up to the age of 18, and where sexual exploitation includes the use of a child in prostitution or in the making of pornography. (Para 7.6.4)

51: It should be an offence to:

- **buy the sexual services** of a child;
- **recruit, induce or compel** a child into commercial sexual exploitation;
- **participate in, facilitate or allow** the commercial sexual exploitation of a child; or
- **receive money or other reward, favour or compensation** for the sexual exploitation of a child.

(Para 7.6.8)

52: There should be offences of :

- **exploiting others** by receiving money or reward from men and women who are prostitutes;
- **managing or controlling** the activities of men and women who are prostitutes, for money or reward; and
- **recruiting men or women into prostitution** whether or not for reward or gain.

(Para 7.7.3)

53: There should be a further review of the law on **prostitution**. (Para 7.8.3)

54: There should be a new offence of **indecent exposure** relating to exposing the penis when he knew or should have known that he might cause fear, alarm or distress to another person. (Para 8.2.9)

55: There should be an offence of **voyeurism** where a person in the interior of a building or other structure has a reasonable expectation of privacy and is observed without their knowledge or consent, whether by remote or mechanical means or not. There should be an exception for authorised surveillance. (Para 8.3.10)

56: A new **public order offence** should be created to deal with sexual behaviour that a person knew or should have known was likely to cause distress, alarm or offence to others in a public place. (Para 8.4.11)

57: A specific offence of **bestiality** should be retained. (Para 8.5.3)

58: **Sexual interference** with human remains should be an offence. (Para 8.6.6)

59: **Sex offender treatment** should continue to develop and be made available to those convicted of relevant offences and early professional assessment of the need and suitability for treatment should be part of any sentence for such offenders. (Para 9.4.7)

60: All of the offences we recommend, except for those which we recommend as public order/public nuisance offences carry some degree of risk that would justify their consideration as part of a review of Schedule 1 of the **Sex Offenders Act 1997**. (Para 9.5.4)



61: The issue of the **requirement for children to register** under the Sex Offenders Act should be separately considered in a review of the Act. (Para 9.5.6)

62: The provision of **alternative verdicts** should be considered in the preparation of new legislation, and for the avoidance of doubt they should be set out in statute. (Para 9.6.3)

### Specific Consultation Points:

These are all specific points on which the review invited comment in the text of the report, in order that the views of the wider community could inform the development of the policy. Views on these points are invited *in addition* to comments on our recommendations.

Rape and sexual assault – honest belief in free agreement. (Para 2.13.14)

- *We invite your views on this proposal, and more generally on the requirement that any belief in consent should be reasonable.*

Children – a defence of mistake of fact in age. (Para 3.6.16)

- *Do you agree that there should be a limitation on the age of the defendant who can use a mistake of fact defence?*
- *If so should it be absolute (i.e. set at a particular age) or should there be an age differential (e.g. a maximum gap in age between the defendant and the child)?*
- *What should the age differential, if any, be?*

Children – a course of conduct offence to reflect a pattern of abusive behaviour. (Para 3.7.6)

- *We would welcome views whether there should be any course of conduct offences relating to the abuse or sexual exploitation of a number of different children (in contrast to recommendation 25 which relates to the abuse of one child over time).*

Children – seeking or giving advice on sexual health matters should not be criminal. (Para 3.8.2)

- *Is it sufficient to make this intention clear in policy terms, or does it need to be set out in any new statute?*

Vulnerable people – capacity to consent. (Para 4.5.13)

- *This is an area that is fraught with difficulty. We would very much welcome the views of the legal, academic and caring communities about these proposals. In particular:*
- *Is the proposed test the right one?*
- *Will it deliver the necessary balance between protection and the right to a private life?*

Vulnerable people – when the offence of a breach of a relationship of care might apply. (Para 4.8.15)

*We would welcome comments and views on these proposals and in particular on the following points:*

- *Should any residential care provision be limited to those where people receive nursing or therapeutic services and/or intimate care?*

## LIST OF RECOMMENDATIONS AND CONSULTATION POINTS

- *Which services in the community should be included and how can the providers and recipients be defined with the certainty needed in the criminal law?*
- *How far should physical frailty or disability be included within these definitions?*
- *How can we define therapist and should it extend beyond mental health therapy to include those offering physical therapy?*
- *Should any prohibition in law apply to sexual penetration or to a wider definition of sexual activity?*

Vulnerable people – individuals in secure institutions (e.g. prisons and detention centres). (Para 4.8.16)

- *Should the criminal law apply to sexual relationships between staff and those detained in secure institutions?*

Abuse within the family – redefining the existing offence of incest. (Para 5.5.14)

- *Should uncles and aunts by marriage or partnership be included in the offence of familial sexual abuse in relation to children under 18 only?*

Abuse within the family – which relationships should remain unlawful in adulthood. (Para 5.8.4)

- *The arguments as regards step-parents were more finely balanced and we would welcome views on whether the law should prohibit adult relationships with step-children and if so whether that should be limited to those who had lived as a child of the family of the step-parent for a given length of time.*

Other offences – exposure by women should not form part of an offence of indecent exposure. (Para 8.2.8)

- *We would welcome information and evidence to refute or support this conclusion.*

Other offences – voyeurism. (Para 8.3.10)

- *We would welcome views on the framing of an offence of voyeurism to ensure protection for victims without curtailing the freedom of the press to investigate issues of public concern.*



# Chapter One

## Purpose and principles

### 1.1 Introduction

1.1.1 We have set out to provide protection, justice and fairness in a modern, fair and effective law. The Home Office's mission is to create a safe, just and tolerant society. The law on sex offences has an important role to play in delivering that aim. The law has to provide protection to deliver safety, to enable redress against abuse and to ensure fairness to defendants in the delivery of justice. In order to have a tolerant society we need equality before the law and for everybody to be treated with respect. A law that will provide protection, fairness and justice will increase public respect and confidence in the criminal law. Modernising the law is also a key part in the Government's strategy to modernise the criminal justice system. This review of sex offences contributes to the modernisation programme, and wider strategies to increase protection for children, vulnerable people and victims and to tackle violence against women. This chapter sets the context of the review, explains how it operated, what it is seeking to achieve and the principles it adopted.

#### *Why we need to review the law now*

1.1.2 The law governing sex offences is complex, and made more difficult by piecemeal changes and amendments. Much of the law dates from a hundred years ago and more, when society and the roles of men and women were perceived very differently. Parliament has not considered the structure of sex offences as a whole since 1956, and even then the Sexual Offences Act 1956 was a consolidation measure that was passed with no real debate. The result is a loose framework of offences, often designed to meet specific problems that caused concern in their day, but with little coherence or structure. Significant changes have occurred since 1956, notably the decriminalisation of homosexuality in private in 1967, changes to the law of rape and increased protection for children. As we enter the 21st century, it is time for a root and branch examination of what the law should be and how it should be framed to meet the complex and changing needs of society. There have been significant changes to the law on evidence and procedure, especially to help victims. This review will bring the offences and defences into the new century. Our work has been strongly evidence based and drew not only on earlier work, such as that of the Criminal Law Revision Committee, but also on the considerable amount of subsequent research and experience of law reform in other jurisdictions since then.

1.1.3 Sex offences reach deeper into society than almost any other part of the criminal law. They set out the parameters not just for what society considers to be acceptable and unacceptable behaviour, but designate behaviour that is so unacceptable as to be criminal. Loving sexual relationships form a rich and fulfilling part of life. Where sex occurs without consent, abusively or inappropriately it is harmful, unpleasant and degrading: a significant number of offences are carried out by perpetrators known to the victim. The criminal law sets the boundaries for what is culpable and deserving of punishment including sexual activity. In doing so it should create a framework that protects the weaker members of society – particularly children and vulnerable people – and those who have been subject to sexual abuse or exploitation. The incorporation of the European Convention of Human Rights into our law, with its emphasis both on the



responsibilities of the state and the rights of the citizen, provides a timely context in which to examine this area of law.

1.1.4 Society has undergone rapid and fundamental change in the past century. Our perception of the roles of men and women have changed. We do not discriminate on grounds of race, disability or sex, nor increasingly on grounds of sexual orientation. We recognise the importance of childhood and the long term harm that can occur through sexual abuse in early life. We also recognise that people with limited intellectual capacity can live fulfilling lives in the community, including in many cases a sexual life. We further recognise that such people are very vulnerable to sexual exploitation of all kinds.

1.1.5 The current law does not adequately reflect these changes. It has created piecemeal protection for children with different provisions applying at different ages. It does not permit a “defective”<sup>2</sup> to have sex, and in order to protect a victim requires him or her to be proved “defective” in court. It is silent on most aspects of consensual sexual behaviour in private – unless it is male same sex activity when special rules apply. We understand much more now about sexual abuse. The law is not as effective as it should be in providing the framework of protection that citizens have the right to expect, nor in reflecting today’s knowledge of the patterns and effects of sexual violence and exploitation.

1.1.6 Whatever the shortcomings of the law, those who work within the criminal justice system try to make it work as effectively as they can. In conducting this review we met many devoted and effective criminal justice practitioners who contributed to our work. We recognised that the law does not readily meet the needs of police and prosecutors in tackling sexual assault, abuse and exploitation and sentencers are often frustrated by the anachronistic penalty and offence structures. We also recognised the vital importance of providing a fair trial and the ability for a defendant, who is innocent until proved guilty, to mount an effective defence.

1.1.7 We are not alone in finding our current law insufficient to meet the needs of society. Many other countries have carried out or are now undertaking programmes of law reform. We have looked closely at developments elsewhere in the world, especially in the common law countries of the Commonwealth and the US where the legal tradition and culture is very similar to our own. This is the right time to take a good look at sexual offences and penalties to ensure that they provide the most effective level of protection for society today.

## **Themes**

1.1.8 The terms of reference for the review are:

“To review the sex offences in the common and statute law in England and Wales, and make recommendations that will:

- provide coherent and clear sex offences which protect individuals, especially children and the more vulnerable, from abuse and exploitation;
- enable abusers to be appropriately punished; and
- be fair and non-discriminatory in accordance with the ECHR and Human Rights Act.”

These terms of reference gave us our three key themes.

1.1.9 *Protection* was the first key theme of this review. It forms part of a wider strategy to enhance protection for children, vulnerable people and victims. Such abuse is one of the great scandals in our society. The Utting and Waterhouse Reports set out the extraordinary vulnerability

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<sup>2</sup> The description of a severely mentally disabled person in the Sexual Offences Act 1956.

of children living away from home, and showed that the law was not providing the protection it should. This review will meet that concern. The extent and nature of abuse that can take place within families, within institutions and within communities is only now coming to be realised in all its complexity and horror. We also have more evidence about the effects of sexual assault and the exploitation of people – ranging from rape to trafficking. There is now a good deal of evidence to indicate the disparity between the incidence of rape and sexual assault in the community and the amount that is reported, this, together with the low conviction rate for offences such as rape, show that the law is not offering the protection it should to the victims of sexual violence who are predominantly women. We wanted to provide a framework of law that will deter and prevent sexual violence from happening, enable perpetrators to be prosecuted fairly and to provide justice to victims.

**1.1.10** *Fairness* was our second key theme. In looking at the present law, and considering proposals for reform, the review adopted a set of principles which reflected the requirements of the European Convention on Human Rights and the overarching commitment of the Government to equality and fairness. It was an important part of our task to recommend a law that was self-evidently fair to all sections of society, and which made no unnecessary distinctions on the basis of gender or sexual orientation. We saw this as a positive contribution to achieving a “safe, just and tolerant society”.

**1.1.11** *Justice* was the third key theme. The review was aware that it had an important task to perform in balancing the need to increase protection for the complainant with upholding the interests of justice and fairness to defendants<sup>3</sup>. In any criminal trial there is a presumption of innocence – the defendant is innocent until their guilt has been proved. The innocence of the defendant was central to our considerations. It is for the prosecution to prove a defendant guilty, not for a defendant to prove his innocence. It is essential that the law is clear and evidently fair and just for both prosecution and defence and this is as important for sexual offences as for other crimes. Issues such as false accusations are tested every time a crime is reported, investigated and prosecuted.

**1.1.12** In following our terms of reference, we looked primarily at the offences and defences that make up the substantive criminal law. We have not looked in detail at the law of evidence or procedure, which has been the subject of considerable Parliamentary attention most recently in the Youth Justice and Criminal Evidence Act 1999. Nor were we charged with considering whether, and if so how, prostitution should be regulated by law; that is a major subject in its own right, although we have considered some of the aspects of the law that relates to sexual exploitation and the trafficking of human beings. Nor were we charged with looking at the law on pornography or obscenity – although where the pornography involves the sexual abuse of individuals, the substantive acts depicted may well form part of our recommended offences.

## **1.2 The impact of the European Convention on Human Rights**

**1.2.1** The Human Rights Act 1998 incorporates the European Convention on Human Rights (ECHR) into UK law. From October 2000 the courts in England and Wales will be able to consider issues arising under the ECHR, and hence to test the compatibility of our law with the Convention. Ultimately the Court of Appeal will be able to make a declaration of incompatibility, which will not directly affect the validity continuing operation or enforcement of the law<sup>4</sup>. It will then be for the Government and Parliament to consider the issue.

**1.2.2** The UK has been a signatory of the ECHR since 1951, and much of the law made in that time has reflected human rights concerns. However not only do many sex offences predate this era, consideration of the issues they raise have, so far as the European Court of Human Rights is concerned, often fallen into the broad area of margin of appreciation. This enables states

<sup>3</sup> Melanie Phillips ‘The Sex-change Society’, SMF (1999).

<sup>4</sup> S4(6a), Human Rights Act 1998.



to have a degree of latitude to decide law and social policy in the light of their own culture and values. That will no longer apply in the same way once judges in this country are considering domestic law in the context of compatibility with ECHR articles. There is no doubt that our courts will scrutinise these offences with great care and that Convention issues will be raised. In assessing whether the legislation is compatible, judges will look to the case law of the European Court, and to relevant UK and Commonwealth precedents.

**1.2.3** The criminal law sets out some crucial balances between human rights and public protection. Sex offences set out a particularly delicate and important interplay between the rights of the individual to the enjoyment of a private life, and the need of the state to provide protection and redress for citizens. Since the review began its work in January 1999, the European Court has considered several cases involving the United Kingdom, including one on discrimination in the law on sex offences. (The applicants in the case of *ADT v UK* challenged the provisions of the law on gross indecency which define any situation where more than two men are present as not being in private.)

**1.2.4** The Convention guarantees a number of basic rights of a civil and political nature. Article 8 of the ECHR gives everybody the right to a private life, which includes that most intimate of aspects, consensual sexual relationships. Private life is more than 'privacy'. The issue has been discussed as follows: *"It would be too restrictive to limit the notion [of private life] to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree, the right to establish and develop relationships with other human beings"*<sup>5</sup>. In an earlier case this right to develop relationships with other human beings was described as being *"especially in the emotional field, for the development and fulfilment of one's own personality."*<sup>6</sup>

**1.2.5** Article 14 protects against discrimination in the exercise of the rights guaranteed by the Convention. Taken together with Article 8, the right for all citizens to enjoy a private life, the inexorable logic of the Convention is that there would have to be very powerful justification for the criminal law to continue to discriminate on the grounds of sexual orientation. While not constituting a free-standing right against discrimination, Article 14 protects the individual from discrimination in the application of other Convention rights. Thus in the *Sutherland* case (on the age of consent) the applicants were able to argue a breach of Article 14 read with Article 8. There was no need to argue that an age of consent set at 18 was in itself a violation of the right to respect for human life – merely that the difference in treatment of, on the one hand, gay men, and on the other, heterosexuals and lesbians constituted a discrimination in the application of substantive rights. Not every difference in treatment will constitute discrimination so as to offend Article 14. What will be unsustainable in respect of Article 14 will be a difference with no objective and reasonable justification or which is disproportionate to that justification.

**1.2.6** Other Convention Articles which are particularly relevant to the work of the review are Article 6 (right to a fair trial and the presumption of innocence) and Article 7 (no retrospective penalties). The review has taken great care to consider its recommendations in the light of the provisions of the Convention. We held a conference with academics and others to discuss the implications of incorporation on the law and the principles of applying Convention rights in the development of proposals for law reform. It is important to recognise that most Convention rights are not absolute, and that protection, necessity and proportionality are all important in considering conflicting principles. Where there may be conflicting rights, the arguments need to be balanced and considered so that any restriction of rights is necessary and proportionate for the protection

<sup>5</sup> *Niemietz v Germany* (1992) 16 EHRR 97, E Ct H R, Para 29.

<sup>6</sup> *X v Iceland*, 18 May 1976.



of vulnerable members of society. The Convention has provided a dynamic template for policy development that is underpinned by the necessity for the law to provide effective protection for the citizen, particularly the more vulnerable.

### 1.3 Basic principles

1.3.1 The review of sex offences has been carried out by an expanded interdepartmental committee and conducted within the strategic direction of Government policy. The key themes reflect Government strategy and in particular the Home Office aim of achieving a safe, just and tolerant society, and in this context the review is seeking to achieve protection, fairness and justice.

1.3.2 This report considers the rights and responsibilities of individuals to make their own decisions about consensual sexual behaviour and the controls that society needs to impose in order to protect its more vulnerable members from coercion. Within these broad headings there are some important principles that formed the conceptual framework within which the review operated. These include a basic set of assumptions that:

- any application of the criminal law must be fair, necessary and proportionate;
- the criminal law should not discriminate unnecessarily between men and women nor between those of different sexual orientation;
- the law should not intrude on consensual sexual behaviour between those over the age of consent without good cause;
- those who coerce, force or deceive anyone into sexual activity are criminally culpable; any coercion, force or deception towards a child or vulnerable person is particularly serious;
- those who induce or encourage children or other vulnerable people to participate in, or be exposed to, sexual behaviour are criminally culpable;
- the age of consent must not be lower than 16;
- there should be a number of factors which could aggravate a sexual offence against a child, such as the age of the child and the relationship between the child and the offender;
- the law should recognise the extent to which the people have the mental capacity to give informed consent to sexual activity;
- the law must ensure that people who do not have the mental capacity to give informed consent are protected.

1.3.3 The approach of the review in developing proposals was to consider that in a diverse and tolerant society, the law should be based on a public morality that protects the individual from danger, harm, fear or distress, with additional safeguards for the younger and more vulnerable members of the community. This would provide a structure that broadly permits consensual activity in private but is effective against force, coercion and harm. The law should not be able to enter the bedroom to regulate sexual activity between consenting adults without very good reason. One such reason may be to prohibit sexual relations between close blood relations, as in the law on incest. This respect for private life means that any regulation which is proposed must be limited to what is necessary in a democratic society, and proportionate to the problem.



1.3.4 In conducting the review, we have looked at what offences are needed and whether such offences require specific defences. Once this structure was clear, a matching structure of penalties was considered, including an analysis of which of the offences we recommend would reflect high risk behaviour which could be suitable for registration under the Sex Offenders Act 1997.

1.3.5 Our aim was to recommend law that is clear and comprehensible to the ordinary citizen. The law requires certainty: there needs to be no doubt about the nature of an offence. The law should be capable of being used by police, prosecutors and sentencers effectively, whilst being fair by seeking to avoid injustice and providing appropriate defences. The law should also be proportionate: any offences and penalties must meet a recognised need and sit appropriately within the wider criminal justice system. Offences should also be as straightforward and readily understood as possible.

## 1.4 The conduct of the review

1.4.1 The review has tried to operate in an open and inclusive way. The membership of the Steering Group and the External Reference Group<sup>7</sup> sought to involve many of the key stakeholders with interests in and concerns about the law. In order to garner a wider spread of views we also invited responses from a wide range of organisations and individuals about what were the problems in the present law and what changes were necessary. We received over 160 replies during 1999, and these are listed in Volume 2 of this report.

1.4.2 In addition we held a number of consultation conferences and seminars with academics, practitioners, representatives from a variety of religious faiths, concerned organisations, police, prosecutors and the judiciary. These were intended to help us focus on the key issues alongside those involved in assisting victims, investigating, prosecuting and defending cases, social services officers and organisations caring for children and vulnerable people, non-governmental organisations and others as well as representatives from a range of Government departments. The reports of these conferences are reproduced in Volume 2 of the report, and their discussions are reflected throughout the text. We are enormously grateful to all those around the country who gave us their time, thoughts and experience.

1.4.3 We also received invaluable assistance from the Law Commission. In particular, their policy paper '*Consent in Sex Offences*'<sup>8</sup>. The policy paper is the equivalent to a Law Commission report. It represents the final views of the Law Commission on the issues of consent and capacity to consent. We are very grateful to them for allowing us to publish this as an appendix to our report.

## 1.5 In conclusion

1.5.1 We have had a unique opportunity to look at a disturbing and difficult area of law from basic principles. We have always borne in mind that although the criminal law plays an important declaratory role in society, it is not the arbiter of morals. The absolutes that the criminal law deals in are those of criminal culpability. The broad membership of the review ensured that it reflected an eclectic and wide-ranging set of opinions on all the issues and these are mirrored in the discussion points of each individual chapter. In producing a set of recommendations which demonstrate a balance between protection, deterrence, the rights of the individual and society's expectation of acceptable behaviour, the review was set a difficult and challenging task to achieve.

<sup>7</sup> Membership of the Groups can be found in Annex 1.

<sup>8</sup> Consent in Sex Offences is published as Appendix C in Volume 2 of this report.

1.5.2 We feel that the principles established by this review form a sound basis for future development of the law. They should allow the law to respond to changes in patterns of behaviour fostered by technical advance and social change.

1.5.3 Publication of this document now presents an opportunity for the public to consider the proposals put forward. We welcome all contributions which will help with the development of new laws, strengthen protection to the most vulnerable in our society, and are fair and non-discriminatory.



# Chapter Two

## Rape and Sexual Assault

### 2.1 Introduction

**2.1.1** Of all sexual offences, rape is the most serious, the most feared and the most debated. This chapter describes the law on rape, indecent assault and related offences. The common feature of all these offences are that they are acts of sexual violation (whether or not they include any physical violence or force) which take place without the consent of the victim. Consent is the crucial issue for these offences because the lack of consent is the essence of the criminal behaviour. It is one individual forcing another to undergo an experience against their will. It is a violation of the victim's autonomy and freedom to decide how and with whom she (or he) would want to share any kind of sexual experience.

**2.1.2** The definition of consent is central to many of these offences. This chapter discusses how it should be defined and what the common law currently says about consent. It also discusses the important issue of how to define the defendant's belief in consent.

**2.1.3** This chapter deals with sexual offences between adults who have full capacity to consent to sexual relations in law and in fact. Other chapters will discuss offences that involve children, those with impaired capacity and those in positions of trust and responsibility.

### 2.2 The present law

**2.2.1** The law on rape and sexual assault is found in both statute and common law. The key offences are:

- Rape – section 1 of the Sexual Offences Act 1956<sup>9</sup> states that rape is sexual intercourse (defined in s44 as penile penetration) of the vagina or anus knowing the person does not consent or being reckless as to whether there is consent. Impersonation of a husband in sexual intercourse will count as rape under s1(2), otherwise consent and recklessness are defined in the common law. Maximum penalty – life.
- Indecent assault – s14 indecent assault on a woman; s15 indecent assault on a man. A child under 16 cannot consent to an offence which would otherwise be an indecent assault, nor can a “defective”. Maximum penalty – 10 years imprisonment.
- Assault to commit rape is a common law offence which has fallen into disuse; assault to commit buggery is an offence under s16 of the 1956 Act. Maximum penalty – 10 years.
- Burglary with intent to commit rape is an aggravated form of burglary set out in s9 of the Theft Act 1969. Maximum penalty 14 years.

<sup>9</sup> As amended by the Sexual Offences (Amendment) Act 1976 and the Criminal Justice and Public Order Act 1994.



**2.2.2** The key question of what constitutes recklessness as to consent and consent itself are defined in the common law, as is the nature of honest belief in consent. It is for the prosecution to prove that at the time of the sexual intercourse the complainant did not consent to it. Consent is given its ordinary meaning. Case law has determined that consent is not present when:

- It was achieved by the use of force or fear of force (which *may* extend to threats to a third party);
- The complainant was incapable of consenting because they were unconscious. This includes sleep (*Larter and Castleton, 1995; Howard 1965*);
- There is a fraudulent misrepresentation as to the nature of the act – for example a deception that the act was not a sexual act (*Flattery, 1877* and *Williams, 1923*);
- Impersonation of another – S142(3) of the Criminal Justice and Public Order Act 1994 re-enacted the previous statute that “a man...commits rape if he induces a married woman to have intercourse with him by impersonating her husband”; *Elbekkay (1995)* extended that impersonation to a partner;
- The complainant is fundamentally mistaken as to the nature of the act (*Clarence 1889*);
- The complainant did not have the understanding and knowledge to decide whether to consent or resist (whether by age, disability or illness) (*Howard 1986; Lang 1975*);
- The complainant was so drunk or drugged they could not consent (*Camplin 1845*).

**2.2.3** Case law recognises the distinction between consent and submission to forced intercourse, and that some forms of submission are not consent. The case of *Olugboja* (1981) left the decision on consent as one of a matter of fact for the jury who had to decide what was in the complainant's mind at the time. This seems to indicate that every case should be decided on its facts but without a framework of what is meant by consent and when submission is rape. In practice this broad approach (which some see as liberal) has led to confusion, and risks very different conclusions being drawn on similar facts in different cases.

**2.2.4** The House of Lords judgement in the case of *Morgan* (1974) changed the understanding of the law as it applied to belief in consent. Before that decision it was understood that for a mistake of fact to provide a defence in criminal law it had to be based on objectively reasonable grounds. The *Morgan* judgement established, for the first time, that if at the time of intercourse the defendant had an honest but mistaken belief that the woman was consenting, even if he had no reasonable grounds for that belief, then he was not guilty of rape. (In that case the conviction of the defendants was upheld because they were found not to have had a belief in consent.) Following *Morgan* therefore the fault element for rape was totally subjective – it depended on the belief in the defendant's mind at the time of the offence.<sup>10</sup>

<sup>10</sup> Lord Hailsham said:-

“Once one has accepted ....that the prohibited act in rape is non-consensual intercourse, and that the guilty state of mind is an intention to commit it, it seems to me that it follows as a matter of inexorable logic that there is no room for either a defence of honest belief or mistake, or of a belief of honest and reasonable belief and mistake. Either the prosecution proves that the accused had the requisite intent, or it does not. In the former case it succeeds, and in the latter it fails. Since honest belief clearly negatives intent, the reasonableness or otherwise of that belief can only be evidence for or against the view that the belief and therefore the intent was actually held.....”

Lord Fraser of Tullybelton summarised the position as:-

“If the effect of the evidence as a whole is that the defendant believed, or may have believed that the woman was consenting, then the Crown has not discharged the onus of proving the commission of the offence as fully defined and, as it seems to me, no question can arise as to whether the belief was reasonable or not. Of course the reasonableness or otherwise of the belief will be important as evidence tending to show whether it was truly held by the defendant but that is all.”

2.2.5 That judgement was controversial from the moment it was given. Many in the legal world accepted that it was a clear statement of the necessary guilty mind (mens rea) for rape and a logical expression of the subjectivism necessary for guilt. Whereas to others it was evidence that it did not matter what the victim said or did, however violated she was, there was no crime of rape. Mrs Justice Heilbronn and the Advisory Committee on Rape thought that the principle of the judgement was right, but that the mental element in rape should be clarified. This resulted in the explanation given in S1(2) of the Sexual Offences (Amendment) Act 1976 that:

*“It is hereby declared that if at a trial for a rape offence (a) the jury has to consider whether a man believed that a woman or man was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.”*

This effectively gave statutory force to the words of Lord Fraser that the reasonableness of any belief was a matter that the jury would have to consider.

## 2.3 Problems in the present law

2.3.1 Rape was the subject of a significant proportion of the submissions to the review and a variety of problems were identified:

- The law did not offer appropriate protection against very serious assaults because the definition of rape as penile penetration of the vagina and anus meant that other kinds of extremely serious penetrative assaults could be prosecuted and sentenced as indecent assault only. This offence and the penalty it carried were not serious enough to deal with the worst cases;
- The nature and effect of sexual assaults of all kinds on the victim, both men and women, were not sufficiently understood by the law, despite the significant advances in understanding made in recent years; this impacted throughout the criminal justice system, including sentencing;
- The increase in reporting of rape and the reduction in the rate of convictions, has reduced confidence in the ability of the law to deliver justice to victims; although the numbers of reported rapes had increased significantly, the number of successful prosecutions had risen only slightly;
- The full legal meaning of consent was not clearly understood, and the doctrine of honest but mistaken belief in consent was widely criticised;
- The law was not sufficiently clear to ensure the protection of transsexuals;
- The sentencing of rape cases remained controversial, particularly where it involved those who had been married or in a relationship;
- The definition of indecent assault was too broad and complex;
- The gradual loss of the offence of assault to commit rape in the common law had left a gap in protection;
- The offence of burglary with intent to commit rape did not carry the requirement to register under the Sex Offenders Act 1997.



## 2.4 Views expressed in consultation and conferences

2.4.1 The review held a seminar on rape and sexual assault in Leeds on 2 July 1999. (A report of that seminar is in Volume 2, Appendix H5). Those attending that meeting were asked to address a set of questions about the offences of rape and sexual assault: the views expressed that day were considered by the review in detail. There was a considerable amount of agreement; the law needed reforming to ensure that:

- all non-consensual sexual penetration could be dealt with by specific very serious offences;
- rape should remain an offence of penile penetration but that the definition be extended to include penile penetration of the mouth;
- another offence of aggravated sexual assault should be created to deal with other forms of penetration;
- consent should be defined and set out in statute law;
- the doctrine of honest but unreasonable belief in consent (set out in the *Morgan* judgement) should be changed; and
- indecent exposure should be regarded more seriously than it was at present.

The seminar also discussed whether it was appropriate to divide the offence of rape into more and less serious offences (e.g. ‘real rape’ and ‘date rape’) and unanimously recommended against it.

2.4.2 The seminar for legal practitioners, held in April 1999, also discussed the issue of consent, which was seen as the core of most sex offences – it was the lack of consent which made an activity culpable. There was some unease that the use of the term “consent” implied an imbalance of power – consent was something that could be seen as agreement by a subordinate. Defining consent as “free agreement” implied a negotiation between equal partners. Others counselled against change for its own sake, or against changes which would jettison case law. A statutory definition of consent was seen as a potential way forward.

2.4.3 About a quarter of the responses to the initial consultation mentioned the law on rape. These reflected a wide range of opinions but the most frequently mentioned issues were the definition of consent and belief in consent in a third of the responses. These responses advocated a definition of consent (with the law in Victoria, Australia being mentioned in several) and were overwhelmingly in favour of overturning *Morgan*. Other issues mentioned by a number of respondents were the need to widen the definition of rape to include forced oral sex and penetration by objects; the significant harm done by sexual assault on men; the need to take trivialised but traumatising offences like flashing more seriously and the importance of appropriate sentencing. We also received letters about false allegations, historic rape, the anonymity of defendants and the need to provide a scale of offences.

## 2.5 Research evidence

2.5.1 Rape and sexual assault are much discussed in the literature and there is extensive case law. The review consulted a wide range of sources, but two were of particular importance. Professor Jennifer Temkin, who was a member of the External Review Group, was asked to review the law and evidence on rape and sexual assault. This thorough and comprehensive document (at Appendix D1 in Vol 2 of the report) formed a working document for the review, helpfully identifying many of the key issues.

**2.5.2** The review also took very careful note of the Home Office research report “A Question of Evidence? The prosecution of rape in the 1990s”. This considered a sample of 483 reported rapes and followed those cases to see what happened to them. The report identifies the stages at which cases dropped out of the system and seeks to identify the factors that may have influenced this. The key issue it addressed was to see why the conviction rate for rape had remained low (around 9% on average).<sup>11</sup> Many of the issues raised in the report relate to police and prosecution procedures and so are outside the remit of the review. There was one recommendation addressed to the review: to consider whether juries would be more likely to convict if there were degrees of rape for those cases which they felt were less serious. This recommendation arose not from the statistical evidence but from discussions with legal practitioners.

**2.5.3** Other reports received or considered during the conduct of the review included the Soroptomists International Working Party on Rape, the 13th report of the Criminal Law Revision Committee, the Law Commission’s policy paper on Consent in Sexual Offences<sup>12</sup> and numerous other research and academic works from the UK, North America, South Africa and Australasia.

**2.5.4** We also looked to see what evidence was available on the prevalence of sexual victimisation. To get an accurate estimate using either official statistics or crime (victimisation) surveys is fraught with difficulties. Victims’ reluctance to report offences to the police mean that official statistics routinely undercount sexual offending, while even the more complete picture of victimisation promised by crime surveys can be undermined in practice by problems with the measures and methods employed. Despite these limitations, available information suggests that non-consensual sexual contact is not a rare occurrence. For example, the 1994 British Crime Survey found that nearly a quarter of women respondents reported some unwanted or coerced sexual contact since the age of 16. In a recent survey (by Coxell, King, Mezey, and Gordon, 1999) a smaller but still significant proportion of men reported experiencing non-consensual sexual contact. Meanwhile, the total number of sexual offences reported to the police has increased steadily over the past decade. The number of reported offences of indecent assault on a female and particularly rape have shown marked increases. How far the rising figures are due to changing attitudes among victims to informing the police cannot be known for certain. Overall, both official statistics and survey figures indicate that females – both adults and children – are at much greater risk of sexual victimisation than males.

## **2.6 The Law in Other Countries and Proposals for Reform**

**2.6.1** The law of rape and sexual assault has been the subject of debate and legislative change around the world over the past 20 years. Many countries have made major changes to their laws in order to ensure that they were fairer and delivered justice to victims. Much of this legislative development came about as a result of feminist debate and pressure. Changes made by some common law countries – notably Canada and many US states in the 1980s and early 1990s – were intended to reclassify rape and sexual assaults as crimes of violence rather than as sexual crimes relating to consent or the lack of it. In contrast other jurisdictions (Victoria, Australia and New Zealand for example) have built on the common law model of consent and refined and developed that. Some jurisdictions (like Michigan, Washington DC and NSW) have adopted a mixed model providing for a crime of violent rape where there is no reliance on consent together with other offences that do rely on a lack of consent. Most European legal codes define rape in terms of force or coercion.

<sup>11</sup> The 6% conviction rate in the report’s sample correlates to the average figure of 9%: the 6% rate is based on all reports of rape made, and the 9% figure is based on those reports which the police record as a crime. The figure recorded by the police is used as the basis for annual averages.

<sup>12</sup> Printed in Vol 2 of the report as Annex C.





**2.6.2** Sexual offences are being reviewed and reconsidered in many countries around the world. Sweden and Norway are undertaking reviews and the law in Germany was changed very recently. The South African Law Commission is undertaking a large programme of work on sex offences and has put out proposals for consultation. The Australian Model Criminal Code Officers' Committee has published a report recommending a code of sexual offences for adoption by states. New Zealand is reviewing its offences. The review has kept in touch with all these developments. The Swedish review, which is charged in particular with looking at the common law system of consent, came to meet with us. We went to Australia and New Zealand to look at the way in which they have defined consent, to see how it works in practice and to benefit from their experience and thinking. Defining a satisfactory law in this area is difficult, and there are no easy answers.

## **2.7 The Policy of the Review**

**2.7.1** In considering the centrally important questions of how the law on rape was to be framed the review applied its general principles (set out in Chapter 1) of *increasing* the protection offered by the law; ensuring *fairness* to the defendant and that the law clearly set out what was criminal behaviour.

**2.7.2** We thought that rape and sexual assault are primarily crimes against the sexual autonomy of others. Every adult has the right and the responsibility to make decisions about their sexual conduct and to respect the rights of others. No other approach is viable in a society that values equality and respect for the rights of each individual. We concluded consent was the essential issue in sexual offences, and that the offences of rape and sexual assault were essentially those of violating another person's freedom to withhold sexual contact.

**2.7.3** It is vitally important that in this most private and difficult area of sexual relationships the law should be as clear as possible so that the boundaries of what is acceptable, and of criminally culpable behaviour, are well understood. This understanding is essential for all those involved in the criminal justice system in practicing and interpreting the law (and we had evidence that it was not always well understood even by professionals). It is important for society as a whole for sexual relationships to be based on mutual respect and understanding.

**2.7.4** This led us to the inescapable conclusion that it was vital for the law on rape and sexual assault to be, as far as possible, set out in statute so that it was accessible and available to all. The complexity of the common law on consent, and the uncertainty caused by differing decisions, were not helpful to the criminal justice system or to the wider community. There will always be a continuing role for the common law to develop as cases raise new issues over time, but the key principles of the meaning of consent should be set out clearly in the law for all to see.

**2.7.5** We also considered the issue of honest belief in consent with very great care. The key legal principle, that a defendant should only be guilty of a crime they intended to commit, (and which in this instance, has a defence of honest belief), is in direct conflict with the perception of many in the community who see that in the particular circumstances of rape and serious sexual assault this belief should be fettered. The review noted that the reasonableness of an honest belief in consent may be looked at by the jury. We were all agreed that there needed to be further safeguards to prevent the misuse of any defence of honest belief; particularly in the light of concern that it would be raised more frequently in order to circumvent the provisions limiting the use of the complainant's sexual history in the Youth Justice and Criminal Evidence Act 1999. However, we were not all agreed on the extent to which the law should be changed in this area. Accordingly we set out the issues in detail below (paras 2.12 onwards) and invite your views.

**2.7.6** As part of our policy of increasing protection we also identified a number of gaps and mismatches in the present law which may result in a degree of injustice to victims. The review also identified areas of the law which, in the light of their impact on victims, should be regarded much more seriously.

## 2.8 The proposals

### *Rape*

**2.8.1** The first issue we thought about was the criminal behaviour that should be included in the crime of rape. We considered the various sexual violations that are perpetrated on men and women by other men and women, and the impact of differing kinds of sexual assaults on the victim in order to assess the relative seriousness of the different kinds of behaviour. We also wondered how the public might understand the law. We looked at what solutions other countries had adopted and sought information on how effective they had been. (The latter was particularly difficult as the letter of the law is only one of many variables in the way the criminal justice process operates.)

**2.8.2** We decided that the essence of rape was the sexual penetration of a person by another person without consent. However, penetration comes in many forms. Men put their penis into the vagina, anus and mouth. Other parts of the body (notably fingers and tongues) are inserted into the genitalia and the anus. Objects are inserted into the vagina and anus of victims. Both men and women may perform such penetration. These are all extremely serious violations of victims which can leave them physically and psychologically damaged for many years. We did consider whether there was evidence that a woman could force a man to penetrate her against his will but, although we found a little anecdotal evidence, we did not discover sufficient to convince us that this was the equivalent of rape. (However we do recognise the existence of such coercive behaviour and think it should be subject to the criminal law. We make separate recommendations about offences of compelling sexual penetration in paras 2.20 following.)

**2.8.3** Having decided that all coerced sexual penetration was very serious, the question was how the law should best deal with it. There seemed to be two potential approaches – that of defining any sexual penetration as rape, and that of treating penile penetration separately from other forms of penetration.

**2.8.4** We were uneasy about extending the definition of rape to include all forms of sexual penetration. We felt rape was clearly understood by the public as an offence that was committed by men on women and on men. We felt that the offence of penile penetration was of a particularly personal kind, it carried risks of pregnancy and disease transmission and should properly be treated separately from other penetrative assaults. We therefore set aside our presumption of gender-neutrality as regards the perpetrator for offences for the crime of rape and propose that it be limited to penile penetration. We also recognised the concerns of transsexuals that the law could except them from the protection of the criminal justice system. If modern surgical techniques could provide sexual organs, the law should be clear enough to show that penetration of or by such organs would be contained within the scope of the offence. The law must give protection from all sexual violence. Whether or not sexual organs are surgically created, the law should apply. Accordingly we thought to put it beyond doubt that the law should apply to surgically constructed organs – whether vaginal or penile.

**2.8.5** The present crime of rape is limited to the penile penetration of the anus and vagina. Forced oral sex is treated as an indecent assault. We thought that inappropriate. Forced oral sex is as horrible, as demeaning and as traumatising as other forms of forced penile penetration, and we saw no reason why rape should not be defined as penile penetration of the anus, vagina or mouth without consent.

***Recommendation 1: The offence of rape should be retained as penile penetration without consent, and extended to include oral penetration.***

**This should be defined as penetration of the anus, mouth or genitalia to the slightest extent, and, for the avoidance of doubt, surgically reconstructed male or female genitalia should be included in the definition in law.**



**2.8.6** An issue that was raised in Home Office research, and by a few respondents, was whether there should be any gradation or degrees of rape. The argument put is that there are “serious” rapes (those which involve violence, by strangers etc.) and less serious rapes – the “date rape” or “he just went a bit too far” type of rape. Some people argued that such a gradation with lower sentences for “lesser” crimes would encourage juries to convict more readily. Without research into juries’ thinking, we do not have any firm evidence to support this view.

**2.8.7** A more serious question is whether there are genuinely lesser rapes. Victim/survivor organisations told us that although all victims/survivors were deeply affected by rape, there was often *greater victimisation* in rapes that were seen as lesser than the traditional model of stranger rape. A woman or man attacked in the street is a chance victim – it is truly appalling, but no blame attaches to the victim. To be raped by someone you know and trust, whom you may let into your house, or when you visit theirs, is not such a matter of chance. The victim has made decisions to put their trust in the other person. There may or may not be overt physical violence but those victims face additional issues of betrayal of trust and being seen as, or feeling, guilty for being in that situation. Some research indicates that the level of violence in partner/ex-partner rape is second only to stranger rape<sup>13</sup>. We were told by those who counsel victim/survivors that those raped by friends or family often find it much harder to recover and may take longer to do so. In addition to these powerful arguments, it is hard to see how degrees of rape could be defined – when does a stranger become an acquaintance or a friend? The crime of rape is so serious that it needs to be considered in its totality rather than being constrained by any relationship between the parties.

**2.8.8** If we are to consider a rape as being not just an offence of violence, but a violation of the integrity of another person, then there is neither justification nor robust grounds for grading rape into lesser or more serious offences. The impact on victims is no less, and indeed there are arguments that it can be more serious and long-lasting. Rape is a very serious crime but sentences can, and should, reflect the seriousness of each individual case within an overall maximum. Gradation of the seriousness of a particular offence is best reflected in the sentence finally imposed rather than creating separate offences.

***Recommendation 2: Rape should not be subdivided into lesser or more serious offences.***

## **2.9 Sexual assault by penetration**

**2.9.1** We recognised that other penetrative assaults could be as serious in their impact on the victim as rape and that they should not be regarded lightly. We thought the present law of indecent assault was inadequate to tackle these serious crimes. It is an offence which covers a wide spread of behaviour from touching to truly appalling violations, and the current penalty of 10 years is inadequate for the worst cases. Accordingly we recommend a new offence of sexual assault by penetration with a penalty the same as that for rape to be used for all non-penile penetrative sexual offences. This offence would include the non-consensual penetration of the anus, vagina and/or the external genitalia by objects or parts of the body other than the penis. This offence should also be defined in a way that would enable it to be used if there were any doubt as to the nature of the penetration (for example when a child or mentally impaired adult is unable to furnish details of exactly what had penetrated them). This offence could be committed by a man or a woman on a man or a woman.

**2.9.2** In all these crimes it is important to define what is meant by penetration. The present law holds that the slightest penetration is sufficient. This seems to us to be right, and we think

<sup>13</sup> Balancing the Scales: Rape, Law Reform and the Australian Culture – Patricia Esteal, 1998.

it should be absolutely clear that it is the penetration of the external genitalia not simply the vagina. The law also holds that no ejaculation is necessary to prove penetration, and that too must be right. It should also be clear that penetration of or by any surgically reconstructed genitalia should also be included as rape or sexual assault by penetration.

**Recommendation 3: There should be a new offence of sexual assault by penetration to be used for all other penetration without consent.**

**This should be defined as penetration of the anus or genitalia to the slightest extent, and, for the avoidance of doubt, surgically reconstructed genitalia should be included in the definition.**

**In circumstances where the means of penetration is not clear, the offence of sexual assault by penetration would apply.**

## 2.10 Consent

**2.10.1** Lack of consent is central to the offence of rape and to our new offence of sexual assault by penetration. The essence of the crime is that sexual penetration took place without the consent of the complainant. It is vital that the law is as clear as possible about what consent means. The law sets the ground rules of what is and is not criminal behaviour, and all citizens need to know and understand what these are. This is particularly important because consent to sexual activity is so much part of a private relationship where verbal and non-verbal messages can be mistaken and where assumptions about what is and is not appropriate can lead to significant misunderstanding and, in extreme cases, to forced and unwelcome sex.

**2.10.2** The common law on consent has developed over the years to deal with many of the circumstances that come before the courts. However, common law is essentially case law. Case law may change with new judgements and its meaning is often not clear to most people. If it is difficult for legal practitioners to research and understand the case law, it is much more difficult for the rest of us. Nor is it always clear what the common law means by “consent”. Although it is argued that the common law allows continuing development to meet society’s needs, that process can lead to uncertainty, as in the case of *Olugboja*. In an area of human behaviour where there are debates within society about what is and is not appropriate, it is more than ever important that the law is clear and well understood, particularly about what behaviour is criminal.

**2.10.3** In law consent is given its ordinary meaning, which means that in the particular circumstances of each case the jury has to decide that they are sure, beyond reasonable doubt, whether the complainant was consenting or not. This is an important, and often difficult, role. Clarifying the meaning of consent in statute would enable judges to be able to explain what the law said and for juries to understand just what is meant by consent. It would also enable Parliament to consider and recommend what should and should not form acceptable standards of behaviour in a modern society. One of the messages that had come to us in consultation was that consent was something that could be seen as being sought by the stronger and given by the weaker. In today’s world it is important to recognise that sexual partners are each responsible for their own actions and that there should be parity of status. In defining consent we are not seeking to *change* its meaning, rather to clarify the law so that it is clearly understood.

**2.10.4** We investigated what the word ‘consent’ means. The Oxford dictionary defines the verb “to consent” as “to acquiesce, or agree” and the noun “consent” as “voluntary agreement, compliance or permission”. These definitions cover a range of behaviour from whole-hearted enthusiastic agreement to reluctant acquiescence. In this context the core element is that there is an agreement between two people to engage in sex. People have devised a complex set of messages to convey agreement and lack of it – agreement is not necessarily verbal, but it must be understood by both parties. Each must respect the right of the other to say “no” – and mean it.



2.10.5 Other common law countries have defined consent as “free agreement” or “free and voluntary agreement”. The Law Commission have suggested “subsisting free and genuine agreement”. We felt that that was too complex and introduced an unnecessary semi-contractual complication into consent. We thought that simplicity and clarity were needed in this definition and that any free agreement would necessarily be voluntary and genuine. We thought that “free agreement” included all the necessary elements and recommend that as a definition of consent.

***Recommendation 4: Consent should be defined in law as “free agreement”.***

2.10.6 We also thought that in addition to defining what consent was, we should also see how it should be applied. We were told by many people, including judges and lawyers, that the law on consent needed clarifying and explaining. A number of other countries have adopted this approach in order to ensure the law is well understood; setting clear boundaries for society as to what is acceptable and unacceptable behaviour. There are a variety of models, but the key elements are that the meaning of consent is defined, and that the law gives some indication of situations where consent is not present. We decided that the arguments for defining and explaining consent in statute were overwhelming. We thought that the approach adopted in a number of Australian states (and the Model Code) of setting out a list of examples of circumstances where consent was not present was helpful to all concerned. Any such list is a set of examples only; it is not complete and does not cover each and every circumstance where consent is not present. Cases must be decided on their own facts. It should help both practitioners and juries in coming to decisions in particular cases, and give broad guidelines for considering the issue.

***Recommendation 5: The law should set out a non-exhaustive list of circumstances where consent was not present.***

2.10.7 Having agreed that it would be helpful to set out some examples of when consent is absent, we then considered what should be included in any list. This is not, and could not be, a complete list. It sets out those areas that are well established in case law as to when consent is not present, and those where it should be clear that consent would not be present. Most are obvious. The courts will continue to develop the common law as they consider cases where different circumstances apply. They will however have the benefit of a more detailed statute, in which Parliament will have given a clear indication to the courts and society about the bounds of acceptable behaviour.

2.10.8 Any list of examples should include the major components of the common law on consent. The challenge for the review was to consider whether there were other types of behaviour and situations that ought to be included in order to produce a robust and appropriate list. The question with any list of examples is exactly which to include and where to stop. A statutory list of examples should be as comprehensive as possible. The essential common element to many of these situations was that there may be submission by the victim. Submission may reflect reluctant acquiescence, but it may also reflect a lack of consent and/or an inability to resist. The fact of submission does not imply consent – it may well be better to suffer a “fate worse than death” than to be killed or grievously wounded. Indeed victims’/survivors’ organisations told us that many victims were frozen into immobility by the threat of rape and the fear of what might happen to them. Any list should make clear that submission does not equate to consent if there is no free agreement.

2.10.9 In drawing up our non-exhaustive list, we thought that it should set out examples of when a person does not consent to sexual activity that could constitute rape or sexual assault by penetration:

- *Where a person submits or is unable to resist because of force, or fear of force;*
- *Where a person submits or is unable to resist because of threats or fear of serious harm or serious detriment of any type to themselves or another person.*

These would cover the broad set of cases where there was force or coercion or threat to a person, their child etc. It could also cover situations where other threats were made – for example losing a job or killing the family pet. It would be for the court to consider in each case what the nature of the threat was and whether the victim would think that she or he would suffer serious harm. These could vary from case to case: the threat of loss of employment might be far more serious in a small community with few other opportunities, for example. The pressures in this section are all negative – there was a distinction between a threat and an inducement, and the distinction that consent was obtained by coercion. Promising rewards for sex did not prevent free agreement being given – it was unlikely to be a coercive situation. We did consider whether the qualification of harm or detriment (as serious) was necessary, and concluded that it was – rape is a very serious crime with very heavy penalty. However, the seriousness of the harm or detriment should relate to the perception of the victim: the decision whether or not to agree was theirs. We have recommended a lesser offence for procuring sex by threat or deception (see para 2.16.1) to deal with other situations where there were more minor threats.

- *Where a person was asleep, unconscious, or too affected by alcohol or drugs to give free agreement;*

All these are situations where the victim would be unable to give free agreement.

- *Where a person did not understand the nature of the act, whether because they lacked the capacity to understand, or were deceived as to the purpose of the act;*

This would cover both where the victim lacked the capacity to understand the act<sup>14</sup> or submitted because they were persuaded that it was necessary for other purposes – a medical examination for instance.

- *Where the person was mistaken or deceived as to the identity of the person or the nature of the act;*

Consent that is given under these situations is obtained by deceit, or by taking advantage of a mistake. The victim may think, for example, that it is her husband or partner who has slipped into bed with her; she would consent to sex with him but not with the defendant – who took advantage of her mistake. The free agreement was to have sex with one particular person, not the one who was present and impersonating another.

- *Where the person submits or was unable to resist because they are abducted or unlawfully detained;*

If a person has been abducted or detained then they are not in a position to give free agreement; the entire situation is coercive.

- *Where agreement is expressed by a third party not the victim.*

Free agreement is an issue between sexual partners and cannot be given by others, whether husbands, partners or those in authority over the complainant.

<sup>14</sup> This is discussed further, and capacity defined, in Chapter 4.



**Recommendation 6: The law should include a non-exhaustive list of examples of where consent is not present such as where a person:**

- **submits or is unable to resist because of force or fear of force;**
- **submits because of threats or fear of serious harm or serious detriment of any type to themselves or another person;**
- **was asleep, unconscious, or too affected by alcohol or drugs to give free agreement;**
- **did not understand the purpose of the act, whether because they lacked the capacity to understand, or were deceived as to the purpose of the act;**
- **was mistaken or deceived as to the identity of the person or the nature of the act;**
- **submits or is unable to resist because they are abducted or unlawfully detained;**
- **has agreement given for them by a third party.**

## 2.11 Judges' Directions

**2.11.1** We considered whether juries needed extra help on the meaning of consent, and whether it would be useful for there to be standard directions for judges on the meaning of consent. We also wondered whether any such directions should be put into statute. At present judges' directions on any issue of law are generally collected from examples of good practice and circulated to all judges. However, in an area of the law that is fraught with misunderstanding there are good arguments for putting the essence of the direction in a standard direction. If that is then in statute law it is clear beyond dispute to judges and citizens.

**2.11.2** The state of Victoria introduced statutory directions in 1991 as a step towards increasing consistency in the application of the law, and to formalise good practice. Placing the directions in statute also had the advantage of making the issues to be considered in a rape trial clear and accessible to the public. When the law was evaluated by the Law Commission in Victoria<sup>15</sup>, these directions were well received. The only real problem identified was that judges sometimes gave all the directions in cases when only some were relevant. That was a matter of practice rather than principle. Indeed some comments to the review indicated that jury members appreciate a greater degree of clarification and explanation from the judge.

**2.11.3** The Australian Model Criminal Code (a federal project) adopted the same approach and recommended a direction that is very similar to that used in Victoria but amended to ensure that it did not establish a presumption of a lack of consent and hence to tilt the balance too far away from the defendant. In a relevant case, a judge is required to direct the jury that:

- “(I) a person is not to be regarded as consenting to a sexual act just because:*
- The person did not say or do anything to indicate they did not consent, or*
  - The person did not protest or physically resist;*
  - The person did not sustain physical injury;*
  - on that or an earlier occasion, the person had consented to engage in a sexual act (whether or not of the same type) with that person or a sexual act with another person”.*

<sup>15</sup> Rape Law Reform: Evaluation Project No. 2 – the Crimes (Rape) Act 1991 (1997).

2.11.4 The review thought that the example successfully established in Victoria and refined in the Model Code provided a useful tool in explaining issues to a jury, and of ensuring that a jury did not assume that submission was consent. We also thought that it was helpful to shift the consideration away from what was in the victim’s mind, in order to focus attention on what the accused *did* to ascertain whether there was free agreement. We did not want to establish any presumption of lack of consent, and so preferred the kind of approach adopted in the Model Code, but thought that it should be considered in detail before being adopted for use in England and Wales.

2.11.5 In looking at how any model direction should be framed we took into account the proposals we have developed and the need for any direction to be as clear and accessible as possible, avoiding the use of double negatives. We also thought that it should be made absolutely clear that a model direction was a tool to be used as appropriate in cases – all may be needed in some cases and only one element in others. The use of consistent phrasing for these important concepts would help both judges and juries, and a uniform delivery of justice. We thought a suitable example of a direction could be:

*“In deciding whether the complainant freely agreed to sexual intercourse on the occasion in question you should not assume:*

- *that the complainant did freely agree just because they did not say or do anything;*
- *that the complainant did freely agree just because they did not protest or physically resist;*
- *that the complainant did freely agree just because they were not physically injured, etc.”*

2.11.6 We thought that such a model direction should be adopted and that there were good arguments for it to be available in a statutory form. A statutory direction would have been scrutinised by Parliament, openly debated and available to a wider public, and we thought these were all good arguments. However, we recognised that this is an unusual course in England and Wales where standard directions are issued by the Judicial Studies Board. We have been concerned throughout this exercise to ensure that the public were able to see and understand what the law means in practice and we think that a standard direction along these lines will make an important contribution to consistency and understanding in these trials. Although we recommend a standard direction rather than a statutory direction, we think that consideration should be given as to whether it could and should be in statute.

***Recommendation 7: There should be a standard direction on the meaning of consent and consideration should be given as to whether this should be placed in statute.***

## 2.12 The Mental Element

### *Intentional and Reckless Rape*

2.12.1 The present law allows a man to be found guilty of rape if he has intentionally had sexual intercourse without consent or when he was reckless as to consent. The review considered whether these were the appropriate standards to apply and concluded that broadly they were. Rape is a very serious offence, and the criminal law is quite rightly reluctant to apply a test of negligence to very serious offences, unless there is a clear responsibility or duty of care on one party which had not been fulfilled.





**2.12.2** A more difficult question is the precise meaning to be given to intentional and reckless. The Government proposed, in the consultation paper “Violence. Reforming the Offences Against the Person Act 1861”<sup>16</sup> to adopt definitions for intent and recklessness based on those the Law Commission recommended in their report “Offences Against the Person and General Principles”<sup>17</sup> in 1993. In codifying the common law definitions of intent and recklessness in the law that applies to offences such as assault and causing injury/serious injury (to replace assault occasioning actual bodily harm, or grievous bodily harm), there is an inevitable read across to sex offences. Once enacted these definitions would provide the template for use in all offences against the person whether of physical violence or sexual violation. We therefore thought we should consider whether those definitions were the right ones for sex offences.

**2.12.3** The proposed definitions are:

#### ***Intent***

*“A person acts intentionally with respect to a result if:*

- (a) it is his purpose to cause it,*
- (b) or although it is not his purpose to cause it, he knows that it would occur in the ordinary course of events if he was succeed in his purpose of causing some other result.”*

#### ***Recklessness***

*“A person acts recklessly with respect to a result if he is aware of a risk that it will occur and it is unreasonable to take that risk having regard to the circumstances as he knows or believes them to be.”*

The definition of intent set out in the first part (a) is clearly relevant and apposite for sex offences; the second (b) is relevant to assaults that cause injury as a secondary outcome (for example pushing someone over where they would fall under a passing car) but is not directly relevant to sex offences. Overall, the definition of intent fits into the context of the mental element in sex offences. The definition of recklessness is trickier. It is a subjective definition, which is appropriate and has a broad relevance to sex offences, which are, like assaults that result in injury, offences against the person. However, as the essence of most sex offences is the absence of consent, it is essential to consider the extent to which the accused gave any thought to consent as part of recklessness.

**2.12.4** Recklessness in sex offences is recklessness as to the consent of the victim rather than as to the deed. The definition of recklessness proposed for offences against the person is insufficient for the purposes of sex offences. The law needs to state very clearly that the accused is liable if they did not give any thought to consent or could not care less about the victim’s consent. The Australian Model Criminal Code Officers’ Committee proposals (which apply a similar recklessness test to offences against the person as proposed here) extends the definition of recklessness in the context of penetrative sexual offences beyond that for offences against the person by adding:

*“being reckless to a lack of consent includes not giving any thought to whether the other person is consenting...”*

<sup>16</sup> The Stationery Office 1998 603764.

<sup>17</sup> LC 218.

2.12.5 We thought that it was necessary to ensure that our law reflected the full extent of recklessness as to consent in sex offences, and that the definition given in the proposals on offences against the person are not sufficient for this purpose. We were told by judges at our seminar for legal practitioners that they described recklessness in rape as “could not care less about consent”. They suggested that this was effective and readily understood. The Law Commission paper on ‘Consent in Sex Offences’ also thought that “could not care less” was a form of recklessness.

2.12.6 We agree that this phrase encapsulates the meaning well. A person who could not care less about consent is rightly regarded as reckless. A person who fails to take all the steps which are reasonable in the circumstances to find out if there is free agreement on the occasion in question could not care less about the other person’s consent and is therefore reckless. We consider that this should be included in any definition in law.

**Recommendation 8: Rape/sexual assault by penetration may be committed intentionally or recklessly and the definition of recklessness in sex offences should include the lack of any thought as to consent; this can be described as “could not care less about consent”.**

## 2.13 Honest Belief in Consent

2.13.1 The question of honest, albeit mistaken, belief in consent, is used as a defence in court, and rouses strong passions in those responding to the review, and amongst the members of the review. About a third of the representations we received on rape argued that the decision in *Morgan* (described above in para 2.2.4 and footnote 2) should be reversed to an honest and reasonable belief. The seminar on rape also unanimously concluded that *Morgan* needed to be changed. The External Reference Group of the review, which advised the Steering Group, endorsed the view that the *Morgan* judgement should be set aside and a requirement of reasonableness be re-introduced into the law.

2.13.2 This issue is often discussed in theoretical terms: for instance, in terms of rape, the extent to which criminality depends on the state of mind of the accused, and whether or not he should be found guilty of a crime that he did not intend to commit. The law at present does not require the reasonableness of a defendant’s belief to be tested (although other tests are possible) so making it possible for a defendant to claim he held a completely irrational but honest belief in the consent of the woman: if this is upheld, he must be acquitted. In terms of subjectivist legal principle this is right. In terms of social policy, it makes some very large assumptions. By allowing the belief of the accused to be paramount, the law risks saying to a victim/survivor who feels violated and betrayed that they were not really the victim of crime, and that what they thought, said or did was immaterial. It is seen to validate male assumptions that they can assume consent without asking. It is an issue that utterly divides opinion, and divided those of us undertaking the review.

2.13.3 Internationally the issue divides common law jurisdictions. No US state has ever extended the subjective bias towards the defendant as far as *Morgan*, and the honest belief of the defendant is subject to a test of reasonableness. Some have limited its use even further, California for example, limits its use to situations where the complainant’s behaviour was “equivocal”.<sup>18</sup> In Australia the common law states (ACT, Victoria, NSW and South Australia) uphold the subjective test set out in *Morgan*. Indeed Victoria and South Australia adopted the subjective approach before *Morgan*. Those states which adopted their Criminal Codes in the 1920s (Tasmania, Queensland, W Australia) have retained the pre-*Morgan* position of an objective test of reasonableness on the defendant’s honest belief. The Model Criminal Code proposals argue for retaining honest belief. New Zealand has reversed *Morgan*. They have developed what they call a “subjective and objective test” – the defendant could hold a subjective honest belief but that belief is subject to an objective test of reasonableness.

<sup>18</sup> Williams.



2.13.4 In the UK, the Law Commission reviewed the mens rea for rape in detail in their consultation paper No 139 (Consent in the Criminal Law: Chapter 7) and their view was that the Morgan rule should be qualified by an objective test, and they sought views on that. They said: “*we think it would be remarkable if the Morgan rule did not sometimes have the effect of encouraging a jury to accept a bogus defence*”. In their policy paper to the review, the Law Commission<sup>19</sup> now recommend that honest belief should be preserved but that judges should direct the jury to the effect that in judging whether honest belief is genuine they should have regard as to whether he sought to ascertain consent, and that if his belief in consent arose from self-induced intoxication, it is not a defence.

2.13.5 The review spent many careful hours discussing this issue. We looked at the present subjectivist view and were all agreed that it could not be retained in its current form. We then looked at a variety of solutions to try to ensure that the defendant is not compromised but the victim is ensured justice. The first thing we established was that in practice, the defence of honest albeit mistaken belief in consent is usually run in tandem with consent. We could not find evidence of it being critical in a trial. The Sexual Offences (Amendment) Act 1976 requires the jury to have regard to the “presence or absence of reasonable grounds for such a belief... in considering whether he so believed”. We noted research by the Law Commission in Victoria to try to determine whether it was more difficult to convict if the belief was run as a defence. In a study of 53 prosecutions, the defendant’s belief was relevant in 23% of cases. 6% used mistaken belief as a primary defence; 17% as part of a defence. Of the 12 cases, 6 were convicted (50%). It is impossible to tell whether putting an objective test onto the reasonableness of that belief would have made a difference in the remaining 6 cases.

2.13.6 The arguments given for the full subjective test are:

- The law should punish people not just for what they did but for what they intended to do. This underlies most modern law, and underpins for example the distinction between intentional killing being charged as murder whilst a death that results from poor driving, although deeply tragic, is not regarded as so blameworthy because there was no specific intent, and in terms of the law is a less serious offence.
- A test of reasonableness is applying external standards. Should a person be found guilty of a very serious crime because they did not apply the same personal standards of reasonableness as those who determined the accused’s guilt or innocence? Is it right to apply external standards when the accused did not think they were doing wrong, for whatever cultural or other factors? What if they did not have the capacity to realise there was no consent?
- How should a reasonableness test be applied? Does it have to be reasonable for a person of the same class, culture or level of intelligence? If so does this not risk accentuating and perpetuating stereotypes about behaviour?
- The nature of the belief and its reasonableness or lack of it are issues to be tested by evidence on the facts of the case. The testing of the nature of the belief by the prosecution is an essential part of the case.

2.13.7 The arguments against the subjective test are:

- It implicitly authorises the assumption of consent, regardless of the views of the victim, or whatever they say or do.

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<sup>19</sup> Consent in Sex Offences; Vol 2 Appendix C.

- It encourages people to adhere to myths about sexual behaviour and in particular that all women like to be overborne by a dominant male, and that “no” really means “yes”. It undermines the fundamental concept of sexual autonomy.
- The mistaken belief arises in a situation where it is easy to seek consent and the cost to the victim of the forced penetration is very high. It is not unfair to any person to make them take care that their partner is consenting and be at risk of a prosecution if they do not do so.
- There is no justice in a situation whereby a woman (or a man) who has been raped in fact (because she or he did not consent) sees an assailant go free because of a belief system that society as a whole would find unreasonable – for example that he saw some or all women (or women of certain types) as sexual objects.
- It is easy to raise the defence but hard to disprove it.
- The Youth Justice and Criminal Evidence Act 1999 limits the use of a complainant’s sexual history in court. One of the exceptional cases where it may be introduced is when the defence of honest belief in consent is raised and sexual history is relevant to that belief. The concern is that this provision will significantly increase the use of the honest belief defence because that would open the door to introducing the element of previous sexual history as part of the defence, allowing cross-examination of the complainant on this issue.

**2.13.8** In balancing these arguments, there was a disagreement between the External Reference Group who unanimously wanted the law restoring to its pre-Morgan state of requiring any honest belief in consent to be subject to a test of reasonableness, and the Steering Group. The Steering Group did not take the ERG’s advice on this issue but identified an effective way of fettering an inappropriate use of honest belief, without re-introducing the external test of reasonableness that the courts had rejected.

**2.13.9** The Steering Group aimed to ensure that their proposals gave proper weight to the victim’s need for justice while maintaining the golden thread of the presumption of innocence of the defendant and ensuring that he was convicted for what he intended to do. It was essential that the law should be acceptable to the public, and to give victims and the wider public confidence that the law offers protection. We thought this confidence was lacking at present. The review is recommending changes to the law to define the meaning of consent as free agreement, and setting out when consent is not present. The Steering Group thought that these changes would create a rather different dynamic in rape cases where it would be more difficult to run a spurious defence of honest belief. The best way forward was to limit the use of the defence of honest belief in a way that fitted with our broader proposals, emphasised the importance of free agreement and made it much harder to run a dishonest defence.

**2.13.10** The Steering Group was very attracted to the Canadian solution to this very difficult problem. In Canada the law retains an honest but mistaken belief defence but fetters when it can be used in a way that ties in with the definition of consent. The intention was to introduce an “air of reality” into the use of a defence that relies on establishing what was happening in the defendant’s mind at the time of the offence. The Canadian Criminal Code states:

*273.2 “It is not a defence....where*

- (a) the accused’s belief arose from the accused’s*
- (i) self induced intoxication*
  - (ii) recklessness or willful blindness: or*

- (b) the accused did not take reasonable steps, in the circumstances known to him at the time, to ascertain that the complainant was consenting”*



**2.13.11** This provides several useful concepts with which to moderate the dishonest or inappropriate use of the defence of honest belief. The requirement on the accused to have to have considered the issue of consent in order to provide a defence of honest belief is particularly important. The accused cannot invoke the defence unless they proved that they took all reasonable steps, in the circumstances known to them at the time, to ascertain whether the complainant was consenting. This undermines the belief that a defendant can make large assumptions about the attitude of the complainant and should mean, for example, in situations where a defendant thinks that all women fight, or say no when they mean yes, they had not sought free agreement at the time.

**2.13.12** Self-induced intoxication because of drink or drugs does not reduce the criminal liability of a defendant, and this is set out in the Majewski Rules. A defendant is liable for his actions if he has voluntarily become drunk or high – because that was a matter of his own choice. He must be responsible for any consequences that flow from his actions when drunk or high. As drink and drugs are often an element in cases of rape, and we are concerned that the law should be clear, then it seems to be important to set out the principle in this context.

**2.13.13** Recklessness is already an element of the offence of rape, and as discussed in paras 2.11.5 above, anyone who is so reckless as to consent that he did not seek to take all the steps that were reasonable in the circumstances to find out whether he had free agreement would not under our proposals be able to argue that he had an honest belief in consent. As an example, if a defendant's belief in consent is based on the complainant's past sexual behaviour with others, and he took no steps to ascertain whether there was free agreement to sex at the time, he could not care less whether she was consenting and was therefore reckless.

**2.13.14** A further important point to ensure is that in retaining an honest belief in consent defence, in future any belief in consent will have to be a belief in free agreement – our definition of consent. The use of the qualifying conditions for the use of any belief in free agreement (i.e. that it was based on self-intoxication, arose from recklessness and that they did not take reasonable steps to ascertain free agreement) would create some sensible safeguards, while enabling the use of a defence when it is genuinely relevant. Accordingly we recommend that the defence of honest belief should be expressed in terms of free agreement, and be subject to limitations as to its use. This does not impose an external and objective requirement of reasonableness on the defendant, as our External Reference Group wanted, but it does reinterpret the doctrine of honest belief as set out by the House of Lords in the *Morgan* judgement, and provides new conditions for its use. The External Reference Group fully support this proposal, but would like to see it linked to a separate requirement that any belief in consent should be reasonable.

***Recommendation 9: A defence of honest belief in free agreement should not be available where there was self induced intoxication, recklessness as to consent, or if the accused did not take all reasonable steps in the circumstances to ascertain free agreement at the time.***

- *We invite your views on this proposal, and more generally on the requirement that any belief in consent should be reasonable.*

## **2.14 Sexual Assault**

**2.14.1** The present offence of indecent assault is one that applies to a variety of behaviour done without consent from unwelcome groping to some kinds of penetration. In making its proposals for new offences the review has recommended new offences to deal with the most serious types of behaviour. However, that still leaves a range of unacceptable behaviour, including “frottage” (rubbing up against someone else in a sexual manner) on the Tube, fondling and groping to quite serious assaults. All of these are distressing to the victim because there is a clear sexual intention,

and they are often directed at the more sensitive and private parts of the body or carried out by the use of the private parts of the perpetrator.

**2.14.2** The review did consider whether the offence should be described as sexual touching, as in other parts of the world, but decided that it was better to retain the concept of an assault, which is being codified in the Government's proposals for the reform of the Offences Against the Person Act 1861<sup>20</sup>. We wanted to retain the concept of an assault, because it includes not only the touching element but also behaviour which puts the victim in fear of force of some kind (i.e. where no touch takes place). It was important not to diminish the importance of the offence of sexual assault. An offence that may not include a severe assault could include a high level of fear, coercion, degradation and harm inflicted on victims.

**2.14.3** The present offence requires three elements to be proved – the fact of an assault, the conditions of indecency and the indecent intention and the lack of consent. This is a complex set of requirements. There have also been legal arguments about whether it is necessary to prove a hostile intent, but the proposed definition of assault does not require this. In the circumstances of an indecent assault, hostility is not a helpful concept. Any unlawful touching must by definition be hostile to the victim because it was without consent. The more difficult question is how we should seek to define the behaviour that is to be caught by the new offence. We have recommended new offences for penetrative assaults. This removes some of the most serious penetrative assaults from indecent assault, but an offence is needed to deal with unwanted sexual touching. There are a number of elements to this:

- It is the lack of consent to the touching that makes it an offence. While touching areas of another's body that are sensitive and generally regarded as private may be acceptable in certain circumstances, such as close physical relationships, this is not acceptable as part of everyday life.
- The new formulation provides for intent or recklessness as to an assault. For indecent/sexual assault, there should also be intent or recklessness in relation to the lack of consent. This would provide the necessary mens rea for the offence and remove the need to prove an indecent intention.

**2.14.4** The review was concerned not to use very broad terms such as indecency in offences, preferring instead to frame clearer and more specific offences. If we are not to use the concept of indecency in an assault, we need to be clear about the type of proscribed behaviour. We could define by body parts (breasts/buttocks/genitalia) but that seems inflexible. A better alternative is to define sexual touching as behaviour that a reasonable person would consider to be sexual (as in the abuse of trust offence in the Sexual Offences (Amendment) Bill). Putting that and the wider definition of assault above, close encounters on the Tube may form part of the everyday material of life but "frottage" in the Underground would clearly be an offence.

**Recommendation 10: There should be a new offence of sexual assault to cover sexual touching (defined as behaviour that a reasonable bystander would consider to be sexual) that is done without the consent of the victim.**

<sup>20</sup> The offence of assault in the Government's proposals for reforming Offences Against the Person is expressed as:

"(1) A person is guilty of an offence if:

(i) he intentionally or recklessly applies force to or causes an impact on the body of another; or  
(ii) he intentionally or recklessly causes the other to believe that any such force or impact is imminent.

(2) No such offence is committed if the force or impact, not being intended or likely to cause injury, is in the circumstances such as is generally acceptable in the ordinary conduct of daily life and the defendant does not know or believe that it is in fact unacceptable to the other person."



2.14.5 The law presently does not permit a child under 16 or a “defective” to consent to an indecent assault. The review decided to continue that presumption, and detailed proposals relating to children and vulnerable people are set out in the next two Chapters.

## 2.15 Assault to Commit Rape

2.15.1 The common law used to contain two parallel offences of assault to commit rape and assault to commit buggery. When the law was codified in the nineteenth century the “assault to commit buggery” offence was put into statute, and assault to commit rape was not. (The reasoning is not clear; it may have been an oversight.) Assault to commit buggery is now found in S16 of the 1956 Act. Assault to commit rape remains a common law offence, but has become unusable because of arguments about its status, and it has for all practical purposes ceased to exist.

2.15.2 This is a genuine problem. The law of attempts requires that in order to charge attempted rape, the action has to be “more than merely preparatory” to the offence. Assaulting a victim with the intent to rape only becomes an attempted rape at a fairly late stage, quite close to penetration. The intent of the assault may however be quite clear to the victim who, even if no rape has occurred, is left deeply affected. The kind of assault to which this offence could apply is where someone is attacked, dragged into an alley and clothing is ripped off with all the preparatory moves towards a rape, but the assailant is discovered and dragged off before it has become, legally, an attempted rape. The victim suffers far greater fear and trauma than for a non-sexual assault because the intent to rape was clear and the terror and trauma suffered is related to that. It may be comparable to an actual rape.

2.15.3 It seems only right that an assault with intent to commit rape or sexual assault by penetration is a serious offence and much more significant in terms of its effect on the victim than a similar level of violence in a straightforward assault. Judges and practitioners told us that there was a real gap in the protection of the law. A new offence is therefore necessary to replace the present S16 and the common law offence that has fallen into disuse. We think however that a new offence should apply to the two most serious new non-consensual penetrative sex offences – rape and sexual assault by penetration.

***Recommendation 11: There should be a new offence of assault to commit rape or sexual assault by penetration.***

## 2.16 Burglary with Intent to Rape

2.16.1 The Theft Act 1969 contains an aggravated burglary offence of burglary with intent to rape in s9. This is an important element in the law on rape as it covers the situation where some one may break into a house (or office or other private place) “with the intent of having sexual intercourse with the person within, if possible with consent but if not then by committing rape”<sup>21</sup>. The rape does not have to take place for the offence to be committed. Even if no rape occurs, the trauma of being seriously threatened with rape by an intruder in your own bedroom or workplace, where you think you are safe, is profound. The offence in the Theft Act is a very serious one, carrying a maximum sentence of 14 years imprisonment.

2.16.2 We considered whether this offence should be left as an aggravated burglary, or whether it was a sex offence. We concluded that the essence of the crime was the sexual intent rather than the burglary, and that hence it should be regarded as a sex offence. We thought that there was a

<sup>21</sup> Archbold, 2000, 21-121.

risk that being tucked away in the Theft Act, it was an offence that could be overlooked. We also noted that it did not carry a requirement to register under the Sex Offenders Act at present.

**2.16.3** The existing offence of burglary with intent to rape would need to be redefined to take account of our proposals to reform the law of serious sex offences. In order to differentiate our new offence, we thought that the word trespass was preferable to burglary – and covers the same elements of unwanted intrusion. We also thought that as the intent to commit a sex offence was central to the offence, the redefinition should apply to trespass with intent to commit any serious sex offence – rape, sexual assault by penetration, sexual assault or adult sexual abuse of a child – and that it should be codified with other sex offences.

***Recommendation 12: A new sex offence of trespass with intent to commit a serious sex offence should replace burglary with intent to rape.***

## **2.17 Abduction with intent to commit a serious sex offence**

**2.17.1** We have argued above that abduction or detention are situations in which the ability to give free agreement to sex would not normally be present. In discussion we also recognised that abducting someone, adult or child, for sexual purposes is very dangerous offending behaviour which comes high on any scale of seriousness. It can be part of a pattern of very serious sexual offending. However, just as in assault to commit rape and burglary to commit rape, there can be situations where following an abduction the rape or sexual assault was clearly intended but did not actually take place. We thought that there was a strong argument for a specific offence of abduction with intent to rape in order to match the offence to the nature of the crime. However it would be important to establish that the intent could apply to any of the serious sex offences we propose, and the new offence should be abduction with intent to commit a serious sex offence – again defined as rape, sexual assault by penetration, sexual assault or adult sexual abuse of a child.

**2.17.2** This offence would replace s17 of the 1956 Act which concerns abduction for the purposes of unlawful sexual intercourse anywhere in the world. We thought that it was important to ensure that we did not lose the element of protection which that offence extends to those abducted to be taken abroad. We were particularly concerned about the potential for girls to be taken in order to be forced into marriage or a sexual relationship abroad, and thought that the law ought to continue to offer a specific remedy. A forced marriage is not valid, and forced sex within that marriage would be likely to count as rape. Our new offence of abduction to commit a sexual offence should be available for use for those abductions where the intention is to take the victim abroad.

***Recommendation 13: There should be a new offence of abduction with the intent to commit a serious sex offence.***

## **2.18 Obtaining Sexual Intercourse by Threats or Deception**

**2.18.1** We have argued that rape and other sexual offences are essentially offences of lack of consent. We have also considered what kinds of threats and deceptions are serious enough to vitiate consent and would lead to the commission of the crime of rape or sexual assault by penetration. The present law contains a set of offences that relate to obtaining sex by threat or false pretences in ss 2 and 3 of the Sexual Offences Act 1956 which to a certain extent overlap with other offences that we have considered.





- S2 is about procuring a woman by threat to have sexual intercourse in any part of the world;
- S3 about procuring a woman by false pretences for sexual intercourse in any part of the world.

**2.18.2** These offences are very rarely used, possibly because the penalty is only 2 years. However that is not in itself sufficient reason to say that they are no longer needed. Their origin may have lain in concern about the white slave trade but there are still very valid concerns that should be addressed. People may be sought for work in holiday resorts abroad that then turns out to be sex work. They are recruited by deception and this kind of behaviour needs to be caught by the law. These offences can be used to deal with the supply end of the trafficking trade where threats or deception are involved. However these offences are not limited to prostitution nor to sex with third parties. Are such offences still needed?

**2.18.3** We have included the use of threat of serious harm or detriment in our examples of situations where consent is not present. Our definition of rape includes any threat of serious harm to the person or another, so should the use of less serious threats in order to achieve some form of consent (otherwise it would clearly be rape) be a separate offence? The CLRC (who sought to separate out an immediate threat of harm, justifying a charge of rape, from wider or longer term threats, which should, they thought, be dealt with by a more serious s2) recommended retaining the offence with an enhanced penalty. Our definition of consent may remove some of the CLRC purpose from this offence. That however leaves a broad band of behaviour where quite a low level of threat may induce a supposed consent that was not genuine, particularly if the victim was young or vulnerable to suggestion.

**2.18.4** The second of the two existing offences relates to procuring intercourse by false pretences – for which today we would rather use the more precise term of deception. In the Theft Act deception means any deception, whether deliberate or reckless, by words or conduct and as to fact or as to law. It also includes a deception as to the intentions of the person. We envisage that this kind of deception is of a lower level or a different kind than in our list of situations where consent is absent (which includes deception as to the identity of the person, or the nature or purpose of the act) and could relate to going through a sham ceremony of marriage.

**2.18.5** A modern gender-neutral replacement offence of both the existing offences could be of “obtaining sexual penetration by threats or deception”, and it too could have a broad international application. This could be helpful in the context of forced marriages, where a girl taken abroad may go willingly because she is deceived as to the purpose of her visit: it turns out not to be a holiday to visit relatives but an unwelcome marriage. We recognise the evidential difficulties, and that it may not be appropriate to use the criminal law in such situations. We thought it important that the law contained a remedy that could be used in appropriate cases, and that it gave a clear message that such behaviour was wrong and unacceptable.

**2.18.6** The offence could also be used in situations such as the advertising in the UK for waitresses or entertainers overseas, when the real requirement is to provide sex.

**2.18.7** We were particularly concerned to ensure that the law provided a remedy for some of the problems we were told of by those who care for people with learning disabilities, where low levels of threat or deception can be used to induce sex. We thought that this new offence could provide a remedy but that an alternative would be to add a new offence of “using threat or deception to procure sex with a person with learning disabilities” (discussed in Chapter 4).

***Recommendation 14: There should be an offence of obtaining sexual penetration by threats or deception in any part of the world.***

## 2.19 Using drugs to stupefy or overpower in order to have sex

2.19.1 S4 of the 1956 Act provides an offence that applies to anyone who gives any “drug, matter or thing” to a woman which will stupefy or overpower her so that any man can have sexual intercourse with her. The offence is intended to deal with the use of spiked drinks, excess alcohol or any other substance which would render a woman unable to resist sex. Any person who administers the drug would be liable, whether or not they are the person who wishes or does have sex with her.

2.19.2 This is an important offence. The behaviour that it catches is not the mutual enjoyment of alcohol (or other substances) that may be a precursor to sex but the cold-blooded administration of a knock-out substance in order to exploit and take advantage of another. The advantage of this offence is that it catches third parties, and does not rely on a rape actually happening. (And if a person is made insensible by drink or drugs then any sex that happens is rape.) There is very real concern about the use of drugs and alcohol to enable rape to take place and we did not want to leave any gap in the law for those who use these methods to slip through the net. We also thought that the law should remain widely drafted to enable any new methods of mental or psychological control to be caught. We also thought it was important for the law to be absolutely clear that such behaviour was totally unacceptable and definitely criminal.

2.19.3 We recommend this offence should be retained, made gender-neutral to give protection to both men and women, and that it should apply to an intention to sexually penetrate the victim.

**Recommendation 15: An offence of administering drugs (etc.) with intent to stupefy a victim in order that they are sexually penetrated should be retained.**

## 2.20 Compelling sexual acts

2.20.1 One aspect of sexual behaviour which is potentially very serious, and clearly criminal, is that of compelling others to carry out sexual acts against their will. It is possible, for example, for someone to force another person to perform a sexual act on themselves, the compellor or a third party. That act is not voluntary – it may indeed be a criminal act such as sexual assault or even rape or sexual assault by penetration. The compellor may want sexual acts performed on him or herself, want the person to masturbate in front of them, or to perform acts with or on a third person, or even on or with an animal. The law should be able to state very clearly that compelling others to do such acts against their will is an offence and that the guilt lies with the person who compels the act rather than his or her immediate victims. We had evidence of incidents of forced masturbation which was accompanied by the threat that the victim was committing a crime of indecent assault, but that the compellor was not doing anything wrong. We have also noted concerns about women who compel men to penetrate them. We do not regard that as rape, but as a serious assault on the man’s sexual autonomy. We think that compelled penetration should be caught by this new offence. In its 1984 report the CLRC noted that there was no specific provision that applied when a man compelled his wife to perform acts of bestiality, and recommended a new offence to fill this gap. We have also recommended that compelling children to do sexual acts should form part of our sexual abuse of a child offence in Chapter 3.

2.20.2 We looked at some proposals for law reform from abroad. The Australian Model Criminal Code Officers’ Committee proposals on sex offences propose new offences of *compelling sexual acts*. These cover the situation where a perpetrator compels a second person either to perform a sexual act on the perpetrator, on him or herself, on a third party or with an animal. The offences are divided into a penetrative offence and an indecent touching (sexual assault) offence. They make no recommendation about offensive behaviour that does not involve touching



like compelling someone to witness sexual acts (such as indecent exposure) which they regard as more minor and summary only, and so outside their remit. The South African Law Commission recommends a very similar offence.

**2.20.3** We thought that there were very strong arguments for having specific offences that deal with compulsion. These situations are a peculiarly nasty form of victimisation that depends on an abuse of power and control. They override the sexual autonomy of the compelled person, who may be forced to commit an offence themselves. An act of compulsion must mean that the compelled person did not consent. Any offence would therefore rely on proof that the compellor knew that the victim did not consent, or was reckless (including that they did not care less) as to their lack of consent, including giving no thought to whether or not the person consented. This offence would also deal with the gap in the law identified by the CLRC.

**2.20.4** We also thought that it would be necessary to structure any new offence to reflect the seriousness of the compelled acts. Although compelling another to do sexual acts is intrinsically serious, it does vary in severity according to the nature of the compelled acts. A compelled touching may be comparatively minor, whilst compelling sexual penetration would be very serious. We thought therefore that there could be two offences with different penalties:

- a more serious offence of compelling sexual penetration of a person or an animal by a person, an object or an animal; and
- an offence of compelling other sexual acts (including sexual touching).

***Recommendation 16: There should be new offences of compelling another to perform sexual acts, with several levels of seriousness depending on the nature of the compelled acts.***



# Chapter Three

## Children

### 3.1 Introduction

**3.1.1** Our task was to ensure that the law offered robust and comprehensive protection, as required by our terms of reference. The risks to children of sexual abuse, particularly from people they know, are now better understood than ever before. Child protection procedures and multi-agency approaches have been developed and improved, as have procedural and evidential changes to enable children to give evidence in court. This chapter considers the substantive offences against children; other chapters deal with rape and sexual assault (chapter 2), abuse in the family (chapter 5) and trafficking and sexual exploitation (chapter 7). In developing our proposals we worked within a framework of national and international law, notably the UN Convention on the Rights of the Child which requires that children, because of their physical and mental immaturity, need special safeguards and care, including appropriate legal protection.

**3.1.2** The criminal law performs a vital role in society by setting standards of acceptable and unacceptable conduct. In making certain types of sexual behaviour criminal, the law provides protection, and supports and maintains the boundaries of acceptable behaviour in the family and community. Children need particular protection in the field of sexual relations because they are physically and emotionally dependent and not yet fully physically or psychologically mature. The law has long held that children are not, and should not, be able to consent to any form of sexual activity in the same way as adults.

**3.1.3** We know much more about the patterns of child abuse than we did even ten years ago. Public attitudes have changed from disbelief to a horrified recognition of the level of abuse, and a realisation that it is both adults and other children who can abuse. The response to our initial invitation to contribute ideas of January 1999<sup>22</sup> overwhelmingly supported increasing the level of protection available to children from sexual abuse.

**3.1.4** The criminal law also sets the age of consent to sexual activity. This protects children from adults, but also affects sexual activity between children. We thought long and hard about the application of the criminal law to such activity, recognising that this could range from enthusiastic to non-consensual. We also had in mind the cross-Governmental strategy to reduce the amount of teenage pregnancy.

**3.1.5** In the previous chapter we have recommended a set of serious sex offences of rape, sexual assault by penetration and sexual assault. These must also be used, as appropriate, for cases involving children. Rape is rape whatever the age of the victim. We thought there were overwhelmingly strong arguments for a set of specific sex offences involving children to mark their particular need for protection, and society's disapproval of adult sexual activity with children. The law already provides some specific offences that relate to sexual activity with children. This chapter discusses the limitations of the present law and how we recommend these offences should be reframed.

<sup>22</sup> Home Office – 'A Review of Sex Offences' Dd 604402 CCN077828 1/99 C.2000.



3.1.6 Our general policy is to have clear, gender neutral offences to enable the law to deal appropriately with all those who abuse children, whether the abusers are male or female and the victims are boys or girls.

## 3.2 Problems in the current law

3.2.1 The major sexual offences that relate specifically to children are:

Sexual Offences Act 1956

- s5. **Intercourse with a girl under thirteen** – Makes it illegal for a man (including a boy) to have intercourse with a girl under the age of thirteen. (Maximum penalty life imprisonment.)
- s6(1). **Intercourse with a girl under sixteen** – Makes it illegal for a man (including a boy) to have sexual intercourse with a girl under the age of sixteen. (Maximum penalty two years' imprisonment.)
- s12. **Buggery** – Anal intercourse with a boy or girl under the age of eighteen<sup>23</sup> is illegal. (Maximum penalty for buggery with a child under 16 is life.)
- s13. **Indecency between men** – Consensual homosexual acts with a boy under eighteen<sup>23</sup> are illegal. (Maximum penalty 5 years' imprisonment.)
- s14. **Indecent assault on a woman** – a girl under sixteen cannot in law give any consent which would prevent an act being an assault. (Maximum penalty ten years' imprisonment.)
- s15. **Indecent assault on a man** – a boy under sixteen cannot in law give any consent which would prevent an act being an assault. (Maximum penalty ten years' imprisonment.)

Indecency with Children Act 1960

- s1. **Indecent conduct towards young child** – Makes it illegal to commit an act of gross indecency with or towards a child under the age of fourteen, or to incite a child under 14 to commit such an act. (Maximum penalty 10 years)

3.2.2 These offences do seem to provide comprehensive protection, but they are open to criticism on a number of grounds:

- There are separate and different offences committed against boys and girls, (and for men and women who have sex with children);
- There are differing defences and case law applying to the different offences;
- The level of penalties are out of kilter (e.g. usi with a girl under the age of 16 years carries a maximum penalty of 2 years, yet indecent assault on a girl of the same age carries a maximum penalty of 10 years);
- There are a variety of age thresholds for different offences;
- Time limits on when prosecutions can take place apply to certain offences;
- Some offences are hardly used.

<sup>23</sup> The Sexual Offences (Amendment) Bill proposes equalising the age to 16.

**3.2.3** The present structure of offences has been built up over time, and added to piecemeal primarily in order to protect girls and boys from older men. It does not form a coherent code, nor one that reflects what we now know of the patterns of child sexual abuse. It deals differently with different kinds of sexual abuse depending on the nature of the act, so providing varying levels of protection for boys and girls. Our starting point is that the law should offer protection to all children under the age of 16.

**3.2.4** There are defences available to some, but not all, offences against children. The terms of those defences can be controversial. The so-called “young man’s defence” (a man of between 16 and 24 who has not been previously charged with a like offence can claim, on reasonable grounds, that he did not think the girl he had sex with was under 16) has been criticised as hindering the protection the law gives to girls and also because there is no equivalent for offences against boys. Case law states a girl under the age of sixteen is not responsible for aiding or abetting a sexual offence against her however willing her participation, on the basis that where the purpose of a particular offence is to protect certain persons, no such person can be convicted of it (*R v Tyrrell*)<sup>24</sup>. By this rule no under-age girl, however willing, can be prosecuted for aiding and abetting a man’s unlawful sexual intercourse with her whatever the circumstances. The man (or boy) always carries the criminal liability.

**3.2.5** Penalties are generally low and there are anomalies between them. As an example, the maximum sentence available for unlawful sexual intercourse with a girl under the age of sixteen is two years’ imprisonment, for buggery with a boy (or girl) under 16 it is life and for indecent assault on a girl or boy it is ten years’ imprisonment.

**3.2.6** There are also time limits, generally unusual in sex offences, on prosecutions for unlawful sexual intercourse (usi) with a girl under the age of sixteen, and gross indecency. Cases cannot be brought more than 12 months following the time of the offence being charged.<sup>25</sup> We now recognise children may delay complaining about abuse until they feel that they are in a safe position to do so, which may be years after the offence, or too late in the process for the law to take account of it.

**3.2.7** Investigators, practitioners, defendants and complainants find the proliferation of age limits in the law confusing. Age limits operate from the birthday at which the child achieves the age. These include:

- 10 – the age of criminal responsibility;
- 13 – below this age intercourse with a girl (and incest) carries a heavier sentence;
- 14 – the offence of indecency with children applies to those under 14;
- 16 – the age of consent in England, Wales and Scotland (and the legal age for marriage with parental consent in England and Wales);
- 17 – the age of consent in N Ireland;
- 18 – the age of consent for male homosexual sex and for the ‘abuse of trust’ provisions in the Sexual Offences (Amendment) Bill (also the age below which they are defined as children in the Children Act 1989 and the UN Convention on the Rights of the Child).

The complexity of the law, together with its distinctions as to whether the child was male or female and what kind of sexual act was involved (whether penetrative, touching or simply encouraging the child to act indecently) creates unnecessary complexity and confusion.

<sup>24</sup> 1 Q.B. 710 1894.

<sup>25</sup> Sexual Offences Act 1956, Schedule 2 Part II.



**3.2.8** Conviction for any sex offence against a child carries heavy consequences in terms of both a requirement to register with the police under the Sex Offenders Act 1997 and in imposing Schedule One offender status under the Children and Young Persons Act 1933. This status applies for life, and where the sentence involves a period of statutory supervision, e.g. a supervision order; probation order or licence, conditions may be attached to regulate such aspects of life as contact with children; where they can live; with whom they can live; work they cannot do; and leisure activities. The Criminal Justice and Courts Services Bill includes provisions to prevent those convicted of offences against children from working with children.

**3.2.9** In recent years the use of some offences has decreased sharply, as is seen in the attached table showing the use of the offence of unlawful sexual intercourse with girls<sup>26</sup>:

Offence	Cautioned			Proceeded against			Convicted at all courts		
	1988	1993	1998	1988	1993	1998	1988	1993	1998
Sexual Offences Act 1956	1988	1993	1998	1988	1993	1998	1988	1993	1998
s5. USI with girl <13	79	67	23	165	97	40	134	76	55
s6. USI with girl <16	1211	551	286	344	187	171	339	169	225

The figures below show the number of cases reported over the same period<sup>6</sup>:

	Cases reported		
	1988	1993	1998
Sexual Offences Act 1956	1988	1993	1998
s5. USI with girl <13	283	268	153
s6. USI with girl <16	2552	1443	1133

**3.2.10** We do not know why the numbers of prosecutions for usi should have fallen so significantly, but changing social attitudes to under-age sex, including whether the behaviour was regarded as criminal, may be one factor. These offences may also provide supporting charges in cases where rape is the main charge because, even if there was consent, if the girl was under 16 the offence of usi would have been committed if sex took place. Although the absolute numbers have declined, the proportion of prosecutions and convictions has remained stable (in sharp contrast to the changing pattern of rape cases). There is little doubt that teenagers are sexually active under the age of 16. The Teenage Pregnancy report<sup>27</sup> showed that 28% of under age boys and 19% of under-age girls were sexually active in 1991 (this was part of an increasing trend). The Durex Global Sex Survey 1999<sup>28</sup> indicated that on average teenagers in the UK have their first sexual experience at 15.3 years – slightly later than the US and Canada, but earlier than most European countries (the global average was 15.9 years).

<sup>26</sup> Figures provided by HO Research, Development and Statistics Directorate.

<sup>27</sup> Teenage Pregnancy – report by the Social Exclusion Unit, the Stationery Office 1999.

<sup>28</sup> Survey of young people and sex; the 1997 and 1998 surveys, using different methodology, suggested the UK age of onset was 17 and 16.8 respectively; the age of first experience dropped in all countries in the 1999 survey. The 1999 survey was based on a sample size of 4200 young people between the ages of 16 and 21 in fourteen countries, some of whom were sexually active.

### 3.3 Views expressed during public consultation

3.3.1 We received a number of responses dealing with sexual activity involving children in our public consultation exercise. Some of these were outside the remit of the review as they related to pornography, children as witnesses in trials, sex education and decriminalising children involved in prostitution. However many of these were thought provoking and contributed to the wider context of the review.<sup>29</sup>

3.3.2 Some submissions called for decriminalising mutually agreed sex between juveniles of roughly similar age. Proposals included using an age differential, so there would be no offence when the parties were close in age, or relying on defining the competence of the individual child to make an informed decision about sex, similar to the use of ‘Gillick competence’<sup>30</sup> in medical issues, although it was hard to see how this would produce the clarity needed in law. The age of consent was described as:

*“one of the most contentious areas of sexual offences legislation. The law holds that a person below the age of consent is incapable of consent. I believe this is condescending and often offensive and distressing to couples caught up in age of consent offences.”<sup>31</sup>*

This was in stark contrast to concerns raised by other contributors:

*“We would protest against the policy of police and prosecutors to recognise the sexual autonomy of children, which is resulting in an increasing number of cautions rather than prosecutions, where unlawful sexual intercourse and indecent assault is involved, probably due to the notion that a child can give his ‘informed consent’.”<sup>32</sup>*

3.3.3 There was a consistent call to increase the protection of the law to children, including the need for gender neutral offences. A number of contributors suggested an offence of child sexual abuse. This, it was thought:

*“would greatly strengthen the position of seeking justice for children whilst also emphasising the strength of the message that adults have a responsibility to protect and not harm children”.<sup>33</sup>*

This proposal was strongly supported at our consultation conference on sexual offences against children.<sup>34</sup>

<sup>29</sup> ‘Information about what constitutes “sex offending”, abusive and exploitative sexual behaviour, should be an element of school sex education programmes. It should have the specific purpose of enabling children to recognise that they may be victims and providing thereafter the facilities for them to disclose safely.’ – Inner London Probation Service, submission to the sex offences review, March 1999.

<sup>30</sup> A young person under the age of 16 is deemed capable of giving consent in certain circumstances. In the case of *Gillick v West Norfolk and Wisbech Area Health Authority* (1986 AC 112), the House of Lords reviewed the issue of consent with regard to young people under the age of 16 and ruled that they could give valid consent to medical treatment as long as they have sufficient understanding and intelligence to appreciate fully what is proposed and are capable of expressing their own wishes. Lord Scarman identified the principle that parental rights yield to the young person’s right to make their own decisions when they reach a sufficient understanding and intelligence to be capable of making up their own minds on such matters – extract from ‘Child Protection Procedures Handbook’, courtesy of ‘Young people, sexual abuse and confidentiality: Guidance for those involved in promoting sexual health’ Salford Area Child Protection Committee, submission to the sex offences review, June 1999.

<sup>31</sup> Submission #59 to the Sex Offences Review, March 1999.

<sup>32</sup> Justice for Children, submission to the Sex Offences Review, March 1999.

<sup>33</sup> The Church of England Archbishops’ Council Board for Social Responsibility – submission to the Sex Offences Review, June 1999.

<sup>34</sup> York, 28-29 June 1999; A report of the conference can be found in Annex H4 of Volume 2 to this report.





**3.3.4** There was also real concern about the potential impact of legislation intended to protect children on those who were not engaged in genuinely criminal behaviour – like 15 year olds mutually agreeing to sex in private. Was this genuinely culpable, and deserving of a criminal sanction?

**3.3.5** Those participating in the consultation conference shared a general perception that sentencing in child sex cases was too low, leaving the victim feeling that the legal process has failed them. There was also some concern that cases were not taken forward because it was thought that the effects of having to appear as a witness in court (even with modern safeguards) would be too traumatic. Yet there was evidence that, given the right level of support, many children felt a sense of empowerment at being able to have their day in court. Reluctance to put children through the criminal justice process added an extra hurdle – sex offenders were well aware of this problem, and this could encourage them not to co-operate with investigators.

**3.3.6** There was also considerable support for the proposition that the law should make a distinction between an age when children ought not to engage in sex, and an age below which it was absolutely wrong to do so. It was thought that children under the age of thirteen were not physically or emotionally mature enough to deal with the consequences of sexual activity and that the law should recognise this. This general policy recognised that although many children under 16 did not have the maturity and competence to give informed consent, there were some who did. It seemed clear to all involved that a child of 12 or under (who may have just started at secondary school and have barely entered puberty) did not have the maturity or understanding to give true consent.

**3.3.7** Two recent reports provided a valuable input into the review: the Social Exclusion Unit report ‘Teenage Pregnancy’<sup>35</sup> (which looks amongst other things at the effect of the present law) and the NCH report ‘Teenage mothers speak for themselves’<sup>36</sup>. The evidence of both reports was that some teenage girls had consented grudgingly, if at all, to early sexual activity. It is vital that young people have enough information to enable them to take rational and well-judged decisions about whether or not they are ready and able to enter a full sexual relationship. Information and advice about sex education, relationships and health are vitally important to help young people develop the knowledge and confidence to make their own decisions. It is essential that the provision of advice and guidance to those young people under the age of consent should be, and be seen as, quite separate from the criminal law.

**3.3.8** At the same time the law has a declaratory and educative role to play. The age of consent is a formal statement about society’s view of acceptable behaviour. It is plain that many young people do not currently know or fully understand what the law says about sexual activity and children. We thought it is vital that the law is clear and well understood.

**3.3.9** We also tried to test the opinion of some young people and, at fairly late stage in the review, had discussions with some Y10 and Y11 pupils (aged between 14 and 16) at one school. (Sadly lack of time meant we could not undertake a wider consultation). The Government has, however, undertaken a wider programme of talking to young people on a range of issues, including sexual matters<sup>37</sup>. Our discussions took the form of group and class discussions in PSHE lessons. We wanted to see whether our assumptions about young people’s attitudes and behaviour were supported. Discussions ranged around the age of consent, what was meant by consent and who was the responsible partner in mutually agreed sexual relationships. The pupils were clear that in mutually agreed relationships both boys and girls were responsible for their own actions. The

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<sup>35</sup> Social Exclusion Unit (June 1999) The Stationery Office.

<sup>36</sup> NCH Action for Children (1999).

<sup>37</sup> ‘Listen Up’, Women’s Unit/Home Office, April 2000.

overwhelming message from all the discussion groups, however, was for more and better sex education, particularly for boys.<sup>38</sup>

### 3.4 The law in other countries and proposals for change

#### *Australia*

**3.4.1** New South Wales has several age-related criminal offences. These include aggravated sexual assault (without consent and in ‘circumstances of aggravation’, i.e. maliciously inflicting actual bodily harm or where the victim is under the age of 16); sexual intercourse with a child under 10; sexual intercourse with a child between 10 and 16; aggravated sexual assault with increased penalties for assaults against children; an aggravated act of indecency with increased penalties for acts with children and carnal knowledge by a teacher (equivalent to an abuse of trust offence). The State of Victoria has a broad range of offences against children including sexual penetration of children under the age of 16; indecent acts with children; maintaining a sexual relationship with a child; abuse of trust offences to protect 16 and 17 year olds (both sexual penetration and indecent acts) and facilitating sexual offences against children.

**3.4.2** The Northern Territory still has offences of sexual intercourse and gross indecency between males in public, with aggravated penalties for an adult where the other person is under 14. There is also an offence of sexual intercourse or gross indecency with a female under 14. Further offences include attempts to procure a young person, maintaining an unlawful relationship of a sexual nature with a child under 16; indecent dealing with a child under 16 (e.g. permitting oneself to be indecently dealt with by a child under 16) and enticing away a child under 16 for immoral purposes. Tasmania, which has a higher age of consent at 17, has an offence of sexual intercourse with a young person, which includes maintaining a sexual relationship with a person under 17. All states now have offences of persistent sexual abuse of a child – these generally permit the prosecution to present an indictment which charges an accused with the offence of having a ‘sexual relationship’ with a child over a period of time. There must be a number of occasions (typically three) when particular sexual acts occurred, but it is not necessary to specify the times, dates or circumstances of the acts.

**3.4.3** In general, defences include marriage, and the Model Criminal Code has proposed that married means ‘married according to the law of Australia’. Overseas marriages are not recognised as valid in Australia at any time while either party to the marriage is under the age of 16.

*“These age limits reflect Australia’s obligations under international law not to recognise marriages where one party is under the age of 18, with latitude permissible for those between the ages of 16 and 18”.<sup>39</sup>*

**3.4.4** The federal Australian Model Criminal Code Officers Committee (MCCOC) report did not recommend the age at which the age of consent should be set in individual States. It did suggest that the age of consent for both females and males, and for heterosexual and same sex contact, should be equalised within each State, and that the same age should be set across Australia. The Committee has also suggested that there should be an ‘absolute age’ below which there could be no defence available to the sexual offence. Current ‘absolute ages’ for defence purposes vary between the States from 10 to 18. They also recommend the offences of persistent sexual abuse of a child and sexual acts committed against a young person by a person in a position of authority.

<sup>38</sup> A report of these discussions can be found in Appendix I, Volume Two to this report.

<sup>39</sup> Model Criminal Code: Chapter 5, Sexual Offences Against the Person, May 1999.



**3.4.5** MCCOC also proposed a similarity of age defence for mutually agreed sexual activity between children as long as the complainant was over the 'no defence' age and the accused was within 2 years in age of the complainant. Such provisions already exist in some States and the age gap varies from one to five years. MCCOC also recommended a defence based on honest and reasonable mistake of fact in age where the child is above the 'no defence' age.

#### ***Canada***

**3.4.6** Canada has offences of sexual interference of a child under the age of 14 years and an invitation to sexual touching. Sexual interference includes touching with a part of the body or an object, any part of the body of a person under the age of 14, and includes sexual penetration. Their offence of sexual exploitation applies where the victim is between 14 and 18 years of age and is, to all intents and purposes, similar to abuse of trust. Anal intercourse is illegal under the age of 18 unless between husband and wife. There is also a specific offence of exposure of the genitalia to a person under the age of 14. Bestiality in the presence of or by a child is illegal. The law on age limits for offences is presently under review.

**3.4.7** There is a mistake of fact in age for the offences of sexual interference and touching, but these do not apply unless the accused has taken 'all reasonable steps' to ascertain the age of the complainant.

#### ***New Zealand***

**3.4.8** Sexual offences for the protection of children in the New Zealand Crimes Act 1961 include sexual intercourse with a girl under care and protection; sexual intercourse with a girl under 12; indecency with a girl under 12 and sexual intercourse or indecency with a girl between 12 and 16. In the three latter offences, a girl cannot be charged as a party to an offence committed upon or with her. There is a mistake of fact in age defence for the offence with a girl under 16. There are also provisions of indecent assault on a girl; an indecent act between a woman and a girl; indecency with boys under 12; indecency with a boy between 12 and 16 and indecent assault on a boy. A boy cannot be charged as a party where the offence of indecency has been committed upon or with him, which provides equality in the law.

#### ***Republic of South Africa***

**3.4.9** The South African Law Commission (SALC) has proposed sweeping changes to its sex offence law, particularly those relating to children. The age of consent is 16, but raised to 18 in circumstances of sexual exploitation<sup>40</sup>. In redefining the offence of rape, they have recommended an absolute age of consent for children set at 12 years. A person who intentionally commits a sexual act with a child at least two years younger is guilty of child molestation, (to recognise the reality of peer group sexual experimentation). The SALC also proposes an offence of persistent sexual abuse of a child which applies if the accused has engaged in a sexual act or an act of sexual penetration in relation to the child on two or more occasions during a specified twelve month period.

**3.4.10** A sexual act has been defined as any indecent act, and includes an act which causes direct or indirect contact between the anus, breasts, penis or vagina of one person and any part of the body of another; or exposure or display of the genital organs of one person to another person. It also includes an act of sexual penetration.

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<sup>40</sup> Discussion of the commercial sexual exploitation of children can be found in Chapter 7.

### 3.5 The age of consent

**3.5.1** In England and Wales the age of consent to sexual activity is 16 for heterosexuals and same sex females<sup>41</sup>, and 18 for same sex males<sup>42</sup>. The setting of ages of consent has a long history<sup>43</sup>.

**3.5.2** The age at which girls can consent to sexual activity was raised to sixteen (from 13) in the 1885 Criminal Law Amendment Act, following a campaign against child prostitution by social reformers including Josephine Butler. (The age of consent was above the minimum legal age for marriage, which remained at twelve until 1929.) The law does not set an age at which boys can engage in heterosexual sex, save that boys under 16 cannot consent to what would be an indecent assault (which covers most sexual activity between older women and boys under 16). Until 1993<sup>44</sup>, there was a legal presumption that boys under the age of fourteen were incapable of sexual intercourse. The age of consent for homosexual activity in private was established at 21 in the Sexual Offences Act 1967, and reduced to 18 in the Criminal Justice and Public Order Act 1994.

**3.5.3** The current Sexual Offences (Amendment) Bill will prohibit sexual activity between adults in certain positions of trust and authority and a child under 18 in their care. It draws a distinction between the age at which the law permits a child to consent to a full sexual relationship, and that which may be appropriate to protect a child from exploitation with which their maturity and experience of life at 16 may not equip them to deal. In some circumstances therefore the law can, and does, make a distinction between a greater degree of protection from sexual exploitation which then justifies a higher age of consent, but one that applies to both boys and girls.

**3.5.4** The age of consent varies between countries, although there is a trend towards a standardisation between 15 and 17. There are variations within the British Isles where both Northern Ireland and the Republic of Ireland have an age of 17 for heterosexual sex. The age also varies within Europe. Spain has the lowest age of consent at 12, although this increases to 18 if there is any complaint or exploitation. France, Sweden and Denmark all use an age of consent of 15, although again a higher age may apply if there is an element of exploitation. Germany, the Netherlands, Switzerland and Portugal set their general limit at 16, although Portugal allows consensual sex between peers from the age of 12. Canada permits consensual sex from the age of 14 if it is not exploitative, but that is now under review. New Zealand has an age of consent at 16, the Australian States have adopted 16 or 17 (with some defences for consensual peer activity). South Africa has an age of consent of 16, but their Law Commission has recommended that this should be increased to 18. In the United States the age of consent lies between 14 and 18.

**3.5.5** The submissions to the review were divided as to whether the age of consent needed to be retained, and if so at what age. There were strong arguments on both sides. It is clear that children now mature physically at a much earlier age, and are exposed to sexual images and pressure to engage in sexual activity by media and peer pressure when they are very young. However society has to protect children from inappropriate sexual activity at too early an age

<sup>41</sup> The offence of indecent assault, which permits no consent to what would otherwise be an indecent assault below the age of 16 establishes an age of consent for same sex female activity.

<sup>42</sup> The Sexual Offences (Amendment) Bill now before Parliament will equalise the age of consent at 16.

<sup>43</sup> The concept of an age of consent for girls arose in the narrow context of the drafting of the two ‘Statutes of Westminster’. These related to the ravishing of a woman ‘that none do ravish, nor take away by force, any maiden within age (neither by her own consent, nor without) nor any wife or maiden of full age, nor any woman against her will’. The age was set at twelve, which was when a girl could legally marry. A lower ‘age of discretion’ introduced in 1576, was ten, and in the statutes of 1828 carnal knowledge of a girl under ten was made a capital offence and under twelve a misdemeanour punishable with imprisonment at the discretion of the court. The age of consent for girls was raised to thirteen in the 1875 Offences Against the Person Act.

<sup>44</sup> Sexual Offences Act 1993.



when it has the potential to cause physical, emotional and psychological harm. The risks of early pregnancy are well documented and there is evidence linking early sexual activity with increased risk of development of sexually transmitted diseases and cervical cancer.<sup>45</sup> And despite earlier physical maturity a child's dependency on others is greater than at the beginning of this century: they cannot legally leave full-time education, enter full-time paid employment or marry until after their sixteenth birthday.

**3.5.6** We recognise that the law will not stop children from experimenting in sexual matters.<sup>46</sup> However, the overriding argument for retaining the age of consent is one of child protection, both from predatory adults, and from other children:

*"We do not think that an immature choice about whether to engage in sexual intercourse is a free one which can be truly regarded as consensual. When a slightly older partner in an under-age relationship exploits his or her age and experience to coerce or induce a younger partner into sexual relations we believe the criminal offence should remain even if rarely used".<sup>47</sup>*

**3.5.7** The age of consent has been intensely discussed in recent times, and in particular whether it should be different for different sexes. In line with our general principles of fairness, protection and justice, we see no strong argument or evidence for differentiating between boys and girls or types of sexual activity in setting an age of consent. Nor do we see any argument for reducing the age of consent – the variation in the rates at which children mature physically and emotionally varies greatly, making any age an arbitrary one. The present age of sixteen is well established, well understood and well supported. We think there is a real need to maintain an age of consent to ensure children are protected, and as a matter of public policy, the age of consent should remain at sixteen.

***Recommendation 17: As a matter of public policy, the age of legal consent should remain at sixteen.***

**3.5.8** Having agreed that 16 should remain the age of legal consent, we then considered the issues of consenting behaviour – which in order to reduce confusion we describe as mutual agreement. We recognised that whatever the law might say, children under 16 may agree to have sex, and that this consenting behaviour was bound to be addressed by the law. We considered whether there was a case for setting a lower age in law beneath which the law would recognise no consent whatsoever in order to provide an absolute protection for younger children. This would be similar to the Australian 'no defence' age below which a defendant could not claim any defence in law. The law provides offences such as rape where the lack of consent (which we define as free agreement) has to be proved, and others which make any sex illegal, even though it may be agreed between the partners, such as the prohibition on sex with a child under 16 because the law states that a child under sixteen cannot consent. The age where consent could not be recognised in law would have to be one below which it could safely be said that there was neither actual mutual agreement (because one or both parties were too young to possess the necessary knowledge,

<sup>45</sup> Risk Factors for Cervical Intraepithelial Neoplasia (Parazzini, Vecchia, Negri, Fedele, Franceschi and Gallotta) Journal: Cancer 1992; 69; pgs 2276-2282. Compared with women reporting no intercourse or their first intercourse after 22 years of age, woman with first intercourse before the age of 18 had an increased relative risk of developing cervical intraepithelial neoplasia (CIN) which was statistically significant. CIN is a recognised precursor of invasive cervical cancer.

<sup>46</sup> The Teenage Pregnancy Report suggested that the law had little influence on influencing young people's behaviour, with a graphic quote of "If some-one wants to have sex, they won't go – ah I can't because I'm breaking the law" – page 47.

<sup>47</sup> NSPCC, submission to the sex offences review, March 1999.

understanding and maturity to know what they were agreeing to) nor legal consent, where children should be protected from all sexual activity.

**3.5.9** There are two arguments to balance in considering whether the law should make special provision for younger children. There is an argument that if sex is prohibited under sixteen that is sufficient, providing the courts have the ability to deal with cases of varying seriousness. Subdividing into age bands could give the impression that abuse is really serious only when it involves very young children, whereas practitioners told us that teenagers could be adversely affected and damaged by under age sex. The alternative argument is that whilst teenagers have developing capacities to consent, and may actually agree to sex upon occasion, the situation of younger children was different. Very young children will not know or understand sufficiently to give free and informed agreement to sex. If they do seem to “agree”, this may be because of persuasion, inducement or ignorance of what it meant. Indeed for small children the imbalance of power with an adult or older child is so strong that they will do as they are told – which can then be interpreted (and presented in court) as “consent”. For these young children there should be no question of true consent – with the meaning of free agreement – being possible. There is neither the knowledge nor understanding of consequences which we suggest as the test for capacity to consent in Chapter 4. It would be possible to devise a test of capacity for younger children but this would lead to uncertainty in the operation of the law and the capacity of each child would need to be tested in court. Having special provision for younger children would remove arguments about capacity to consent and the test of the victim’s/complainant’s capacity in court. We thought that would provide improved protection, especially in recognising the particular needs of pre-pubertal victims.

**3.5.10** Having decided that there should be an age below which no consent was possible, we considered what that age should be. Our law has long recognised that girls under 13 should be protected by offences with particularly heavy penalties, which provided a starting point for consideration. The Australian Model Criminal Code Officers Committee has recently proposed that there should be no possibility of consent below the age of 10. This is the age of criminal responsibility in England and Wales, but we felt it was too low to offer proper protection. We wanted to protect children who were clearly pre-pubertal or entering puberty, but recognised that it was impossible to get a perfect match. The age of the onset of puberty is very variable, and as a result of better general health and nutrition, has reduced over the past century. Children mature at very different rates. After careful thought we decided that the *thirteenth birthday* provided a benchmark that is already established in law and recognised by society as the entry to teenage years. We adopted that as the age below which no consent should be recognised. We also thought that offences of adult sexual abuse of a child under 13 should be of strict liability, and attract no statutory defence such as mistake of age.

**3.5.11** In making this recommendation, we are not proposing statutory rape. The presumption of no consent below 13 applies to the “consensual “ offences of adult sexual abuse of a child, persistent sexual abuse of a child and sexual activity between minors. Rape and sexual assault by penetration are in essence offences where lack of consent has to be proved. We hope however that courts will find our arguments useful in considering the issues of consent in cases involving the rape of children.

***Recommendation 18: The law setting out specific offences against children should state that below the age of 13 a child cannot effectively consent to sexual activity.***

## **3.6 Adults having sex with children**

**3.6.1** One of the key issues to emerge from our consultation conference was the need for the law to establish beyond any doubt that adults should not have sex with children, and that this



warranted a serious offence to recognise the importance of the crime. The proposal was that there should be an offence of adult sexual abuse of a child, to replace the existing offences of unlawful sexual intercourse and indecency with children, and to offer an increased level of protection against sexual activity between adults and children. Those working with children thought that such an offence would focus attention on the activity of perpetrators, provide greater clarity in law and give a strong message to the public that sexual activity between adults and children is not acceptable. The review accepted the principle of such an offence, and thought that it would clearly define a set of behaviour that was unacceptable and enable the law to treat it with appropriate seriousness. It should also help in the risk assessment of offenders.

**3.6.2** To make such an offence both simple and effective, it would need to cover a range of behaviour committed by men and women with children. We first considered whether the offence should include all types of sexual activity by adults with children. We were particularly concerned that a single offence for all such behaviour, from the most serious to the least serious, would be too broad. It risked undermining the ability of the law to deal with the worst behaviour – i.e. rape. This argument was supported by submissions to the review, some of which felt that the offence of *usi* was sometimes being used inappropriately.<sup>48</sup> We concluded therefore that a single offence was not the best approach.

**3.6.3** Rape is the most serious sex offence and a reformed law would be fundamentally flawed if the rape of a child was not charged as such. The review concluded that rape, sexual assault by penetration and sexual assault, all of which deal with non-consensual behaviour, should be available for use as needed. There should be a separate offence to tackle behaviour that would not be an offence if committed between consenting adults but was wrong and inappropriate when children were involved. In general, therefore, consent was irrelevant – the culpability of the behaviour was because it was with a child.

**3.6.4** We propose that the offence of adult sexual abuse of a child would apply to a man or woman of 18 or older who was:

- involved in sexual penetration with a child under 16; or
- who undertook any sexual act towards or with a child under 16; or
- who incited, induced or compelled a child to carry out a sexual act, whether on the accused, another person or the child himself; or
- who made a child witness a sexual act (whether live or recorded)<sup>49</sup>.

The only person who is criminally liable for this offence is the adult. There is no criminal liability on the child, whether boy or girl, however much they may appear to have consented, aided or abetted the offence. This offence is essentially about the adult's responsibility towards the child.

**3.6.5** No similar offence exists in other countries. New Zealand and Australia do not have a 'catch-all' sexual abuse offence by adults. The South African Law Commission, in its recent discussion paper, has recommended an offence of child molestation: this is not confined specifically to adults, but includes any person intentionally committing a sexual act with a child or any person who commits any act with the intent to invite or persuade a child to allow any person to commit a sexual act with that child.

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<sup>48</sup> *"The offence of Unlawful Sexual Intercourse needs reviewing. We note that the maximum sentence where a victim is under 13 is life. However many practitioners comment on how a man can be convicted of U.S.I. on say an eight year old and not rape. It seems inconceivable that a child so young can not have been raped".* National Organisation for the Treatment of Abusers (NOTA), submission to the sex offences review, March 1999.

<sup>49</sup> This should not include recordings viewed by children as part of recognised sex education programmes, or of television or cinematic material with an appropriate age rating.

**Recommendation 19: There should be an offence of adult (over 18) sexual abuse of a child (under 16). The offence would cover all sexual behaviour that was wrong because it involved a child; it would complement other serious non-consensual offences such as rape, sexual assault by penetration and sexual assault.**

### *Time Limits*

**3.6.6** The current offence of unlawful sexual intercourse can only be prosecuted within twelve months of the offence being charged. The reason for the time limitation has been put forward as a protection against blackmail, and the CLRC recommended its retention. There have been some suggestions that the time limit should be relaxed, with a proviso that no prosecutions should be brought after a child's eighteenth birthday, which might protect the accused from '*fictitious allegations which are so old that his ability to disprove them is undermined*'.<sup>50</sup> This is a valid concern in the context of prosecuting long-past offences. However, we were keenly aware that many instances of child abuse may not come to light for many years until the survivor is able to report it. These cases do present severe problems to the police and prosecutors in investigating and preparing cases and to defendants in preparing a proper defence to allegations of long past events. We did not think the law should prevent later prosecutions being brought where there is a case to be made, or other charges being added in long and complex investigations. In principle we thought that time limits were not justified for any sexual offences. We therefore considered that a statutory time limit would not be justified for the offence of adult sexual abuse of a child.

**Recommendation 20: There should no time limit on prosecution for the new offence of adult sexual abuse of a child.**

### *Defences*

**3.6.7** We also considered whether and if so what statutory defences might apply. The two defences available for the offence of sex with a girl under the age of sixteen are known respectively as the 'young man's' and the marriage defences. Essentially the 'young man's' defence relates to a mistake of age which can be used in certain circumstances, e.g. the man must be between the ages of 16 and 24 and must not have been previously charged for a like offence. The review has already recommended at paragraph 3.4.7 that a child under 13 cannot consent to sexual activity in any circumstances, and that no statutory defence such as mistake of fact should apply. We thought that a child under 13 was not readily mistaken for one over 16, and that sex with a child between 13 and 16 was illegal. The present law does not allow such a defence. We saw no justification for introducing one.

**3.6.8** We then thought whether there should be any defences for sexual activity with those between 13 and 16. There is a genuine tension between the interests of fairness to defendants and the wider interests of child protection in deciding whether there should be a defence. Different jurisdictions have reached different conclusions. In most US states under-age sex is a strict liability offence, and in some states it is statutory rape. In Canada (where the age of consent is 14) a mistake of fact defence can only be used if the defendant took "all reasonable steps to ascertain the age". In Australia, most states have a form of mistake of age defence. The Model Criminal Code commented that some form of defence was necessary in the interests of justice. They recommended a mistake of fact defence as to the age of the child that was both honest and reasonable.

<sup>50</sup> Bar Lesbian & Gay Group: submission to the Sex Offences Review, March 1999.





**3.6.9** The Criminal Law Revision Committee (CLRC) considered the issue of the young man's defence in some depth:

*The "young man's defence" has been frequently criticised for its arbitrariness. Its origin lies in a political compromise. The Criminal Law Amendment Act 1885 provided a defence to a man charged under what is now section 6 of the Sexual Offences Act 1956 if he believed on reasonable grounds that the girl was aged 16 or over. The Bill that became the Criminal Law Amendment Act 1922 sought to remove this defence in an effort to tighten the law but was keenly opposed by some Members of Parliament. It appears that it would not have passed had the supporters and opponents not agreed on the "young man's defence" as a compromise.*

*The defence presents several unsatisfactory features. First, although in general mistake of fact is a defence to a serious criminal charge, this defence is not available to a defendant aged 24 or over, whereas mistakes may be no less likely to be made by older men. Nor is it available to a defendant under 24 who has previously been charged with unlawful sexual intercourse. Secondly, in any event, a defendant should not be precluded from raising the defence merely because of a previous charge if mistake of age was not then in issue or he was not convicted. Thirdly, a defendant who made a genuine mistake should in principle have a defence even if he had no reasonable grounds for his mistake.<sup>51</sup>*

**3.6.10** The CLRC went on to recommend a generally available defence of mistake of age for unlawful sexual intercourse with a girl, and that the belief need not be based on reasonable grounds. In our view this would not provide the protection of the law for children under 16.

**3.6.11** We agree that the current 'young man's' defence should be abolished. It is arbitrary, confusing and does not necessarily provide justice. In drawing up new statutory defences for a serious offence such as adult sexual abuse of a child, there is a tension between society's need to protect vulnerable children and to ensure the interests of justice and fairness to the defendant are met where there is a genuine mistake of fact. There is a real divergence of opinion between those who consider that it would be unjust and wrong for an honest mistake to result in conviction of a serious charge and those who thought that because it caused such difficulties in the prosecution of usi at the moment, there should be no such defence at all. We looked at the evidence of cautions and prosecutions of usi to see if there was any noticeable trend in the statistics, but it was not possible to identify any. (See the tables in paragraph 3.2.9.) It was difficult to assess from available statistics whether the defence had any real impact on men in the age group 16–24. Clearly however the defence is believed to have an effect on prosecutions; it was raised on a number of occasions in the work on the Teenage Pregnancy report as making the law ineffective.

**3.6.12** The interests of justice and fairness require an honest mistake to be recognised. An adult may meet with a child in a situation where they expect them to be over 16, for instance a pub or club. The child may appear older than they are and indeed may claim to be older. If that meeting leads to a sexual relationship, the adult may have sex with an under-age child with no intention to do so. On the other hand, it is all too easy to claim an honest mistake when no such mistake existed and there is evidence that some men specialise in the targeting of young girls. The present offence of usi is narrower and less serious than our proposed offence of adult sexual abuse of a child. That increases the argument for a defence of honest mistake. Our desire, and remit, to increase protection argued for no defence. Equally our desire and remit to be fair argued for a defence to be in place for an honest and reasonable mistake. Our conclusion was that a

<sup>51</sup> Fifteenth report of the Criminal Law Revision Committee: Sexual Offences (April 1984).

limited mistake of age defence should be available for adults charged with adult sexual abuse of a child. However, because it is relatively easy to claim and hard to disprove, any defence should be constructed as tightly as is consistent with fairness.

**3.6.13** This means placing some weight on the defendant to demonstrate that he took some sensible precautions. If a defendant wishes to show an honest mistake there should be reasonable grounds for any belief in age and the defendant should have taken all reasonable steps to ascertain the child's age. We consider this is necessary and proportionate.

***Recommendation 21: A mistake of fact in age should be available, but with the following restrictions: that it should be limited to honest and reasonable belief and that the defendant has taken all reasonable steps to ascertain age.***

**3.6.14** We also thought that there were strong arguments for limiting the use of the defence – a track already followed in the existing law of usi and in one other place. It does seem reasonable that if someone has once been mistaken about the age of a sexual partner he or she will take greater care in future. If the same mistake is made on several occasions the chances of it being honest are severely reduced. We know that sexual offenders can have repeated patterns of behaviour in their preferred targets; this kind of behaviour should not be shielded by the repeated use of an honest mistake defence. The present defence relates to previous charges; this predates the use of cautions, is arbitrarily dependent on charging practices. It seems simpler to only allow the defence to be run in court on one occasion only. If the defence was run on more than one occasion, the defendant could have evidence of previous use of the defence admitted as evidence. That may require the retention of appropriate court records, but has a precedent in the offence of handling stolen goods where it is possible to introduce some evidence of previous offences.

***Recommendation 22: The use of the defence of mistake of fact in age should be limited to raising the defence in court on one occasion only.***

**3.6.15** We also considered whether the defence ought to contain any age limitations. The present defence is limited to young men between 16 and 24 – apparently as the result of a political compromise in 1922. This is criticised both for being too restrictive and too arbitrary. In effect it could make sex between young people less likely to be successfully prosecuted, while not allowing the defence to older men who may be more likely to mistake age, or who may be an older predator who seeks out young girls. However, others argue that the 8 year age gap in 16 to 24 is too great; if it is intended to be easier on similar age activity. Barnardo's, amongst others, argue that the key point is the age differential and an age gap of over five years is a potential indicator of an abusive relationship rather than a peer relationship.

**3.6.16** In terms of justice and fairness there are no grounds for limiting the use of mistake of fact on the basis of the age of the defendant. However, there are other arguments this would reduce protection for children and on balance we believe age requires greater responsibilities to be exercised: on this basis a defence limited by age can be justified. At the same time, there does not seem to be a logical rationale for picking any particular cut-off age for use of the defence. One option was to use a 5 year age differential as suggested by Barnardo's, so that a person of 21 or over would not be able to claim a mistake of fact about the age of a sexual partner of 16. We thought we should consult more widely on this specific issue.

***Recommendation 23: In principle, the defence of mistake of fact in age should remain limited by age of defendant.***



- *Do you agree that there should be a limitation on the age of the defendant who can use a mistake of fact defence?*
- *If so should it be absolute (i.e. set at a particular age) or should there be an age differential (e.g. a maximum gap in age between the defendant and the child)?*
- *What should the age differential, if any, be?*

### ***The defence of marriage***

**3.6.17** The second defence is that of marriage. S6 Sexual Offences Act 1956 presently allows a defence to a charge of *usui* that where a man believes a girl under the age of sixteen is his wife, and if he has reasonable cause for this belief he has not committed an offence of unlawful sexual intercourse, even where that marriage might be invalid in UK law. Thus those who are married in other jurisdictions where the age of consent is lower would have a defence to a charge of *usui*. This defence raises some interesting questions. Even though our new offence is gender-neutral, the defence would only be available to heterosexual couples. That in itself would not prevent its retention, because of the special status of marriage in the European Convention of Human Rights.

**3.6.18** The defence may apply in only a very few cases, but these could be significant. Some countries have a low legal age of marriage, in places as low as 9 to reflect the earliest onset of puberty. Those who have undertaken a valid marriage with a child would believe that they are acting quite properly in having sex with their wife. In such circumstances there is no criminal intent. Our intention is to increase the protection for children from sexual abuse, and we were reluctant to agree to a continuation of a defence that would effectively legalise what we think could be serious child abuse.

**3.6.19** Marriage has a special status in international law, and the UK has obligations to recognise valid overseas marriages. It would be more attractive simply to say that people in this country must obey our laws, including not having sex with children under 16 whether or not they have married in another jurisdiction. We believed that those whose faiths or law allowed them to marry young children should accept that the democratic process must prevail when they are in this country. However, it would be difficult to claim to be recognising the validity of a foreign marriage if we criminalised sexual contact between the spouses. Differing ages of marriage within the EU, and even differing ages of consent within the UK would create potential difficulties. We were satisfied that there were some safeguards in place, including the operation of the Immigration Rules in scrutinising and controlling the entry of very young spouses, that would protect children. We therefore thought that we could not remove the defence of marriage.

**3.6.20** However, the offence we recommend is quite broad and covers a range of sexual behaviour with children. We thought that it was increasingly hard to justify a statutory defence of marriage. Even the South African Law Commission has recommended that the defence of marriage should not be retained (they argued that it was still possible for a very young girl to be forced to marry). The Australian Model Code has made specific provision that the defence should not apply below the age of 16 – and applies this prohibition to sexual intercourse between partners in Aboriginal tribal marriages which are traditionally contracted at an early age. In short, in order to succeed by way of the defence, the accused and the child must either have been married according to the law of Australia, or the accused must have reasonably so believed.

**3.6.21** The defence may reduce to two elements – whether there was a valid marriage and whether the accused believed he had a valid marriage. In terms of criminal culpability the belief is the more important. We do not think these situations arise often – we did not know of any instances that ended up in court. The CLRC thought the defence should be retained for the very unusual occasion when it might be justified. We very reluctantly conceded the difficulty in removing the defence in law, despite our concern that an overseas marriage (even one not valid in the country in which the ‘ceremony’ took place) meant that we should accept under-age sex

within the UK. However, our proposal to have an absolute age of no consent at 13 means that no defence would be available below that age. We also recognised that a defendant could put forward a defence of belief in marriage with an older child, but that would have to be robustly tested in court.

***Recommendation 24: Belief in marriage should remain a defence to offences involving sex with a child, but this should not apply where the child is below the age of 13.***

### 3.7 Persistent Sexual Abuse

**3.7.1** One of the many distressing aspects of the sexual abuse of children is that it may take place over a long period of time. This makes it difficult to prosecute because there have to be specific instances listed on the indictment, and difficult to defend because it relates to behaviour over a period of time. The usual practice is to put counts on an indictment relating to specific incidents over a period of time as a way of indicating that it was part of a larger pattern of abuse. It is important that the instances are specified in a way that the child can relate to (“at Christmas”, or “my birthday” for instance), and in a way that the defendant is able to consider and provide a proper defence. Both these are key elements for fairness and justice. However the other side of the picture is that by using such specific indictments the court does not deal adequately with the pattern of abuse, especially the nature of organised and/or multiple abuse, nor does sentencing necessarily reflect that course of conduct which the specific charges were brought in to illustrate.

**3.7.2** One approach which has been adopted in some other countries is to introduce an offence of persistent sexual abuse of a child which is particularly intended to address the problem of how the courts can fairly and justly tackle the course of conduct illustrated by specific examples. The kind of offence which has been constructed provides that where a person has, on three or more separate occasions, engaged in abuse of a particular child, that is a criminal offence (and this need not be the same offence each time), he or she will be liable to a very serious sentence (25 years has been proposed in Australia). Effectively the sentencing will pay regard to the fact that what has been proposed is a continuing course of conduct that has been illustrated by examples. Any such offence will need to contain safeguards to ensure that it is fair to both defendant and victim, and that justice is properly served, for example that the alleged incidents are sufficiently detailed and particular to enable a proper defence to be made, and that the defendant could not be separately tried for the same behaviour.

**3.7.3** We discussed this offence with practitioners in Victoria and they all welcomed it as a helpful addition to the powers of the courts. However, it has only been used on a couple of occasions since being introduced in 1991. Despite that, it was regarded as useful and important in providing a framework for establishing abuse and for providing a remedy that would not otherwise be available. Such an offence would not reduce the evidential burden in prosecuting what are always difficult offences, but it provides a particular remedy which goes directly to the nature of the problem and provides appropriate sanctions for very serious abuse.

***Recommendation 25: An offence of the persistent sexual abuse of a child reflecting a course of conduct should be introduced.***

**3.7.4** In discussing the use of this proposed new offence, we also considered wider concerns raised by those who have had to deal with people who regularly adopt patterns of serial sexual offending within institutions or families against multiple victims. They argued strongly for a special offence, or a widening of the offence of persistent sexual abuse, to cover a course of conduct with a number of victims. Their concern was that the law did not have an adequate response to patterns of repeated abuse involving a number of victims in similar settings. The



practice of our law has been to deal with offences against an individual as one offence or one set of offences on an indictment. One case could be made up of many indictments each of which dealt with one victim. In that way the jury were able to consider the evidence relating to each victim separately. If the jury were convinced beyond reasonable doubt by the testimony of some victims but not others, they could bring in separate verdicts so that the defendant would be found not guilty on some counts, but guilty on others. If different victims were all included in a broad offence, then in such circumstances the case could fail.

**3.7.5** Where indictments against different victims were severed (ie tried separately) the court would not necessarily hear the full range of offending behaviour, and individual elements may seem plausible – it was the whole picture that was overwhelming. We recognised that this was a problem, but thought that the answer probably lay in procedural or sentencing responses. We thought it important to raise the issue and to invite views and suggestions about how it might be tackled.

**3.7.6** We also considered whether there would be any justification for any other course of conduct offences that might apply not just to sexual abuse but to sexual exploitation and pimping. We thought that there was not really sufficient evidence to determine what value such an offence would have, what they would add to the use of the existing offences and how fair they would be on the defendant in seeking to answer not just specific charges, but an assumption about other behaviour. In persistent sexual abuse, the prosecution would have to prove that sex offences took place over a period of time to the normal standards of proof, but the court could take account of the pattern in sentencing. In pimping there may be a repeated pattern of behaviour with a single victim or multiple victims, adult or children, but the problems set out in 3.7.5 remain. We were not convinced that other offences were justified except in the particular circumstances of persistent child sexual abuse where there is powerful evidence of repeated and long-term patterns of behaviour.

- *We would welcome views on whether there should be any course of conduct offence in sex offences relating to the abuse or sexual exploitation of a number of different children (in contrast to recommendation 25 which relates to the abuse of one child over time).*

## **3.8 Health and Treatment Issues**

**3.8.1** The criminal law must not be a barrier to the provision of advice, guidance or treatment on health and relationships to young people. We regard this as a vital role that is important to their future health and well being, a view that is underpinned by the Government's strategy for tackling teenage pregnancy. Those involved in trying to give help, advice, treatment and support to young people in matters of sexual health, such as contraception, etc. should not normally be regarded as aiding and abetting a criminal offence. No one wishes to deter young people from seeking such help, or professionals from offering it.

**Recommendation 26: Those recognised as giving help, advice, treatment and support to children and young people in matters of sexual health should not be regarded as aiding and abetting a criminal offence, nor should the children and young people who seek help and advice about sexual health matters, including contraception.**

**3.8.2** Our intention is clear and we wondered whether it would be useful to make it explicit in any new legislation. We therefore invite views on that point:

- *Is it sufficient to make this intention clear in policy terms, or does this need to be set out in any new statute?*

### 3.9 Underage sexual activity between children

**3.9.1** We have considered very carefully how the law should treat sexual activity of all kinds committed by adults with children, and recommended a serious new offence. We then considered how the law should be framed to deal with sexual activity between children. Our adult offence applies to those *over* 18 and those *under* 16. We now need to propose how the law should apply to those *under* 18 with those *under* 16. Primarily we are talking about *mutually agreed activity* between children. (Rape and other serious offences can be used, as at present, to prosecute non-consensual sexual activity.)

**3.9.2** Although the age of consent for sexual behaviour is set in law, we recognise that children have sex with each other and will continue to do so. The review is seeking to increase protection to children, and to assist in the reduction of teenage pregnancies and other health risks associated with the early onset of sexual activity. The primary purpose of the law is to protect children from abusive (coerced and unwanted) sexual behaviour from older people and other children. We have recommended offences to tackle this behaviour.

**3.9.3** The role of the law in dealing with under-age sex is much more difficult. The Children Act requires the welfare of the child to be a paramount consideration, and we have sought to apply this. Yet we know that as well as teenage experimentation in sex, which may well be mutually agreed, children can and do coerce and abuse each other. Even so-called mutually agreed relationships can be called into question. Sexual relations between children are capable of being exploitative.

**3.9.4** Many people, including members of the review, have questioned the need for a criminal offence for sex between minors, arguing that there is no public interest in prosecuting sexual experimentation between mutually agreeing adolescents, giving them a criminal record for behaviour which they and many others do not regard as criminally culpable. They also argue that fear of being criminalised may deter young people from seeking help and advice, and possibly also raise questions about agencies offering it.<sup>52,53</sup> Where children are sexually active, it is important for them to feel confident enough to seek help and advice about sexual health matters, including contraception if appropriate. To ensure this, children must be very clear that by seeking such guidance, neither they nor their advisors would be breaking the law.

**3.9.5** We have to achieve a very difficult balance between ensuring that the law is appropriate, fair and effective in enabling a range of coercive activity to be dealt with, while not criminalising young people for mutually agreed behaviour. We recognised that the law also plays a significant social role in setting parameters for behaviour, and we want to discourage under-age sex.

**3.9.6** We looked very carefully at how the criminal law operated in this area. It is at present an offence for those under the age of consent to have sex. In fact very few boys under 16 are ever prosecuted for under-age sex (although it may be an additional charge on an indictment with a rape charge). The numbers of complaints and cautions have dropped. At present, a case will

<sup>52</sup> As part of the Government's teenage pregnancy strategy, the Department of Health is to issue revised guidance this summer on contraception for the under 16s, with the goal of ensuring better understanding of the legal framework amongst service providers and young people.

<sup>53</sup> The British Medical Association, in association with the General Medical Standards Council, the Health Education Authority, Brook Advisory Centres, the Family Planning Association and the Royal College of General Practitioners has issued extensive guidance on teenage sexual activity: 'Confidentiality and people under 16'. This includes information on Gillick competence (see also footnote 10) and the legal issues surrounding advice on contraceptive services. Doctors are asked to consider:

- whether the patient understands the potential risks and benefits of the treatment and the advice given;
- the value of parental support. Doctors must encourage the young people to inform parents of the consultation and explore the reasons if the patient is unwilling to do so.
- whether the patient is likely to have sexual intercourse without contraception, and to assess whether the patient's physical or mental health or both are likely to suffer if the patient does not receive contraceptive advice or supplies;
- whether the patient's best interests would require the provision of contraceptive advice or methods or both without parental consent.



only be instigated if a complaint has been made, there is sufficient evidence to proceed, and the prosecution is in the public interest. The final decision on prosecution rests with the Crown Prosecution Service (CPS), applying the principles set out in the Code for Crown Prosecutors. In addition prosecutors have more detailed guidance, set out in the prosecution manual, which is not at present in the public domain. The Director of Public Prosecutions, when giving evidence to the Home Affairs Committee said that he wishes to make the prosecution manual a public document. We would very much welcome this particularly in the difficult areas of social and legal policy such as those involved in dealing with under-age sex. Greater transparency and public knowledge of the criteria used by the CPS are an essential part of public knowledge and understanding in this area and we very much welcome the clarity and certainty this would add.

Number of boys between the ages of 10 – 16 cautioned, prosecuted at Magistrates' courts and convicted at all courts for <i>usi</i> with a girl <sup>54</sup>			
	1988	1993	1998
s5 SOA 1956 – <i>USI</i> with a girl <13	cautioned – 21 prosecuted – 6 convicted – 7	cautioned – 34 prosecuted – 5 convicted – 3	cautioned – 14 prosecuted – 5 convicted – 6
s6 SOA 1956 – <i>USI</i> with a girl <16	cautioned – 202 prosecuted – 7 convicted – 7	cautioned – 84 prosecuted – 4 convicted – 5	cautioned – 41 prosecuted – 2 convicted – 2

**3.9.7** There are potential difficulties in using the criminal law too readily. In order to deal with the problems of juvenile offending, a new system of reprimands and final warnings has been introduced to replace cautions for children under 18. These provide a coherent structure for tackling the problems of youth offending, and require action to be taken with the young person to address the offending behaviour. However, we thought that it was inherently undesirable for young people to end up in court because they had been involved in mutually agreed sex with their 15-year-old girlfriend or boyfriend. We were not convinced that was an appropriate social response. We also were concerned that those children who came to notice for their sexual activity may be those with little privacy and who may already be in care or known to police and social services. It would be unfair and add to social exclusion for the law to bear down disproportionately heavily on those children. We wanted to find a way forward that recognised the undesirability of early sexual activity whilst offering help rather than punishment and a criminal record to those involved in it.

**3.9.8** We did consider whether mutually agreed sex between contemporaries should be regarded as criminally culpable at all. Some members of the review thought that the criminal law should not be involved; it was not appropriate. Some other countries have adopted an approach that where the sexual activity is mutually agreed and there is a small age differential between the partners, there is no offence. The Australian Model Criminal Code Officers Committee report advocates a 'similarity of age' defence of two years that would remove criminal liability from those who engage in mutually agreed under-age sex with a child over ten and who are within two years of age of the child. The defence does not apply to incitement to commit such acts. This was controversial but the recommendation (which applies in some States) has been maintained. The South African Law Commission's recommendation of a new offence of child molestation also says that there should be no criminal culpability where the age gap was two years or less. However, there is genuine concern that this would undermine the age of consent, and that closeness

<sup>54</sup> Home Office Research, Development and Statistics Directorate. Where some of the figures for conviction exceed those for prosecution, this may reflect that other more serious charges (such as rape) had been laid but not proved, or where the prosecution had started in one year and the conviction had taken place in the following year.

in age did not necessarily mean that a relationship was genuinely mutual. We recognised that younger, less mature or secure children could be over persuaded or coerced into sex – and that this was a factor of their age and maturity – the very reasons we sought to protect them. If there was no law in place we could not deal effectively with these situations which may not be serious enough to justify the more serious charges of rape or sexual assault. Every country in the EU has a law in place to deal with under-age sex, particularly where there is a complaint or exploitation.

**3.9.9** Treatment of under-age sex, linked to the age of consent in the European Union is shown in the following table<sup>55</sup>:

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<sup>55</sup> ILGA Europe and the Teenage Pregnancy Report.





Country	Age of consent	Other ages limits	Comments
Austria	14	14/18 (male same sex)	It is illegal for a male over the age of 19 to commit homosexual acts with a male aged between 14 and 18
Belgium	16		
Denmark	15		This may be raised to 18 in certain circumstances; e.g. abuse of trust
Finland	16/18	18/21 (same sex)	Second age is for 'abuse of trust' offences
France	15		No consent between a minor (<18) and a person in a position of authority
Germany	16		This may be raised to 18 in certain circumstances; e.g. abuse of trust
Greece	15	17 (male same sex)	The higher age only applies for 'seducing' a male person if the partner is an adult
Ireland	17		
Italy	14		If one of the participants is an older family member or a guardian, the age of consent is raised to 16
Luxembourg	16		
Netherlands	16		If a person between the ages of 12 and 16 commits a sexual act with another person between those ages, they will not be prosecuted unless there is a complaint from the other participant, a parent or guardian. However, if a person over 16 commits a sexual act with a person under 16, they will be liable to prosecution regardless of whether a complaint has been made
Portugal	16		It is an offence for a person who has attained the age of 18 to commit sexual acts with a person under 16
Spain	12		Although this may be increased to 13. If a person between the ages of 12 and 16 has committed a sexual act with a person over 16, the older person may be liable to prosecution if the younger person's parents complained
Sweden	15		Raised to 18 in certain circumstances, e.g. abuse of trust

**3.9.10** We concluded that there had to be some criminal law in place to ensure the protection of children from each other as well as adults. The offences of rape, sexual assault by penetration and sexual assault are already in place to tackle serious non-consensual behaviour. We thought there should be a separate offence for those aged under 18 with those under 16 to mirror the more serious “adult sexual abuse of a child offence”. We set the upper age limit for the commission of this offence at 18. This provides a gap of two years between the age of consent at 16 and the age of majority at 18 before the more serious adult offence would apply.

**3.9.11** As a mirror to the adult offence, the offence of “sexual activity between children” would apply to behaviour that would not be culpable between consenting adults but was wrong for children to be involved in: sexual intercourse and penetration; sexual touching, inducing a child to commit sexual acts, performing sexual acts with or towards a child, and making a child witness sexual acts. It would replace the existing offences of unlawful sexual intercourse and indecency with children. It should be used where behaviour was not mutually agreed, but exploitative and coercive. The law would be clearer and more accessible to children. We hoped it would provide better protection by acting as a more effective deterrent to underage sexual activity.

**3.9.12** In seeking a way through these difficult issues we considered another possible approach. This was to create a separate, less serious, offence of ‘penetrative sex with mutual agreement’ for children aged between 13 and 16 to deal explicitly with mutually agreed sex. There were several problems with this approach. Such a ‘third tier’ offence for children would mean that our wider offence would be restricted to coercive or abusive behaviour which was not severe enough to justify a more serious charge. We thought about trying to define coercive circumstances, but found that this posed great difficulties, and if the offence relied on lack of consent the child victim would have to be cross-examined to determine the degree of coercion involved – raising all the evidential and procedural problems that occur in rape trials. If the offence existed it would certainly be used, and although some thought that this would go some way towards strengthening the age of consent, others thought that it might be used too readily and would unnecessarily criminalise young people. On balance we believed that our proposal for an offence which mirrored the adult offence of adult sexual abuse of a child was a better solution. We thought that rather than a separate offence we should concentrate on diversion and alternative disposals.

**3.9.13** We thought the defences applying to the adult offence should also apply to the juvenile offence – and that there should be a statutory defence of mistake of fact in age, with the same safeguards for the adult defence, where the younger child was aged between thirteen and sixteen. If the younger child was below the age of 13, there should be no mistake of fact in age. If one or both of the parties was under the age of 13, this should always be considered under child protection guidelines, even though it was mutually agreed activity. The offence should ideally be used where there was an element of coercion or abuse by a child on another child. It should also prove an alternative charge or verdict for rape/ sexual assault by penetration. Where there is evidence of serious abuse or coercion the offences of rape or sexual assault by penetration should be charged as appropriate.

***Recommendation 27: There should be an offence of sexual activity between minors to replace the existing offences of unlawful sexual intercourse, buggery, indecency with children and sexual activity prohibited for children. It should apply to children under the age 18 with those under the age of consent.***

**3.9.14** The review also considered the question of criminal responsibility for under-age sex. Where adults are involved in sexual activity with children, we have recommended that only the adult should be liable, with no liability on the child. For the offence of sexual activity between minors, if one of the partners is over the age of consent, (ie a 16 or 17 year old with a child under 16) he or she should be liable. Where two children under the age of 16 are involved in a mutually agreed sexual relationship, we propose that the law leave open the issue of who is liable



unless one partner is below the age of 13 (our age of absolute protection) in which case the older child is liable. There are strong arguments that in a mutually agreed relationship, both parties should be prepared to take responsibility for their actions. Leaving the liability open would enable the police and prosecutors to decide who is responsible on the facts of the case – if and when a prosecution is deemed necessary and in the public interest. There are risks to girls and boys in early sex – of pregnancy for girls and STIs for both sexes. Girls however may suffer more readily from loss of reputation, and if they do become pregnant, from a very public recognition of their activity. Some members of the group thought that because of these features, girls should never be liable. However, we thought that this was not appropriate in the context of mutually agreed peer activity. Whilst recognising girls could be coerced into sex, that should be assessed in each case. We were also aware that pressure to have sex came not only from partners but from peers and apparently from a wider society. The law provides some counterweight against that.

**3.9.15** Criminal justice action is not the best or most effective way to tackle the problem of mutually agreed under-age sex between peers. We did not think prosecution would be in the best interests of the children concerned, and it is important to apply the principles of the Children Act in ensuring that the welfare of the children is a primary consideration. The function of the criminal justice system is to protect against coercion, abuse and exploitation. If criminal justice action is required because there is evidence of coercion, a decision on who should be prosecuted should be made on the facts of the case in the context of clear and well-understood prosecution guidelines that would reflect such features as an imbalance of power, age or competence. To have no power to prosecute in any circumstances would effectively reduce the age of consent, or to apply inappropriate gender-based rules.

**3.9.16** However, the new arrangements to deal with young offenders introduced in the Crime and Disorder Act 1998 which will replace the system of police cautions do introduce a new element into the discussion. Reprimands and final warnings are being implemented throughout England and Wales on 1 June 2000 following successful pilot projects. If a young person comes to the attention of the police when they commit an offence, and they admit their guilt, on the first occasion the offender will be reprimanded. A second offence will result in a Final Warning. At the Final Warning stage, the new Youth Offender Teams will undertake diversionary work, such as voluntary attendance at a tailored rehabilitation scheme. Both reprimands and final warnings will be noted on the Police National Computer and for a sex offence they will also carry a requirement for the young person to register their name and address with the police as a sex offender<sup>56</sup>. Although the reprimand and final warning is an admission of guilt, the young person has no option about accepting a reprimand or final warning (unlike a caution). A third and subsequent breach will mean that the offender will have to appear in court. (More serious offences may short-circuit this process.) The third time they are apprehended for any criminal offence they appear in the juvenile courts. Reprimands and Final Warnings can be triggered by any criminal offence, including underage sexual activity. Depending on the gravity of the offence, a young offender can be 'fast-tracked' to court without the reprimand or final warning. A conviction for a sex offence against a child results in a requirement to register under the Sex Offenders Act 1997 and to Schedule One Offender status under the Children and Young Persons Act 1933.

**3.9.17** Special procedures have been developed for dealing with an exceptional category of children who are regarded as victims rather than offenders. These are children involved in prostitution, where the emphasis is on diversion from an inappropriate and dangerous lifestyle. We thought that this could provide a more flexible model for dealing with mutually agreed under-age sexual activity.

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<sup>56</sup> An offender in receipt of a caution, reprimand or final warning for a sex offence against a child will have to register under the Sex Offenders Act 1997; registration is not currently required for offenders under 20 who commit sex with a girl between 13 and 16, buggery with a boy under 18 and gross indecency with a boy under 18.

**3.9.18** If there is a complaint of under-age sexual activity against a child, but the evidence is that the activity complained of was mutually agreed, the children concerned should not automatically fall under the reprimands and final warning scheme. The police do have discretion not to issue a reprimand or final warning or charge, but we wanted to ensure that young people who were clearly not involved in abusive or exploitative sexual activity should have a non-criminal alternative. We considered whether it was appropriate to refer them to a multi-agency forum for help and diversion. One possibility we considered is that the new Youth Offending Teams, who have a remit both to tackle offending and those at risk of offending, could provide the right forum and blend of skills to help and assist these young people without the long-term consequences of a criminal record for a sex offence. This would treat mutually agreed under-age sex seriously, but not require the young people to enter the reprimand and final warning system automatically. It would fit closely with the new arrangements for youth offending and retain the possibility of using the criminal law where it was in the public interest. It would also sit closely with the guidance on young sex offenders in ‘Working Together’<sup>57</sup>, which advocates a multi-agency approach to protect children.

**3.9.19** However, many of those working in the field of child protection felt that referral of a child to any panel concerned with youth offending would provide a negative effect by tainting the whole process: children would automatically equate such panels with criminalisation, and would be reluctant to seek their help. It was thought, in particular, that children in care (who were more likely to come to notice of the police and whose lives were chronicled by social services so that their smallest misdemeanour was a matter of record) might be most likely to be caught up in these arrangements for other offending behaviour. Although children involved as willing partners in underage sexual activity are committing a criminal offence, it was agreed that it was not normally acceptable to put them through the mechanism of the criminal justice system. This reflects the present situation: prosecutions for under 16s are very rare. What was really needed was a process to run in parallel with investigation procedures, which could give individual assessment and possible referral to a range of services from sex education to other forms of intervention, ensuring that these reflected the aims of a national sexual health strategy. This process will require professional skills to provide an worthwhile intervention, and a network to link into multi-agency services.

***Recommendation 28: We recommend that further consideration should be given to appropriate, non-criminal, interventions for young people under 16 engaging in mutually-agreed under-age sex who are not now, and should not in future, normally be subject to prosecution.***

### **3.10 Disposals for children who abuse**

**3.10.1** We also recognised that in addition to young people who were experimenting with sex in a variety of ways, there are young people who abuse and exploit other children in a very serious manner. We felt that it was important to draw a distinction between sexual experimentation and sexual abuse. Some of this abuse is against very young children.

**3.10.2** The guidance in ‘Working Together’ sets out best practice and a change of emphasis in the treatment of young sex abusers. Formerly both child victims and perpetrators were brought into the child protection system, but this would now be unlikely unless the young abuser was also thought to be a victim at risk of significant harm. While we recognise that many young people who sexually abuse may have been abused themselves, and are in need of care and protection, that provides a context for their actions; it certainly does not condone or justify them.

<sup>57</sup> “Working Together to Safeguard Children”, Department of Health, December 1995.



Unless properly treated they will continue to be a risk to others, and they need to be held accountable for their actions.

**3.10.3** One of the definitions of a juvenile sex offender sets out the range of behaviour and the imbalance of power, manipulation or coercion that may be involved:

*“Young people (below the age of 18 years) who engage in any form of sexual activity with another individual, that they have power over by virtue of age, emotional maturity, gender, physical strength, intellect and where the victim in this relationship has suffered a sexual exploitation and betrayal of trust. Sexual activity includes sexual intercourse (oral, anal and vaginal), sexual touching, exposure of sexual organs, showing pornographic material, exhibitionism, voyeurism, obscene communication, frottage, fetishism and talking in a sexualised way. Any form of sexual activity with an animal, and where a young person sexually abuses an adult”.*<sup>58</sup>

There is some debate in society whether a child who indulges in inappropriate behaviour is experimenting or is abusing. Indeed much may depend on the particular circumstances and the age and understanding of the child or children concerned. Children are exposed to sexual imagery and acts throughout their lives, some much more than others. The importance of the criminal law is that it must provide a remedy that can be used to deal with those children who do abuse. This does not assume that all sexual exploration is abusive, but ensures that where it is, the law can be brought into play.

**3.10.4** Most professionals working with children recognise that they need early intervention and specialist treatment to help prevent them from continuing to abuse in adulthood:

*“An apparently isolated incident may well be part of a much more entrenched pattern known only to the young person who abuses. Some will spontaneously self correct, but we do not know which ones will and which ones will not. Prolonged work may be needed in some cases but assessment is needed in them all”.*<sup>59</sup>

*“The risk of sexual abusing is likely to be present unless the opportunity to further abuse is ended, the young person has acknowledged the abusive behaviour and accepted responsibility for it and there is an agreement by the young abuser and his/her family to work with the relevant agencies to address the problem”.*<sup>60</sup>

Further:

*“Intervention needs to be based on an accountability approach, recognising that sexual abuse is illegal ... Without intervention, such behaviour is more likely to escalate than diminish, and there will always be the risk of recurrence ... Adolescent sexual abusers are unlikely to engage in treatment unless there are significant negative consequences for them not doing so”.*<sup>61</sup>

<sup>58</sup> Calder, Hanks and Epps (1997).

<sup>59</sup> Martin Calder ‘Children and Juveniles who Sexually Abuse’, 1997.

<sup>60</sup> Working Together, para 6.35.

<sup>61</sup> Morrison and Print, 1995.

**3.10.5** A variety of suggestions have been made as to the best way to treat young abusers, including that they should be treated separately from adult sex abusers. It was also suggested that wherever possible they should be removed from the criminal justice system, and civil remedies, together with welfare support, should be used to tackle abusive behaviour. The principles of the punishment or treatment of young offenders is beyond our remit, but we did consider that whatever approach was adopted needed to reflect the basic principles of protecting the community and the individual and preventing re-offending.

**3.10.6** The evidence does seem to show that adolescent sex offenders are as varied as adult offenders. Some abuse much younger children, whilst others relate to their peers. There are some consistent findings that around a third of sex offences committed against children were committed by other children<sup>62</sup>. Although a large proportion of adults who abuse children state that their deviant interests began in adolescence, the vast majority of adolescent offenders do not re-offend as adults<sup>63</sup>. In this way they present a similar reaction to many young offenders of all types who do not continue their offending behaviour into adulthood. Intervention and treatment for young offenders is particularly important to ensure that as far as possible they do not continue to abuse as adults.

**3.10.7** The offences we have proposed will provide a remedy in law for young sex offenders. We did consider whether the offence of sexual activity between minors might be seen as insufficiently weighty for young abusers, but thought it was appropriate given the availability of the serious nonconsensual offences of rape, sexual assault by penetration or sexual assault. Those who engaged in less serious activity could be charged under our new offence. What is even more important is that these young offenders are given appropriate sentences and disposals to ensure that they do not continue to pose a risk to others, and they receive appropriate treatment. Baseline assessment of these children was important for the courts in sentencing them appropriately, and we thought it was essential that courts had available a detailed specialist assessment of the child, to inform the judges' decision on sentencing and disposal. This would need to take into account the perceived risk that the young offender presents, which should also include situational factors such as family perceptions; collusion; denial etc, and any kind of abuse suffered by the offender. The courts are already able to decide on the need for custody, and to make treatment orders in the community. We thought that the need for treatment should be given particularly careful consideration for young offenders.

***Recommendation 29: The criminal law needs to have measures in place which can be used to deal with children who sexually abuse other children. Sentencing decisions should reflect specialist assessment of risk and potential for longer term offending and include treatment options.***

## **3.11 Abuse of trust**

**3.11.1** Current Government proposals to protect children include the introduction of abuse of trust offences for adults who are in certain positions of trust or authority over a child. These have been introduced in the Sex Offences (Amendment) Bill. Abuse of trust provisions relate in the main to relationships where the child or young person is either in an institution of some sort, or where the adult is in a particular position of influence, such as a teacher. We fully support the introduction of this new offence.

**3.11.2** In discussions in Parliament, there were calls to extend the scope of this offence to a wider range of adults, particularly to others in a position of trust or authority or within the family. We discuss these issues in greater detail in Chapter 5.

<sup>62</sup> Sex Offending against children: Understanding the risk, Don Grubin, Home Office, 1999.

<sup>63</sup> Weinrott, 1997.



# Chapter Four

## Vulnerable People

### 4.1 Introduction

4.1.1 One of the most striking aspects of this review was the evidence given to us of the extent and nature of the sexual abuse of vulnerable people. The law seems to offer only limited remedy against this. Our terms of reference ask us to increase the protection the law gives to vulnerable people, and we regard this as a vitally important part of our task.

4.1.2 The term ‘vulnerable people’ is broad and hard to define precisely, but our primary concern is for those who are vulnerable to sexual abuse and exploitation. Mentally impaired people are a particularly vulnerable group – they are obedient and suggestible, and once adult they may well have sexual feelings and not be able to resist inappropriate behaviour. Children are also vulnerable for similar reasons because of their immaturity of judgement, lack of authority in relation to adults and physical vulnerability. We have discussed how they should be protected in Chapter 3. However, although *this* chapter concentrates on vulnerable adults, it is important to recognise that our discussions also relate to vulnerable children, especially those over the legal age of consent yet below the age of majority. People with mental disorder, whether permanent or temporary, and some physically frail people, may also be vulnerable to sexual exploitation. It is also possible for normally competent adults to become vulnerable people in certain circumstances. This chapter discusses all these issues.

4.1.3 We considered that vulnerable adults shared the universal right to a private life which is specifically protected by the ECHR, and that private life can include a sexual life. On the other hand, those who are vulnerable to exploitation have to be protected by the law:

*‘The law must balance between two competing interests – protecting people with impaired mental functioning from sexual exploitation, and giving maximum recognition to their sexual rights. The difficulty for the legal system in striking a balance between these interests is compounded by the considerable diversity of people with mental impairment in terms of extent of impairment, living circumstances, and sexual interest and knowledge.’<sup>64</sup>*

4.1.4 It is important to emphasise that, in addition to the specific proposals discussed in this chapter, when vulnerable people do not consent to sex, charges of rape and sexual assault by penetration can and should be used where possible. However, these offences rely on proof of lack of consent, and this can be particularly difficult for vulnerable people. Some may not have sufficient ability, knowledge and understanding to be able to consent to sex, and this chapter discusses how the law could define capacity to consent for very vulnerable people. There is no statutory definition and the meaning and effect of the common law is still the subject of legal debate<sup>65</sup>.

<sup>64</sup> Law Reform Commission of Victoria (1988) Report No. 15 Sexual Offences against People with Impaired Mental Functioning.

<sup>65</sup> R v Jenkins, 2000 (unreported).



**4.1.5** Over the past 20 years there have been very significant changes in the way vulnerable people live. It is now far less likely for vulnerable adults to be found in institutionalised care unless they are very severely disabled or very ill. Care in the community has brought many people out of institutions and provided alternatives of living in sheltered or supported houses in the community or with families. It is estimated that there are 200,000 people with a severe or profound learning disability in England and Wales.<sup>66</sup> There would be many more with medium to mild learning disabilities and also those with dementia or other illnesses. It would be unfair and unjust to make consensual sexual activity illegal for all these people and any such absolute prohibition would place a very difficult burden on those who care for them.

**4.1.6** We were given disturbing evidence of the extent of calculated sexual predation on these vulnerable members of our community, and to the risks their more open lives entail. The risks which living in the community poses are different: for example, vulnerable people are now more likely to come into contact with a wider range of people. However, it should not be thought that the risk of abuse only began with the move to community care. There was a great deal of abuse in the old closed institutions. At least now there is more chance of abuse coming to light because people are not dependent on the same small group for everything. This chapter considers how best to improve protection for all vulnerable people, whether living within the community or in institutional care.

## **4.2 Problems in the present law**

**4.2.1** At first glance, the law seems to offer protection.

- The Sexual Offences Act 1956 forbids intercourse with a ‘defective’<sup>67</sup> woman and procurement of a ‘defective’ woman, knowing that she is ‘defective’ (ss 6 and 7). It also makes specific provision for indecent assault on female and male ‘defectives’ (sections 14(3) and 15(3)); abduction of a ‘defective’ woman from parent or guardian (s 21); permitting a ‘defective’ woman to use premises for intercourse and causing or encouraging prostitution of a ‘defective’ woman (sections 27 and 29).
- The Sexual Offences Act 1967 does not permit mentally defective men to consent to homosexual acts (s1(3)).
- The Mental Health Act (MHA) 1959 (as amended by the Sexual Offences Act 1967) prohibits male staff employed in mental hospitals and homes or those providing care for mental patients from having intercourse with male or female patients.

Most of these offences are little used, carry low penalties (2 years in the main) and are not perceived as providing effective protection.

**4.2.2** All these offences (apart from the MHA 1959) relate to victims with a severe mental impairment. The definition of ‘defective’ is taken from the Mental Health Acts as a person suffering from a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning. Anyone who met this definition would be severely disabled. A key point is, however, that in order for these offences to apply, it has to be proved that the victim is indeed ‘defective’ – a demeaning and derogatory term. This may be done by expert evidence but it may also involve the victim coming to court and being questioned in order to test

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<sup>66</sup> Source – MENCAP.

<sup>67</sup> A ‘defective’ is defined in section 45 of the Sexual Offences Act 1956 as a person suffering from a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning within the meaning of the Mental Health Act 1959.



his or her abilities – effectively putting that person on trial. Additionally, by being confined to those with a severe mental impairment, these offences do not protect other vulnerable people who have some degree of ability or capacity to consent to sexual relationships. We were told that those people can be easily induced or persuaded into a sexual relationship and are targeted by others for their own sexual gratification.

**4.2.3** Several contributors felt that the law denied those with mental impairment the right to consensual sexual relationships. In part this seemed to be because medical and care staff could not be certain when such activity transgressed the law, and this is a major criticism of the present situation. Such protection has to be balanced against the right, set out in the ECHR, for individuals to have a private life. The existing offences are often gender-specific and hence create a patchwork of protection. The law should seek to protect all those who are vulnerable, regardless of gender, or the severity of their disability.

**4.2.4** The lack of a clear definition in law of capacity to consent to sex makes it particularly hard to prosecute the most serious sex offences such as rape (which rely on proving lack of consent) when the victim is severely impaired and where there is no definition of capacity to consent. The purpose of the law, to protect the most vulnerable, can be lost in consideration of whether or not *actively expressing sexuality* was actually consent. In one recent case, it was held that there was no reason in law why a severely impaired woman should not consent to sex.<sup>68</sup> That is why those offences intended to protect severely mentally impaired people do not require consent to be proved.

**4.2.5** It is difficult to find any statistics on the extent and nature of sexual abuse of vulnerable people. We cannot identify whether any of the convictions for rape and indecent assault represent offences against vulnerable people. There were 6 prosecutions and 1 conviction for the specific offences of sex with a ‘defective’ in 1998. These statistics do not reveal the genuine extent of the problem. Abuse against vulnerable people may not come to light, and if it does is unlikely to be reported to the police. There are considerable difficulties in both investigation and prosecution, and because of evidential difficulties cases may not proceed to court. Research has estimated that the incidence of sexual abuse of people with disabilities may be as much as four times higher than within the non-disabled population<sup>69</sup>. A high proportion of those in the research were women and girls, most of whom knew the person who abused them.<sup>70</sup> Whatever the scope of abuse, it is clear it is extensive, and that the law does not provide a good remedy at present.

### 4.3 Views expressed during public consultation

**4.3.1** We received many submissions about the need to reform the law in this area:

*‘The law needs to explicitly recognise the barriers to consent which exist for many people with intellectual impairments e.g. they may be easily influenced, easily tricked, easily bribed (sometimes by such small items that their worth as serious bribes is not taken seriously by courts), ... easily intimidated including by threats which other adults would shrug off (“I’ll tell your parents, if you don’t do as I say”). Alleged perpetrators should therefore be able to demonstrate that they did not exploit the learning disabled person.’<sup>71</sup>*

<sup>68</sup> R v Jenkins, January 2000 (unreported)

<sup>69</sup> Muccigrosso, 1991, cited in NSW Department for Women “Reclaiming our Rights”

<sup>70</sup> Sobsey and Doe, 1991, cited as above, suggest 81% of victims were female, and 99% knew the abuser.

<sup>71</sup> The Tizard Centre, submission to the Sex Offences Review, March 1999.



Many of those who wrote in thought the current law used offensive terminology and focused too narrowly on severe disability. The majority of vulnerable people have mild to moderate disabilities, but also need some form of protection (and this could include elderly persons receiving care). However, some people are so profoundly disabled that they could never give informed consent, and it would be dangerous to withdraw the protection offered in the law from them.

**4.3.2** There was a great deal of concern about the largely unregulated nature of the care industry, and calls to ensure that those who were not suitable to work with vulnerable adults were prevented from doing so. It was suggested that there should be legislation for preventing unsuitable people from working with vulnerable adults. This was outside our remit, but is being considered as part of the Care (Standards) Bill now before Parliament.

**4.3.3** There was also concern that some people used a caring or counselling role, even in a regulated or semi-regulated background (such as psychologists, psychotherapists, etc.) to manipulate patients/clients into inappropriate sexual activity. Such activity was described to us as an offence against 'natural justice':

*'All health professionals are forbidden by their code from having sex with patients. The seriousness of this issue is reflected by the fact that in some States in the US such behaviour is illegal and defined as statutory rape.'*<sup>72</sup>

**4.3.4** Contributors expressed concern about the prohibition on sexual relationships, and the lack of clarity in law about how to deal with people having some capacity to consent:

*'The present law aims to achieve protection through restriction or prohibition of sexual activity involving people by category .... This had created serious difficulties for services for people with learning disabilities wishing to promote the appropriate sexual development of their client. There are also anomalies in the way that men and women are treated under the law. A modern law on the sexuality of people with learning disabilities should take account of their capacity to consent to particular activities.'*<sup>73</sup>

**4.3.5** Yet if that prohibition were to be lifted, there was also the question of when sexual activity was appropriate, and some responses to the review expressed the opinion that a relationship between a fully capacitated person and a vulnerable adult should always be regarded as abusive. There was, of course, a diametrically opposed view to this:

*'... the current law, as a by-product, puts anyone in a sexual relationship with a person with learning difficulties at a technical risk of having caused an offence. It also makes assumptions about the morality of all such relationships. For instance, could there be a sexual relationship between a man with learning difficulties and a woman without, which was not abusive? What about a sexual relationship between a woman with learning disabilities and a man without? There are built-in assumptions in the different reactions we might have to those two statements. I would suggest that it is not the job of the law to make such assumptions.'*<sup>74</sup>

<sup>72</sup> Frances Blunden, Director of the Prevention of Professional Abuse Network (POPAN), commenting to the press on 4 June 1999 after a case involving a former professor of clinical psychology at Liverpool University. Forwarded by MIND in a submission to the Sex Offences Review, June 1999.

<sup>73</sup> The Royal College of Psychiatrists, submission to the Sex Offences Review, March 1999.

<sup>74</sup> Chartered Psychologist, submission to the Sex Offences Review, March 1999.

There were some interesting and helpful suggestions about when a sexual relationship between an adult with no mental impairment and a vulnerable adult might be abusive (and therefore criminally culpable). This drew a distinction between those who were in a position of trust or responsibility to the vulnerable person, and those who were not.

4.3.6 Proposals were also made about how capacity to consent could be defined. Respondents recognised that this was very difficult:

*‘Assessment of capacity plays a pivotal role in determining when decisions need to be made on behalf of someone. It therefore has major clinical implications for health care professionals and civil liberties implications for the person concerned. In many countries, there is a presumption that adults have the capacity to make health care decisions. However, in persons with a mental disability, capacity may be temporarily or permanently impaired.’<sup>75</sup>*

Learning deficit has to be considered in tandem with difficulties in social functioning. Often vulnerable people have no knowledge about what is appropriate behaviour.

4.3.7 The review held a valuable conference with many of those most concerned with these issues. Some of the alternatives put forward at that conference included a suggestion that there should be a change in the burden of an offence from proving the level of incapacity to proving the exploitative behaviour. Another concept put forward was that those who were dependent on others for some reason, including being financially dependent, should also be regarded as being in a vulnerable position. However, the review believed that this would extend the parameters of any offence too broadly and would include individuals who were fully capable of making a mature and informed decision about having a sexual relationship. They might be rather indignant to hear themselves described as vulnerable in this context.

4.3.8 Several contributors emphasised the practical difficulties of prosecuting serious sexual offences:

*‘People with severe learning disability tend to be vulnerable. That vulnerability has a number of elements. They are less able to understand communication directed towards them, less able to communicate adequately in response or in initiating communication, and less able to establish credibility as witnesses because of their communication difficulties. In terms of sexual offences, and to over-simplify, those who can’t communicate can’t tell, and those who can’t communicate well won’t be believed. The superficial impression might be that current sexual offences legislation is highly/over protective of some people with learning disabilities. The reality is that what would be rape in other cases gets downgraded to assault because the difficulty in being clear about consent reduces the potential charge to non-consensual assault rather than rape.’<sup>76</sup>*

4.3.9 The Law Commission had ongoing work on consent in the criminal law, and also on mental incapacity in the civil law. They worked closely with us in our conference on capacity to consent, and we were grateful for their policy paper “*Consent in Sex Offences*”<sup>77</sup>. Their proposals are discussed below.

<sup>75</sup> Draft report on capacity to make health care decisions, Department of Psychiatry (Section of Developmental Psychiatry) University of Cambridge, and Department of Academic Legal Studies, Nottingham Trent University – submission to the Sex Offences Review, March 1999.

<sup>76</sup> Mencap, submission to the Sex Offences Review, March 1999.

<sup>77</sup> Law Commission, *Consent in Sex Offences*, February 2000, published in Volume 2 Appendix C.



## 4.4 The law and proposals for reform in other countries

### *Australia*

4.4.1 New South Wales prohibits sexual intercourse where a person is in a position of authority in connection with a facility or programme providing services to persons who have intellectual disabilities and prohibits any sexual intercourse between any person and a person with an intellectual disability if perpetrated with the 'intention of taking advantage of the other person's vulnerability to sexual exploitation'. In the Northern Territory there is a defence if the accused was, at the time of the alleged crime, the husband or wife of, or a de facto spouse of, the mentally ill or disabled person or did not know that the person was a mentally ill or disabled person.

4.4.2 Queensland prohibits all unlawful sexual or indecent acts with a person with impaired mental functioning, but it is a defence if the accused did not know of the mental impairment or if the act was not 'sexual exploitation'. South Australia prohibits sex where the accused knows that the complainant, by reason of an intellectual disability, is unable to understand the nature or consequences of the act. Victoria prohibits sexual or indecent acts between carers and persons with impaired mental functioning; a reasonable belief in marriage is a defence.

4.4.3 At the federal level, the Model Criminal Code Officers Committee suggested that the general offences of rape or its equivalent and indecent assault should apply to victims with impaired mental functioning where appropriate. Although one of the aims of having law relating to sexual offences might be to provide freedom of choice in sexual matters, that law may not meet the needs of adults who are incapable of making a proper choice due to their particular circumstances. However, the Committee did not support a total prohibition on sexual activity as that would not allow for the sexual rights of vulnerable people.

4.4.4 The Committee was particularly concerned with the high level of vulnerability to sexual exploitation. They felt that there were powerful arguments for prohibiting sexual activity between people in a position of authority and those in their care. They thought that victims would be unable to refuse such a relationship which was not only a breach of trust but could cause real psychological harm. They recommended a series of offences to prohibit sexual acts (penetration, touching or sexual acts directed at) on a vulnerable person by a carer. In their definitions:

- (1) *mental impairment includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.*
- (2) *a person is responsible for the care of a person with a mental impairment if the person provides medical, nursing, therapeutic or educative services to the person in connection with his or her mental impairment.*

Their definition of a carer is quite broad and not restricted to those who fulfil such roles for mentally impaired persons in a professional capacity.

4.4.5 The Model Code Committee also recommended that consent should not be a defence unless:

- a) *the person with the mental impairment consented to the act; and*
- b) *the giving of that consent was not unduly influenced by the fact that the person was responsible for the care of the person with the mental impairment.*

The prosecution would have to prove the lack of consent and the undue influence, which may place a heavy burden on the victim as witness. In their discussion on consent in this context the Committee returned to the general definition of consent, and in particular, that consent is not present when:

*the person is incapable of understanding the essential nature of the act.*

In effect consent would not necessarily be lacking 'if the person has sufficient knowledge or ability to comprehend the physical nature of the sexual act, and to understand the difference between that act and an act of another character, such as bathing of the body or a medical examination.'<sup>78</sup> Some thought this test was too narrow, and that there should also be further knowledge (such as pregnancy, etc.) and an understanding of the social significance of sexual intercourse.

4.4.6 They also suggest a defence of marriage, where at the time of the act:

a) *the person was married to, or reasonably believed he or she was married to, the person with the mental impairment; or*

b) *the person was the de facto partner of the person with the mental impairment.*

### **Republic of Ireland**

4.4.7 The approach in Ireland has been to apply protection very tightly. The Criminal Law (Sexual Offences) Act 1993 makes it illegal to have sex with a mentally impaired person, who is defined as:

*'suffering from a disorder of the mind, whether through mental handicap or mental illness, which is of such a nature or degree as to render a person incapable of living an independent life or of guarding against serious exploitation.'*

Soliciting or importuning in order that such illegal sexual intercourse should take place is also an offence.

4.4.8 The definition of mental impairment includes persons with a permanent mental disorder and those with mental illness, which may be temporary. The Law Reform Commission recommended that it should be an offence to engage in other exploitative sexual activity with the mentally impaired, and would broaden protection from ways to prevent mentally impaired women from becoming pregnant to means of preserving their dignity and protecting them from abuse.

4.4.9 The Irish Law Reform Commission has also suggested<sup>79</sup> that a mentally impaired person should not be charged with an offence against another mentally impaired person, unless the act in question constituted a criminal offence in another provision of the law. It was thought that this would avoid inappropriate prosecutions. The argument against was that a matter of such sensitivity should be left to the discretion of the Director of Public Prosecutions.

### **New Zealand**

4.4.10 New Zealand prohibits 'sexual intercourse with a severely subnormal woman or girl' if the perpetrator knows or has good reason to know that she is severely subnormal (section 138 of the Crimes Act 1961). For this purpose the definition of 'severely subnormal' is 'if she is mentally subnormal, within the meaning of the Mental Health Act 1969, to the extent that she is incapable of living an independent life or of guarding herself against serious exploitation or common physical dangers.'<sup>80</sup> There is no defence of consent.

<sup>78</sup> R v Morgan (1970) VR 337; R v Beserick (1993) 30 NSWLR 510.

<sup>79</sup> The Law on Sexual Offences: A Discussion Paper, Department of Justice, Equality and Law Reform, May 1998.

<sup>80</sup> Section 138 (2) Crimes Act 1961 (New Zealand)



### ***Republic of South Africa***

4.4.11 The South African Law Commission review of sex offences has considered how the law should protect victims with impaired mental functioning. They were concerned about their particular vulnerability due to the fact that they often do not understand what has happened to them, are unable to communicate their experiences and do not have access to persons outside their home or residential facility where the abuse takes place. At present South Africa prohibits any sexual relations with persons who suffer from a certain degree of mental disability (currently described as 'idiots and imbeciles' in the South African Sexual Offences Act 1957).

4.4.12 The Commission discussed how to protect mentally impaired people from sexual exploitation. They recognise that a mentally impaired person should be able to make decisions about a sex life on a par with his or her ability to conduct the rest of their private life. The law should not overregulate and recognise that mentally impaired persons have sexual rights to make decisions concerning reproduction and to security and control over their bodies. They were agreed that the continued use of the terms 'idiot' and 'imbecile' was derogatory and should be replaced by 'mentally impaired', which would they thought be simpler and more effective in court.

4.4.13 The Commission proposes a new offence covering exploitative relationships with mentally impaired persons and situations where the mental impairment of the complainant excludes free and informed consent to acts of sexual penetration. They apply similar reasoning to the Australian Model Criminal Code Committee; namely that the person may not want a sexual relationship, but may find it difficult to refuse, or the potential for psychological harm which may result from such a relationship as well as the breach of trust by a care giver.

4.4.14 The basic principles they adopted were:

- a) *For a person to consent he or she must have sufficient mental capacity to understand what they are consenting to;*
- b) *It must not be an exploitative sexual relationship; and*
- c) *To prove the offence the offender must know that the complainant was mentally impaired, and must intend to commit a sexual act with that person.*

The Commission has proposed the following offence<sup>81</sup>:

#### *'Sexual offences with mentally impaired persons*

- (1) *Any person who intentionally commits a sexual act with, or in the presence of, a mentally impaired person shall be guilty of an offence.*
- (2) *Any person who commits any act with the intent to invite or persuade a mentally disabled person to allow any person to commit a sexual offence with that mentally disabled person shall be guilty of an offence.'*

#### *'Definition of 'mentally impaired person'*

*'Mentally impaired person' means a person affected by any mental disability irrespective of its cause, whether temporary or permanent, to the extent that he or she is unable to appreciate the nature of the sexual act, or is unable to resist the commission of such an act, or is unable to communicate his or her unwillingness to participate in such an act.'*

<sup>81</sup> South African Law Commission Project 107, Sexual Offences: Discussion Paper 85 – Sexual Offences: The Substantive Law. ISBN: 0-621-29374-1. August 1999.

### United States

**4.4.15** A number of States have introduced ‘sexual exploitation’ laws which strictly prohibit professionals in the mental health community, or anyone who purports to provide mental health services, licensed or unlicensed, from sexually exploiting their clients to meet concerns about abuse by therapists in the mental health community. In some cases this extends to former clients.

*‘Concerning the question of the client’s ‘consent’ in the sexual relationship, the imbalance of power and the potential for abusing a client’s vulnerability is so strong in these cases, that civil statutes explicitly prohibit the fact that the client may have ‘consented’ from being considered in the case.’<sup>82</sup>*

In some States, penal codes classify this form of abuse as a second-degree felony, defining it as a form of sexual assault.

### The Netherlands

**4.4.16** The Netherlands has introduced legislation relating to sexual abuse by therapists. Article 249 of Title XIV (Serious offences against public morals) of the Dutch Penal Code is a wide-ranging provision initially for indecency with minors, but which includes:

*249 (2) a director, physician, teacher, public servant, supervisor or employee, in a prison, State workhouse, State institution for the care and protection of children, an orphanage, or a charitable institution, who commits indecencies with a person admitted to such an institution.*

*(3) a person employed in the healthcare or social care sector, who commits indecencies with a person who, as a patient or client, has entrusted himself to his care or assistance.<sup>83</sup>*

### Germany

**4.4.17** Germany too has relevant legislation in the Criminal Code under sexual misconduct. Exploitation of a counselling, treatment or care relationship is set out as:

*174c (1) Any person who has sexual contact with a person who has been entrusted into his/her care because of a mental or psychiatric problem, or a handicap including addiction, or who is in a situation of counselling, treatment of another, or who forces such a person to carry out a sexual act, will be punished by imprisonment of 5 years or by a fine.*

*(2) This will also apply to any person who has sexual contact with a person for whom he/she is providing psychotherapeutic services, or who forces such a person to carry out a sexual act.*

*(3) An attempt is also an offence.<sup>84</sup>*

<sup>82</sup> Sexual Exploitation of Clients by Professionals: Advocate.Web.

<sup>83</sup> The Dutch Penal Code, as translated by Louise Rayar (Maastricht University) and Stafford Wadsworth (Wadsworth & Wadsworth Associates, Eijsden).

<sup>84</sup> §174c Sexueller Missbrauch unter Ausnutzung eines Beratungs-, Behandlungs- oder Betreuungsverhältnisses.



## 4.5 Capacity to consent

**4.5.1** Capacity to consent, or the ability to exercise free choice, is a crucial element in sexual relationships, and pivotal in deciding whether a relationship is appropriate for a vulnerable person. It was clear to us that the lack of clarity in determining capacity to consent was an important issue in the law. We felt that providing a definition that would work in the context of the criminal law (where the needs may be different to those in the civil law or indeed in determining whether people were competent to make decisions about treatment) would be a significant advance. However, we also recognised that defining capacity with certainty and clarity was a complex task, and we were grateful for the help we received from many contributors, including the Law Commission. A workable definition may also help those responsible for providing residential care in deciding whether to allow sexual activity between those with mental impairment – and how to identify when such relationships were abusive. We realised that on its own such a definition would not provide the increased protection we wanted to achieve. Accordingly other proposals are discussed below.

**4.5.2** In looking at capacity to consent we first wanted to define the public policy parameters that should apply in these areas. There are a range of possibilities, each of which has different implications for the balance between protection and the right to a private life. A definition that applied to only the most severely disabled would allow those people who had some capacity to have a sex life to do so without infringing the law, but would not provide a specific offence to protect them. A definition that would encompass more mildly disabled people would prohibit all consensual sexual activity with them as well as very disabled people, so ensuring protection but restricting their private life. There is a very real tension between the right to a private life and the need to protect people who are susceptible and easily taken advantage of. We concluded that any test of capacity should apply to the most severely disabled, rather as the definition of ‘defective’ in the present law does. We thought that there were other and more effective ways for the law to provide increased protection for less severely disabled people. We also thought that any definition of capacity should apply to all sexual activity, and not just to sexual intercourse. We hoped that increased clarity in and understanding of the definition of consent would enable the criminal justice system to deliver protection under the law more consistently than it does at present.

**4.5.3** The review was unanimously agreed that some people had levels of mental (and sometimes physical) disability so severe that they could not be regarded as being able to give consent in any circumstances. Examples may be those with severe brain damage, severe learning disabilities or severe dementia. Such people would not be able understand what was being asked of them or to communicate consent, or the lack of it, in any way. An absolute prohibition on sexual relations with such individuals was fully justifiable as essential for their protection.

**4.5.4** In its report ‘*Making Decisions*’, the Lord Chancellor’s Department considered how the civil law should deal with incapacitated people and how far they should be able to make decisions for themselves in the ordinary events of life – about finance for instance. Following the consultation exercise on the earlier paper ‘*Who Decides?*’ the Government accepted the definitions proposed by the Law Commission (in the context of making decisions on treatment, financial issues, etc.) to ascertain whether a person lacks capacity. These are:

- *A person is without capacity if, at the time that a decision needs to be taken, he or she is ‘unable by reason of mental disability to make a decision on the matter in question; or unable to communicate a decision on that matter because he or she is unconscious or for any other reason’.*
- *Mental disability is ‘any disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning’.*



- *A person is to be regarded as unable to make a decision by reason of mental disability if the disability is such that, at the time when the decision needs to be made, the person is ‘unable to understand or retain the information relevant to the decision, or unable to make a decision based on that information.’*

4.5.5 These definitions were constructed in the context of the civil law and it quickly became clear to us that they did not translate directly into the criminal law. There was insufficient clarity and precision to apply them to the specifics of the criminal law and the particularly difficult area of sexual relations. The Law Commission too recognised that the criminal law may need a rather different approach, and their paper *‘Consent in Sex Offences’* examines these definitions in the context of the criminal law.

4.5.6 Professionals working with vulnerable adults pointed out that relying on intellectual attainment was too narrow a view of a person’s capacity to consent, and suggested that a broader definition encompassing social and communicative abilities was preferable. One proposal was that capacity to consent should be linked to specific knowledge and understanding of several issues:

- that sex is different from personal care;
- that penetrative vaginal sex can lead to pregnancy;
- that penetrative anal sex is associated with a risk of HIV/AIDS.<sup>85</sup>

The review was assured that most of those who were mentally impaired but able to undertake genuinely consensual relationships would be able to demonstrate the abilities needed. If someone had this knowledge but lacked sufficient communication skills to make their wishes known to others, there could be no consent – it would not be free agreement.

4.5.7 The Law Commission’s policy paper on consent examines the issue of consent and capacity in some detail, and is a valuable contribution to the debate. They have re-examined their earlier proposals in the light of the work of the review, the conference we held on capacity to consent and further submissions after that conference. They were determined to ensure the definitions adopted were appropriate for use in the criminal law. These should enable the law to deliver effective protection while preserving sexual autonomy for people with mental disability. The Law Commission proposes a new test of capacity that would require both the need to understand the nature and reasonably foreseeable consequence of the sexual act, together with its implications and reasonably foreseeable consequences (which could include pregnancy or disease).

4.5.8 The Law Commission recommends that, for the purpose of any non-consensual sexual offence:

*‘(1) a person should be regarded as lacking capacity to consent if at the material time:*

- (a) the person is by reason of mental disability unable to make a decision for themselves on the matter in question: or*
- (b) the person is unable to communicate their decision on that matter because they are unconscious or for any other reason;*

<sup>85</sup> The Foundation for People with Learning Disabilities; the Tizard Centre made a very similar proposal.



- (2) *a person should be regarded as being unable to make a decision on whether to consent to an act if:*
- (a) *he or she is unable to understand*
    - (i) *the nature and reasonably foreseeable consequences of the act; and*
    - (ii) *the implications of the act and its reasonably foreseeable consequences; or*
  - (b) *being able so to understand, he or she is nonetheless unable to make a decision; and*
- (3) *“mental disability” should mean a disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning.’*

4.5.9 The Law Commission thought that their recommendation would not, on its own meet concerns about the sexual autonomy of people with mental disabilities. Under this test of capacity, those unable to understand pregnancy as a foreseeable consequence of sexual intercourse would lack capacity to consent, so that sexual intercourse between such parties would necessarily be non-consensual. The Law Commission suggested that the autonomy of those with mental disabilities to engage in sexual activity could be recognised by provision in the substantive criminal law which restricts the scope of particular sexual offences. Then, although the activity would be non-consensual using this test of capacity to consent, it would not necessarily be criminal.<sup>86</sup> They thought that where a more able person was involved in sexual activity with a very disabled person then it would be for the defendant to prove there was no exploitation. This places a burden of proof on the defendant that is justifiable in terms of the need to protect some very vulnerable and suggestible people, especially in the light of evidence that many such relationships are exploitative. We agree that defining capacity alone does not provide protection, but are proposing a different approach as set out below.

4.5.10 We also considered some common law definitions of capacity to consent: an often quoted one was established in the Supreme Court of Victoria in the case of Morgan:

*‘It must be proved that she has not sufficient knowledge or understanding to comprehend:*

- (a) *that what is proposed to be done is the physical act of penetration of her body by the male organ; or if that is not proved,*
- (b) *that the act of penetration proposed is one of sexual connection as distinct from an act of a totally different character.’*

Professor Glanville Williams had put forward a test where *‘the woman must know the physical facts and must know that the connection is sexual. Lack of knowledge of either aspect would render her incapable of consenting’*.

4.5.11 We concluded these tests were too limited, and that it was important to include both knowledge and understanding in order to incorporate an element of social functioning. The most difficult question to resolve was the degree of understanding that is necessary. A test that required little or no understanding would be limited in its application, perhaps too much so to deliver protection. In understanding an act is sexual, there should be some understanding that it can have reasonably foreseeable consequences such as pregnancy or disease. We felt some degree of understanding that the sexual act has implications which may not be desirable was important.

<sup>86</sup> The type of provision envisaged by the Law Commission is considered at paragraphs 4.71-4.81 of its policy paper ‘Consent in Sex Offences’, February 2000, published in Volume 2 Appendix C.

We thought the test proposed by those working closely with mentally impaired people, and set out in para 4.5.6, gave a way forward in providing a more specific definition of capacity for vulnerable adults that reflects a degree of knowledge and understanding. We were not entirely convinced that it was necessary to set out very specific examples of knowledge – selecting some issues to highlight could result in others being ignored. We thought the broad requirement that a person should know the act is sexual and that it can have consequences such as pregnancy and infection were right in principle.

**4.5.12** However, even knowing sex can lead to pregnancy may not be sufficient for a learning disabled person to relate that to their own life – to have an appreciation that they may have a baby and something of what it would mean for them. We thought that the rather broader test proposed to us by the Law Commission was preferable – it set out broad issues of understanding, of reasonably foreseeable consequences and of communication that contain the elements which we thought were necessary. It also included a requirement about the ability to make a decision on these issues, which we thought gave an additional and useful element.

**4.5.13** For most severely mentally impaired people, we thought that evidence of how far they do or do not meet this test ought to be provided to the court by expert testimony.

***Recommendation 30: There should be a statutory definition of capacity to consent which reflects both knowledge and understanding of sex and its broad implications. We recommend adoption of the definition proposed by the Law Commission set out in paragraph 4.5.8.***

*This is an area that is fraught with difficulty. We would very much welcome the views of the legal, academic and caring communities about these proposals. In particular:*

- *Is the proposed test the right one?*
- *Will it deliver the necessary balance between protection and the right to a private life?*

## **4.6 Sex offences against people with no capacity to consent**

**4.6.1** The law contains specific offences for sexual behaviour with people with severe mental impairment, where consent is not in issue. These are little used at present. Our proposal to define capacity is intended to give absolute protection to those who do not meet our recommended test. The key question is whether this protection should be provided by relying on the fact that, if a person was incapable of consenting, then the appropriate charge would be rape or sexual assault by penetration because sex with them was inherently non-consensual. If not, a separate criminal offence is necessary.

**4.6.2** In Chapter 2 we set out a list of situations as examples where free agreement is not present in rape and sexual assault by penetration. These include situations where the victim is incapable of consenting. A clear definition in law would enable those most serious offences of rape and sexual assault by penetration to be used where appropriate for victims who were severely mentally impaired. There are strong arguments for the use of rape/sexual assault by penetration in these circumstances; serious violations should carry serious consequences whatever the capacity of the victim. Those who could not meet the test of capacity we suggest would be self-evidently severely mentally disabled in some way. Taking sexual advantage of these most vulnerable people is very serious.



**4.6.3** However, the offences of rape, sexual assault by penetration and sexual assault all require the prosecution to prove the mens rea or guilty intent of the accused, as well as the lack of consent. There may be occasions when these offences are too severe for the circumstances of the sexual activity, or where there is real difficulty in prosecuting the more serious offence. We felt that a specific offence to protect the most severely mentally disabled was justified as a fail-safe. Such an offence could not be as serious as rape or sexual assault by penetration and there would be no question of consent as the victim must lack capacity to consent. It would apply to those who indulged in sexual activity with those who were so severely disabled that there was no question that they had the knowledge, understanding or communication skills to consent (and who therefore did not pass those tests set out in section 4.5 above). However, although less serious than rape, this offence marks a significant betrayal of a very vulnerable person, and should carry a substantial penalty. Both sexual penetration and sexual activity (defined as activity that a reasonable person would consider to be sexual<sup>87</sup>) would fall within the scope of the offence, thus replacing the existing indecent assault provisions as well. This offence should be an alternative to charging rape but should also provide an alternative verdict in the event of a rape charge not being proved.

**4.6.4** We did consider whether this specific offence should be one of strict liability where the defendant would not be able to claim any defence. The argument for a strict liability offence is that the victim would be so severely disabled that it should be absolutely evident that they were very vulnerable, and that, therefore, there was utterly no excuse for a defendant's actions. We considered the need for such a robust protection for these very vulnerable people against the Law Commission's definition of lack of capacity that we have adopted. This would include not only those who are severely mentally impaired, but also those who were, at the material time, mentally disordered. We thought that there could be occasions where such a disability may not be quite so self-evident as to justify a strict liability offence. Accordingly we thought that a defendant would have to know, or ought to have known, that the victim was a person with severe disability. It is important that the test is both objective and reasonable.

**4.6.5** We also considered what would happen when someone in a longstanding relationship becomes so disabled through accident or illness that they lose their pre-existing capacity. Should a husband or wife, or long term partner, have to cease all sexual relationships with their spouse as technically they could be charged with a very serious offence? It is certainly possible for rape to be committed within relationships, and for sex to be abusive. The review considered this issue carefully, and concluded that if somebody lacked capacity to consent then they could not give free agreement to sexual activity. A marriage defence, or something similar to encompass de facto relationships, was unacceptable in these circumstances where a person was so severely incapacitated that any sexual penetration of them would be tantamount to rape. (Different considerations apply in the discussion of the relationship between a carer and a person who is able to consent but in receipt of care – see section 4.8 below.)

***Recommendation 31: There should be a specific offence relating to sexual activity with a person with severe mental disability who would not have the capacity to consent to sexual relations.***

## **4.7 Sexual abuse by other people with mental disability**

**4.7.1** We also looked at the difficult question of sexual relationships between people with severe mental impairment. There may be genuinely loving relationships between mentally impaired people, but there are wide variations in capacity between individuals, and potential for abusive

<sup>87</sup> As set out in the Sexual Offences (Amendment) Bill.

relationships and forced sex. The CLRC thought that offences committed by mentally disabled persons should not be prosecuted, and the Law Commission has suggested that where neither has capacity there should only be criminal culpability where there was evidence of abuse or exploitation. We agree with that principle.

**4.7.2** This is a very difficult area to address in law because of the complexity of legal processes when both the victim and the perpetrator are vulnerable adults. Such acts should not be considered outside the law, but if the perpetrator is severely handicapped he may not have the capacity to know that what he was doing was wrong, or indeed that his actions were unwanted. In such a case there would be no criminal intent. On the other hand it seems wrong for the criminal law to withdraw completely from this area. If an abuser is capable of telling right from wrong, and has the capacity to know about sex and understand broadly its consequences, he or she should not be immune from prosecution, nor should such behaviour be condoned by carers. We thought that providing definitions of capacity would help in deciding whether or not prosecution would be justified. It should be for the judgement of experts assisting investigators and prosecutors to determine whether there was sufficient lack of capacity by a perpetrator to justify a lack of intent.

## **4.8 Breach of a relationship of care**

**4.8.1** The abuse of vulnerable people in institutions and the community is a real problem, and one that should not be under-estimated. Our conference heard that many learning impaired people regarded sexual abuse as a normal and expected part of life: a devastating concept. There are many loving and dedicated people working in care; others, however, find the provision of care provides a unique opportunity to use those in their charge for their sexual gratification with little chance of discovery or effective redress. The law needs to deal effectively with abuse by service providers, but all the evidence is that such abuse is hard to detect and harder to prosecute.

**4.8.2** Those with a mental disorder may not be able to make rational choices about sexual relationships, and are likely to be strongly influenced by those treating them. The Mental Health Act 1959 (MHA) provides a comprehensive restriction to prevent those caring for mentally disordered people from abusing their position. This seems a sensible and potentially effective offence, although at present there are very few prosecutions or convictions – only 2 or 3 a year.

**4.8.3** As there seemed to be evidence indicating that caring work offered access to very vulnerable people and the potential for abuse, we decided to explore a different approach to protecting mentally impaired, disordered or otherwise vulnerable people. We already have law in place that deals with certain caring relationships – those with mental patients. Many other countries have adopted law that criminalises inappropriate sexual relationships between carers and recipients of care. The Sexual Offences (Amendment) Bill 2000 applies this principle to 16 and 17 year old children and certain adults in positions of trust and responsibility. In Chapter 5 we suggest that some family relationships should not be sexual. We thought that it should be possible to identify those relationships of care where any sexual element would be so wrong and inappropriate as to justify a criminal sanction. In a relationship of trust or care with a vulnerable person the relative imbalance of power can be so great that it is difficult to deny sexual demands or protest effectively about their actions. Consent would either be absent or obtained inappropriately.

**4.8.4** We looked at the situations where people were most vulnerable and there was the greatest potential for abuse and exploitation. The conference on capacity to consent had identified three areas where protection could be enshrined in law. These were:

- an absolute prohibition on sexual activity with people who were so severely disabled that they could not understand or communicate consent in any way;



- a more limited prohibition on sexual activity between people living in residential accommodation or receiving similar institutional care who were able to consent, and members of staff in the place where they were living, etc; and
- a further prohibition on sexual activity between people living in the community who could communicate consent, and those who were providing caring or medical services etc.

We have already dealt with those who lack capacity. We were clear about the people we wanted to protect: learning impaired people, frail elderly people, mentally disordered people and those with dementia whether in residential homes, or those same groups receiving care in the community. The common thread for all of these is that they are above the threshold set by our definition of capacity to consent, so they have some capacity to consent but are in receipt of care services whether medical, therapeutic or social.

**4.8.5** We first considered whether, and if so how, we could define vulnerable people. The Home Office guidance<sup>88</sup> on preventing abuse of trust of vulnerable people says:

*'There is no simple definition ... there is no age at which elderly people should be classed as vulnerable, and many would rightly resent such a classification. Nor could or should all those with physical disabilities be classed as vulnerable. Moreover, some people may go through periods of being vulnerable, for example someone who has gone through a nervous breakdown, but subsequently recovered. There are however certain services provided for adults where the service providers are in a particular relationship of care to all those who are receiving those services, the majority of whom are likely to be vulnerable ...'*<sup>89</sup>

**4.8.6** It was clear from the discussions on codes of practice and on increasing protection in the Care (Standards) Bill that defining vulnerability was extremely difficult. We thought we could not define vulnerability, with the certainty needed in the law, by mental capacity alone (although that will inevitably be a factor), and that we should look at both the individual and their situation. Some people will be permanently vulnerable because of their mental frailty or disability, others may be temporarily vulnerable because of illness or external events. In some cases physical frailty or disability can make a person very vulnerable. A common factor in personal vulnerability is that people will be in receipt of care usually based on a medical or social services estimate of need. They may be in a hospital, residential care of some kind or in the community in receipt of care services from visiting carers. This would probably include some medical and nursing care. Although the vulnerable person would have the capacity to enter into sexual relationships, it was already the case that sexual relationships between carers and patients/clients is seen as wrong and inappropriate. We were, however, told that in some cases access to vulnerable victims is achieved by working in homes or in the care services. As it becomes increasingly difficult for those with a history of sexual offending to work with children, they transfer their attentions to working with mentally incapacitated or elderly people.

**4.8.7** We were also concerned about people who were vulnerable purely because of the situation they were in – because they were confined by law or for some other reason (e.g. in prison or a

<sup>88</sup> Caring for young people and the vulnerable? Guidance for preventing abuse of trust. Home Office, 1999.

<sup>89</sup> The guidance is intended to strengthen professional controls. The Care Standards Bill, currently before Parliament, includes new measures to protect vulnerable adults from unsuitable people. Under the provisions set out in the Bill, the Secretary of State for Health will maintain a List of people who are unsuitable to work with vulnerable adults. People who are included in that List will be banned from working in a number of areas where people are likely to be vulnerable, including residential care homes, hospitals and other settings. Employers in those areas will be required to report to the Secretary of State cases in which a person has harmed an individual or put an individual at risk of harm, and will be required to check the List before offering a person employment that will involve regular contact with vulnerable adults. Other employers, and voluntary organisations dealing with vulnerable people will also be able to check the List.

detention centre). In such situations inmates are not really in a position to give free agreement to a sexual relationship with a member of staff who was in a position of power over them; they may not be able to see any alternative.

**4.8.8** A third area of vulnerability was that of temporary vulnerability. We all recognise that the most able and assertive individual may on occasion become dependent on others. Perhaps one area where this is most likely is in a medical and particularly a psychological/psychotherapeutic situation. It is well established that professional relationships such as those between a medical practitioner and their patient should not be sexual. Professional and ethical codes require that if a sexual relationship develops, the professional bond should be broken before any sexual activity takes place. We were told that many areas of therapy and counselling were little regulated. Those who go to seek help, for whatever physical, psychological or psychiatric reason from those they regard as professionals are particularly vulnerable to being exploited. The relationship that develops between the therapist and patient is often one of great dependence, and the therapist, of whatever discipline, is in a particular position of trust. The risk of a patient becoming emotionally dependent was recognised from the earliest days of psychotherapy. Some therapists may take advantage of their position to begin a sexual relationship with their patient/client, even though professional bodies regard this as highly unprofessional and inappropriate. A very small minority of professionals whose role is to help and care for vulnerable people do exploit them sexually. It cannot be emphasised enough that most healthcare professionals are entirely innocent of such misconduct. But it does occur and bodies such as POPAN (a charity dedicated to helping people abused by health or social care professionals, and to preventing future occurrence of such abuse) report a growing caseload. However, the numbers are fairly small: POPAN reported 394 new enquiries in the year 1998-9<sup>90</sup> of which about one third related to sexual abuse.

**4.8.9** Although a patient may seem to have free choice and be able to escape, he or she is not in charge of their own feelings and is not in a situation where free choice can be exercised. Some research indicates this lack of control:

*‘The woman patient under these circumstances is seldom in control of any of these issues. What is more typical is that the woman patient is caught up in the throes of her own past, of her childlike feelings, of experiencing emotions that are powerful and frightening and that often lead the woman in such a posture to feel that she is at that moment not in charge of any aspect of her life. ... the woman patient at such moments is in a state of psychological regression – a retreat into a childhood state not only emotionally, but also intellectually. At that moment she becomes the helpless child again, reliving the experiences of the past, unable to cope with what is happening to her, feeling robbed of the ability to make choices, perceiving herself as small and weak and therefore unable to defend herself’.*<sup>91</sup>

The victim of such abuse could just as easily be a man.

**4.8.10** We therefore identified several potential categories of vulnerability where the vulnerable people should be protected:

- Those who are mentally disordered and receiving inpatient or outpatient care;
- Those in residential homes who are in receipt of care services (hospitals, hospices, nursing homes and homes for mentally disabled people);

<sup>90</sup> POPAN (Prevention of Professional Abuse Network) Annual Report 1998-9.

<sup>91</sup> Extract from Chapter 5 Seduction of the Female Patient (Sydney Smith PhD), *Sexual Exploitation in Professional Relationships*, Gabbard G.O., 1989, American Psychiatric Press, Washington.



- Those in the community who are assessed as being in need of care, and in receipt of intimate care services such as bathing or dressing;
- Those who put themselves in the care of medical practitioners, therapists or others who provide therapeutic or caring services;
- Those who are confined in institutions such as secure units, detention centres or prisons.

**4.8.11** The next question to consider was whether the criminal law was the best way to offer protection. It already applies in some instances – for example by prohibiting sexual relationships between male staff treating or caring for mental patients. Despite the fact that this law was little used, we thought that this functional approach to providing protection had real advantages. The combination of a recognised relationship of trust or care with a prohibition on sexual relations ought to be both fair and effective. The Government was already adopting this approach for children over the age of consent but under the age of majority in the Sexual Offences (Amendment) Bill. We thought that the law did have a role to play in protecting very vulnerable people.

**4.8.12** We were not convinced that the present regime of good practice and professional codes was adequate to provide protection. Whilst some professions have defined codes and disciplinary procedures, others do not. Some therapies are not regulated at all. Other countries have increasingly sought to define in law certain relationships which include such an imbalance of power and authority that where there is a sexual relationship it is so wrong as to be criminal. There is a strong case for the law to prohibit sexual relationships between vulnerable people (possibly those who cannot choose or can be unduly influenced into entering a sexual relationship) and those who provide medical, therapeutic or intimate care services to them, whether those services are provided in an institution or in the community. The law would reflect the serious abuse of the relationship of trust that is implicit in the relationship. It would not exclude a genuine relationship: breaking the caring relationship would remove the legal prohibition. (Just as now if a relationship develops between a doctor and a patient, the appropriate ethical response is for the patient to move to the care of another doctor.)

**4.8.13** There is a two-fold advantage to this approach: it underpins and extends existing codes which say that such relationships are inappropriate, unprofessional and wrong. Where carers or therapists are not subject to any professional code or control, it would provide a sanction and give confidence to the wider public. It would have to be very clearly defined so that those who were care providers knew their responsibility under the law. This has the potential to be very effective in increasing the protection of the law to very vulnerable people. Consent would be irrelevant: it would be necessary to prove both that sexual penetration took place, and the fact of the relationship of trust falling within the law. Where a loving relationship did develop between carer and patient, it would not be prohibited if the caring relationship were broken.

**4.8.14** We have not attempted to define where this offence would apply but to determine the general principles. The core areas are clear – caring for mentally disordered people including those with dementia; caring for those with learning disabilities and caring for those who have problems of mental health and well-being who entrust themselves to others for help. The common feature of all of these is the vulnerability of the recipient and the ability for consent to be overborne. The common feature of the caring role is that their work puts them in a position of access and authority that they would not otherwise have. But within these common features there are varying degrees of vulnerability and authority which will need to be carefully defined. Other areas should not be included: the residential home for active elderly people for example and those who may provide advice and counselling to others as part of more general duties. The law would have to be perfectly clear to whom such an offence should apply so that all those providing care knew and understood their responsibility under the law. It will require considerably more work to formulate the details of which relationships should be included in any criminal offence. We thought that the consultation



process initiated by our review would enable a debate on the extent and nature of such controls. Our recommendations are based on building up a set of proposals to identify the principles for protection, the core areas, and to identify a set of consultation points on the wider issues.

**4.8.15** We thought that by setting out the issues in categories, respondents could focus on the key issues on each area: the nature of the problem to be addressed, the nature of the relationship of trust and how it should be defined. A set of particular questions are set out below the recommendations. The recommendations set out the offence in terms of the prohibited relationship, but any offence will need to be framed in terms of the prohibited acts which form part of a sexual relationship which could be proved in court. We considered whether this should be limited to sexual penetration (which would include penetration of or by a vulnerable person and any penetration of anus or genitalia, or penile penetration of the mouth) or the wider definition of sexual activity (activity that a reasonable bystander would consider to be sexual). One is more limited and more certain; the other could deliver wider protection but could be open to misunderstanding and have the potential to limit the caring role for fear of false allegations. We thought that this was a point on which we should seek views more widely.

**Recommendation 32: There should be offences of a breach of a relationship of care to prohibit:**

- **sexual relationships between a patient with a mental disorder, whether inpatient or outpatient, and any member of staff, whether paid or unpaid;**
- **sexual relationships between a person in residential care and a member of staff, whether paid or unpaid;**
- **sexual relationships between a person receiving certain care services in the community and designated care providers whether paid or unpaid;**
- **sexual relationships between doctors and their patients, and therapists and clients.**

*We would welcome comments and views on these proposals and in particular on the following points:*

- *Should any residential care provision be limited to those where people receive nursing or therapeutic services and/or intimate care?*
- *Which services in the community should be included and how can the providers and recipients be defined with the certainty needed in the criminal law?*
- *How far should physical frailty or disability be included within these definitions?*
- *How can we define therapist and should it extend beyond mental health therapy to include those offering physical therapy?*
- *Should any prohibition in law apply to sexual penetration or to a wider definition of sexual activity?*

**4.8.16** We had also been told of problems relating to those who were confined in secure institutions such as prisons and detention centres. The Sexual Offences (Amendment) Bill prohibits sexual activity between children of 16 and 17 in secure institutions such as secure units or prisons and those in a position of responsibility over them. We had little evidence of the extent or the severity of the problem. Such places already have professional and disciplinary codes that apply to staff. We are considering backing up such professional codes with a criminal offence in other contexts, recognising that such behaviour may already be covered by the criminal law if there were no consent. We also recognise that there may be particular scope for false allegations in such settings. We thought that we should not make a specific recommendation but invite views on whether such an offence was needed:



- ***Should the criminal law apply to sexual relationships between staff and those detained in secure institutions?***

4.8.17 One area of potential difficulty is that where care is given by husband or wife within the family or by partners in long-standing relationships. These relationships were sexual long before illness, accident or dementia intervened. In circumstances where individuals retained some capacity to consent it would be wrong and unreasonable to intrude into the private life of such couples. It is important therefore that there should not be an offence where the carer and patient were married or in an existing sexual relationship.

***Recommendation 33: There should be a defence of a pre-existing sexual relationship for the offence of breach of a relationship of care where there is some degree of capacity to consent.***

## 4.9 Defences

4.9.1 Currently a man who has sexual intercourse with a severely handicapped woman has a statutory defence under section 7(2) of the Sexual Offences Act 1956 which says:

*“A man is not guilty of an offence under this section because he has unlawful sexual intercourse with a woman if he does not know and has no reason to suspect her to be a ‘defective’.”*

4.9.2 The CLRC argued that it would lead to a defence for a man who believed that the woman was not severely mentally handicapped, and recommended that the defence should only be available if he believed that the woman was not suffering from any degree of handicap. They felt that the presence or absence of reasonable grounds would be evidence of the genuineness of the belief. The review considers that such a low test would be too difficult for prosecution purposes. Where somebody has a serious mental disability, leading to a lack of capacity to consent, or a total inability to communicate such consent, that should be apparent. We have proposed however that a defendant would have to know, or ought to have known, that a person was severely disabled.

## 4.10 Obtaining sex by threats or deception

4.10.1 In Chapter 2 we propose a replacement offence of obtaining sex by threats or deception. That is an offence of general application, but we were aware of the particular problems identified for mentally impaired people whether living in the community or in institutions. One problem for these people is that their arrested state of development may leave them child-like and subject to levels of threat and deception which may seem implausible to most people. We were told that inappropriate inducements were used to obtain sex (a bag of sweets or a promise to be a ‘boyfriend’ for example.) We were also told that threats and deception of a very simple kind were all that was necessary to obtain agreement to sex – threats to tell a parent, or a carer so they would get into trouble.

4.10.2 We thought that there was a case for a separate offence to recognise the special and often limited nature of the threats or deception needed to obtain sex with mentally impaired people. We thought that such a specific offence would enable carers, police and prosecutors to take action more readily than they might when faced with the apparently heavier burden of proving a general offence.

***Recommendation 34: There should be a specific offence of obtaining sex with a mentally impaired person by threat or deception.***



# Chapter Five

## Sexual Abuse within the Family

### 5.1 Introduction

5.1.1 The family unit, whether formally established by marriage or not, is for most children the cornerstone of their lives. It should be, and often is, a haven where both children and adults can live in safety and develop their full potential. It can also be a place where children are subject to hidden long-term sexual abuse. This chapter discusses how the law presently deals with sexual abuse within the family, and considers what changes may be necessary to reflect the looser structures of modern families.

5.1.2 In England and Wales, sexual abuse in the family may be prosecuted using a range of offences such as rape, indecent assault or unlawful sexual intercourse with a girl. Where there has been sexual intercourse between close blood relations, incest may be used. This chapter considers how far the present law is adequate to provide protection within the family, and how it should be framed in future.

5.1.3 Incest is recognised around the world as a crime. Sexual relations between close family members have long been taboo in most societies. However, incest was not a criminal offence in England and Wales<sup>92</sup> until the Incest Act 1908, now incorporated in sections 10 and 11 of the Sexual Offences Act 1956. There is an additional offence of inciting a girl under the age of 16 to have incestuous intercourse (section 54(1) of the Criminal Law Act 1977). The offence of incest prohibits vaginal sexual intercourse between a man and a woman he knows to be his granddaughter, daughter, sister (including half-sister) or mother. Consent is irrelevant. A woman over the age of sixteen may not permit a man she knows to be her grandfather, father, brother (including half-brother) or son to have sexual intercourse with her by her consent.

5.1.4 The offence of incest sets out in law a fundamental social taboo about sexual relations within the family, reflecting widely held abhorrence. We regard the offence as one of a fundamental breach of trust by one family member against another. This raises issues about the nature of ‘the family’:

*‘With the rise in divorce and the increasingly diverse nature of modern families the offence of incest which outlaws sexual intercourse within the family should be a crime whether it is committed by a natural father or by a stepfather, by a natural sibling or by a stepsibling with no common genes. It is the protection of children within the family rather than the incestuous nature of the relationship, which is important. That fact should be recognised by the criminal law. There should be an offence which punishes the illegal sexual behaviour within the family and adds an extra penalty for the abuse of trust.’<sup>93</sup>*

<sup>92</sup> Except for a short period during the Interregnum in 1650 when incest, together with adultery, was made a capital offence, incest was dealt with by canon law, punishable by a penance. Scotland has had a statutory offence since 1567 which at one stage included relationships by affinity i.e. by marriage, e.g. mother-in-law. By the end of the nineteenth century the use of the ecclesiastical courts to punish incest had almost ceased, but social reformers were gathering evidence that children of the poor were at risk of sexual abuse within the family.

<sup>93</sup> NSPCC – submission to the sex offences review, March 1999.



5.1.5 In considering whether incest should still be regarded as criminal, the Sex Offences Review had to consider the following questions:

- whether the proposals for the new offences of adult sexual abuse of a child and sexual activity between minors removed the need for a separate offence of incest in relation to children;
- if there was a need for a special offence, how it could be constructed to protect children in all kinds of family units;
- whether the criminal law should still apply to consensual sexual relationships between adult family members.

In considering the protection of children in a family unit we applied the term very broadly. This is important because the evidence is that there is a greater risk of sexual abuse where new people move into the family unit.

### *The eugenics debate*

5.1.6 It is often assumed that the offence of incest is a protection for the potential offspring of such a union, to prevent inbreeding (the eugenics argument). However there is little evidence for this being used as the rationale for the law in the past. Research into closely related communities such as the Amish of North America (who have a high proportion of 'first cousin' marriages) reveals that they do run a greatly increased risk for a variety of diseases when compared to other populations. However it is doubtful whether these risks would justify a criminal offence. Marriage between unrelated persons who carry genetic markers for various hereditary diseases such as Huntington's Chorea or Sickle Cell Anaemia is not proscribed, nor should it be. It is treading a dangerous path to base the criminal law solely on any form of eugenic argument.

5.1.7 Although some of the contributions to the review on the subject of incest discussed the offence of incest in terms of eugenics, many called for the scope of the offence to be extended beyond blood relatives. Where arguments were deployed to extend the scope of incest beyond the present lineal provision, the arguments were related both to an abuse of trust and power within the family as well as a genetic need.

5.1.8 Although some studies have shown that the risk of serious defect in the progeny of an incestuous relationship is 28% higher,<sup>94</sup> the Criminal Law Revision Committee in their 1984 report considered that the precise degree of genetic risk was not a crucial factor in considering the justification for an offence of incest.

5.1.9 We thought that the eugenic argument was not significant in considering whether or not there should be an offence of or similar to incest. Our policy was to ensure that the law provided protection for the family and in particular for children within the family. We thought it was important that the law should provide not only a tool to tackle an acknowledged social problem but that it should clearly define the need for adults to protect children in their care. The family unit is central to a healthy society and the protection of children in the family is vital for us all.

## **5.2 Problems with the current law**

5.2.1 The limited nature of the present law was cited as a problem. Incest applies to vaginal intercourse only, with separate offences for men and women. There are strong arguments that the law should be able to deal with other types of sexual penetration, which also cause psychological and physiological harm, and that it should include same sex abuse.

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<sup>94</sup> Adams and Neel (1967).

**5.2.2** Criminal liability for women over the age of sixteen who permit sexual intercourse to occur with a close relative was also cited as a potential problem.<sup>95</sup> The argument is that such relationships are primarily abusive reflecting a long-term imbalance of power in the family. Ostensibly consensual relationships between adults may have their origins in under age grooming or sex. If a child is brought up to think such behaviour normal she may not realise the true nature of the activity for many years. As an adult she is then culpable. Even though prosecutions of women for incest are rare, the thought that they too could be liable may prevent some women from coming forward to report the abuse.<sup>96</sup>

**5.2.3** The current offences of incest are little used, with comparatively few prosecutions and convictions each year. Yet that in itself does not mean it is not useful. The offence requires only the proof of the act between relatives, and does not rely on any issue of consent. It has been argued that incest of a child under 16 should be charged as rape, as it may be now if it is clear that there is no consent in fact. Any consideration of rape would involve proving the child did not consent, which may be difficult in a family situation. A child may be brought up to be obedient to older family members or be made compliant by a process of grooming. The table below shows the level of prosecutions undertaken in recent years.<sup>97</sup>

Number of defendants proceeded against at magistrates' courts			
ss10 & 11 SOA 1956	1987	1992	1997
Males	184	74	25
Females	6	7	1

**5.2.4** The present offence is limited to lineal blood relatives and siblings, and so does not include today's looser family structures including step-parents, nor does it encompass the transient nature of some family relationships. It was also argued during consultation that the stigma attached to the word 'incest' tainted both the victim and their family, because there was a perception that it was consensual behaviour, and therefore that the victim was complicit.

### 5.3 Views expressed during public consultation

**5.3.1** The issue of protecting children from sexual abuse within the family and the offence of incest were discussed in a number of representations to the review. We also held a seminar on the subject in September 1999<sup>98</sup>. The issues of the protection of children and the structures of modern families are closely entwined. We were asked to make the general sex offences against children clear and specific. So in this context we sought to make it crystal clear that sexual relations with children within the family (however defined) were not to be condoned. It was vital to establish that abuse within the family was one of the most serious and harmful types of abuse because of the fundamental breach of trust involved.

<sup>95</sup> Professor Jennifer Temkin – 'Do we need the crime of incest?', *Current Legal Problems* 1991, Vol 44.

<sup>96</sup> 'We know that incest does not usually commence with the consent of both parties when a complainant is 16. Should recognition of this fact be left solely to the prosecuting authorities?' Literature review on the law of sex offences against children and vulnerable groups – Lee Maitland and Caroline Keenan, Bristol University.

<sup>97</sup> Figures from Home Office Research, Development and Statistics Directorate.

<sup>98</sup> The report of this seminar is in Vol 2 Appendix H7.



5.3.2 The conclusion of the seminar, and of some of those who contributed to the review, was that an offence of incest was still required in addition to the more general offences intended to protect children. It was needed to express society's disapproval of certain sexual relationships within a family. There was general agreement that any new offence should be gender neutral:

*'There has to be an acknowledgement that women also enter into incestuous relationships with boys as well as men entering into incestuous relationships with girls.'*<sup>99</sup>

5.3.3 Some contributors argued for extending the scope of the offence of incest to other blood relations:

*'... although uncles may have a fairly distant relationship with nieces and nephews, the same is true of grandparents and grandchildren. In both cases, however, the relationship may be very close, with uncle or grandfather being a regular and trusted visitor to the home or living with the family ... studies reveal that abusive sexual relationships between uncles and nieces are not at all uncommon.'*<sup>100</sup>

5.3.4 One proposal was that rather than retaining incest, the abuse of trust offences for 16 and 17 year olds (set out in the Sexual Offences (Amendment) Bill 2000) should be extended to proscribe sexual activity between a parent and child, whether related by blood or adoption, grandparent and grandchild, uncles/aunts and nieces/nephews, and between blood siblings or siblings, whether blood related or not, living within the same family.<sup>101</sup> These respondents focussed on the abuse of trust rather than the family relationship; they thought incest could be retained where both parties are adult.

5.3.5 Some respondents pointed out that the law does not effectively protect children from sexual abuse by step-parents, live-in partners of their natural parent, or those who may be in a long-standing relationship with their parent, but not live with them permanently. However, although there were attractions to extending the scope of the offence to catch all those who are seen by a child as a person of influence, it was recognised that this concept would need to be defined very carefully to provide the certainty needed in law.

5.3.6 The issue of adult sibling incest was particularly difficult. Many contributors felt that such relationships tend to begin in childhood and often represented power differentials within the family which made them intrinsically abusive. However others pointed out that consensual activity between adult siblings (who may not have been brought up together) should not be subject to the criminal law.

5.3.7 Other contributors felt that rather than having a separate offence of incest the degree of abuse of trust should form a significant aggravating factor in sentencing for the proposed offence of adult sexual activity with a child. Factors which should aggravate the sentence could include:

- whether the perpetrator was a close blood relation or a significant individual in a child's life;
- whether the perpetrator had 'groomed' the child; or
- the age of the victim.

<sup>99</sup> National Foster Care Association – submission to the Sex Offences Review, March 1999.

<sup>100</sup> NSPCC – submission to the sex offences review, March 1999.

<sup>101</sup> Joint submission to the Sex Offences Review by Christians for Human Rights and the Lesbian and Gay Christian Movement, March 1999.

## 5.4 The law and proposals for reform in other countries

### *Australia*

5.4.1 All states have laws about sexual abuse in the family, although they are not always defined as incest. In Tasmania, the offence of incest refers to lineal ancestors, lineal descendants and siblings; and it requires the relationship to be known. The offence in the State of Victoria (Crimes Act 1958) contains a much broader definition of when a sexual relationship is prohibited, including step-relationships and ‘de facto’ relationships; again it is necessary to know the relationship. New South Wales has two offences: having, attempting to have, or assaulting with intent to have sexual intercourse with a child between 10 and 16, where the child is under the authority of the person; or carnal knowledge, attempted carnal knowledge, or assault with intent to have carnal knowledge by a teacher, father, stepfather of a pupil, daughter or stepdaughter of 16 or 17 years of age. There is no specific offence of incest. The Northern Territory of Australia still has an offence of incest for blood related family members.

5.4.2 The Australian Model Criminal Code Officers’ Committee have proposed that incest should be primarily aimed at the protection of children and that it should no longer be a criminal offence for consenting adults. They argued that it is not the proper role of the criminal law to prohibit conduct that poses no real harm to the general community. The Committee first tentatively suggested that there was no need to retain an incest offence if there was adequate legislation to protect children from inappropriate sexual conduct or legislation relating to sexual conduct between adults which was not consensual. Responses to this proposal were largely hostile. Some were opposed on moral grounds but *‘a number of those dealing with child sexual assault victims disagreed with the recommendation: they asserted that many adults who are sexually abusing children whilst those children are under the age of consent continue their relationship after the child has passed the age of consent. They suggested that an absence of prohibition on adult consenting incest would permit the subsequent sexual conduct to continue, even though, in reality, the “consent” of the young adult was very much vitiated by the long-standing abuse that occurred when the child was under the age of consent.’*<sup>102</sup>

5.4.3 The Committee has recommended that there should be an offence of incest which is limited to penetrative acts of a sexual nature. They have also recommended that the offence should be limited to relationships of direct consanguinity, that is, penetrative sexual contact between parents and children, siblings, grandparents and grandchildren. The Committee also believed that the offence should require intent, as it would be ‘harsh and irrational’ to criminalise an adult person who engaged in consenting sex with a second adult person when completely ignorant of their consanguinity. The offence they propose is:

*(1) A person who:*

*(a) Sexually penetrates a close family member; or*

*(b) Is sexually penetrated by a close family member;*

*Knowing that the person is a close family members, is guilty of an offence.*

*(2) For the purposes of this section, a close family member is a parent, son, daughter, sibling (including a half-brother or half-sister), grandparent or grandchild, being such a family member from birth and not marriage or adoption.*

*Consent is not a defence to this offence.*

<sup>102</sup> Australian Model Criminal Code – report on sexual offences against the person, May 1999.



### ***Republic of Ireland***

5.4.4 The Republic of Ireland relies primarily on the Incest Act 1908, which was amended by the Criminal Law (Incest Proceedings) Act 1995. An amendment was tabled during the passage of that Act, which would have had the effect of extending the offence of incest to the non-blood relationships of step-parent and stepchild, and adopted parent and adopted child had it been passed.

*'The argument for extending the scope of the offence is that in step-parent and adoptive parent situations, the child is, for all intents and purposes, part of a family and its relationships are no different in familial terms to those of children to their biological parents.'*<sup>103</sup>

5.4.5 The Department of Justice, Equality and Law Reform discussion paper on sexual offences considers that the provision of an offence relating to the criminal liability of adult females presumes that the female is never the instigator. As the law stands in the Republic of Ireland (and currently in England and Wales) a 15 year-old girl might instigate a relationship with a younger brother or half-brother: in that circumstance, the brother could be charged with incest while the older sister could not – but making under-age girls liable for the crime of incest in any circumstances might be seen as eroding the protection given by the law at present to girls under the age of consent.

### ***New Zealand***

5.4.6 The New Zealand offence of incest (Crimes Act 1961 section 130) covers vaginal sexual intercourse between parent and child; brother and sister (including half-brother or sister) or grandparent and grandchild where the person charged knows of the relationship between the parties. Everyone of or over the age of 16 years who commits incest is liable to imprisonment. Adoptive relationships are included but not step-parents.<sup>104</sup> New Zealand has instead introduced a separate offence of 'sexual intercourse with a girl under care or protection', which also covers foster daughters and wards living as a member of the family.

### ***Republic of South Africa***

5.4.7 In South Africa the common law offence of incest consists of unlawful and intentional sexual intercourse between two persons who on account of consanguinity (blood relationship), affinity (relationship by marriage) or an adoptive relationship may not marry one another.<sup>105</sup> The prohibition extends to ascendants and descendants in the direct line (for example father and daughter; grandfather and granddaughter); brother and sister; in-laws (for example mother-in-law) and adopted parents and adoptive children. The South African Law Commission review of sexual offences states in its consultation paper:

*'it is clearly vital to the actual security and the sense of security of all members of the family unit that certain boundaries are set and preserved ... Of these boundaries, the sexual one is the most fundamental'*<sup>106</sup>.

<sup>103</sup> The Law on Sexual Offences: a Discussion Paper, Department of Justice, Equality and Law Reform, May 1998.

<sup>104</sup> Adams on Criminal Law CA130.08 and R v Stanley (1903) 23 NZLR 378 (CA).

<sup>105</sup> South African Law Reform Commission – review of sex offences, August 1999.

<sup>106</sup> Professor Jennifer Temkin 'Do we need the law on incest?' page 187.



The review recommended that the crime of incest should be left in the common law, but that the proposed statutory definition of ‘sexual penetration’ should apply to the common law offence of incest in order to make it gender neutral and to expand the ambit of the offence.

### **Scotland**

**5.4.8** The Criminal Law (Consolidation) (Scotland) Act 1995 limits the offence of incest to those who have some degree of consanguinity<sup>107</sup>. Blood relationships that fall within the offence are wider than those in England and Wales and include uncles and aunts, nephews and nieces and great-grandparents and great-grandchildren. The offence also includes relationships by adoption between adoptive parents and adoptive children, even where they were formerly adopted, but not adoptive siblings. Defences include not knowing the degree of relationship, not consenting to the sexual intercourse and marriage.

**5.4.9** The Scots also provide related offences including sexual intercourse with a step-child or former step-child if two conditions apply. These are that the step-child must be younger than 21 at the time of the offence or that the step-child lived in the same household as the accused and was treated as a child of the accused’s family at any time before the complainant’s 18th birthday. The law provides defences of not knowing the relationship, believing on reasonable grounds that the step-child was over the age of 21, not consenting to sexual intercourse or of being married.

**5.4.10** There is also an offence of sexual intercourse with a child under the age of 16 by an older person who is both a member of the same household as the child and is in a position of trust or authority in relation to the child. This offence is discussed in greater detail in paragraph 5.66 onwards. The defences are reasonable belief that the complainant was over the age of 16, not consenting to the sexual intercourse or of being married.

## **5.5 Do we still need an offence of incest?**

**5.5.1** Much of the prohibited activity – sexual relations within the family – may well be criminal in terms of other offences, and it can be argued that in itself that makes an offence like incest unnecessary. Where the intercourse is non-consensual, it can and should be prosecuted as rape. Where children are involved, there are other offences in existence, or that we propose, that would provide a remedy in law. The question is therefore whether there is any justification for specific laws against incest or abuse within the family.

**5.5.2** In their report of 1984, the Criminal Law Revision Committee (CLRC) considered the justification for legal intervention in offences of incest. In doing so they took account of the work of the Policy Advisory Committee which had said:

*‘We accept as a basis for all our considerations that incestuous relationships are wholly undesirable for the individual and for our society and potentially harmful with possible long-term psychological consequences for those involved and their families ... From the evidence we have examined there appears to be a general consensus of opinion that the involvement of the criminal law in cases of incest can be in many instances not an appropriate or helpful means of dealing with the complex psychological and social problems which may be disclosed ... the introduction of the criminal law can in some cases do more harm than good. But even among those who point to this danger it is the generally held view that the criminal law does have a role to play, and there is very little support for the proposition that the criminal law should be removed from this area altogether ... [that] would be unacceptable and incomprehensible to the vast majority of people in this country.’<sup>108</sup>*

<sup>107</sup> This consolidated the Incest and Related Offences (Scotland) Act 1986, which replaced the Incest Act 1567 following a report by the Scottish Law Commission.

<sup>108</sup> Policy Advisory Committee: Criminal Law Revision Committee fifteenth report – sexual offences, April 1984.



**5.5.3** The primary aim of the law in this area should be to protect against sexual exploitation within the family, especially young and vulnerable people. There is something very particular about the family – the place where we all should be safest – becoming the place of abuse and exploitation. The dynamics of relationships within families are different to those between friends. Adults within families take on rights and responsibilities of protecting and safeguarding the weaker members – in doing so they have a degree of power and authority over younger or weaker members. Any abuse of this power is individually destructive and socially disruptive. The evidence is that abuse within the family is particularly damaging and debilitating to the prospects of a happy and fulfilled life, whether that abuse is by an adult in the family or by a sibling.<sup>109</sup>

**5.5.4** The dynamics of relationships within families change as children grow up, but patterns of domination started in childhood can continue into adult life, and significantly affect adult behaviour. In particular the issue of whether an adult child or sibling can ever truly consent to a sexual relationship with a father or brother is questionable, and the law and practice need to recognise this. The particular nature of close family relationships, and the importance of the family in society, justify special provision in the criminal law.

**5.5.5** We concluded that it was important that the law should make special provision for sexual abuse within the family in order to increase protection and provide appropriate remedies. After careful consideration, we decided that the word incest, although well understood, was perhaps no longer the right one to use in the context of delivering protection in the family. It is generally understood as an offence of blood relations, and carries a very heavy burden, not only for the offender but also for the victim/survivor who can be seen as complicit. It seems inappropriate for the informal and temporary family arrangements that can be the cause of particular concern, and are well outside the present law of incest. The rationale for the offence is the need to protect children and more vulnerable people within the family, however that is defined. The law must be seen to apply in the situations of family abuse to make the clearest possible statement of the importance of the family grouping in society for the long term health of our children and hence our society. We decided to adopt a different approach by developing an offence of familial sexual abuse to incorporate the present offences of incest and extend protection for children in the family however informal the adult relationships are in that family unit.

**5.5.6** We also bore in mind that although our proposals will provide other serious offences which can be used to prosecute those who violate children within the family, these may involve issues of consent, fact and knowledge of age, for example. In a family relationship these issues are rather different. Consent is not an element of the present offence of incest, nor in our proposed offence. The sexual relationships in the family that we propose should be prohibited can never be freely agreed. An adult will know the age and abilities of the child. It will be necessary to establish that any defendant knew of the relationship to fulfil the full incest-like part of the offence, but in general this should be an offence of strict liability that is determined if the fact of the relationship and the sexual penetration are established. It therefore offers additional protection to the offences of more general application, and may provide an alternative charge or verdict to those other offences.

***Recommendation 35: There should be an offence of familial sexual abuse to reflect the looser structure of modern families which will replace and extend the existing offences of incest.***

<sup>109</sup> Brother-Sister Incest-Father Daughter incest: a comparison of characteristics and consequences – Rudd and Herzenberger.

5.5.7 There are some key differences between our other proposals on protecting children and this proposal for protection within the family. In looking at how the law should protect children, we have drawn a distinction between the age of consent to sexual activity, which will be 16, and the age at which children may require particular protection. There are circumstances in which children who are above the age of consent (i.e. those of 16 and 17) may not be in a position to properly give their consent to sexual activity with certain people in positions of trust and authority. In principle we think that children up to the age of 18 deserve protection from abuse and exploitation in situations where they might not be able to make an informed and mature choice of sexual partner because of their dependence on members of the family. Children in a family are particularly vulnerable and there is anecdotal evidence that some incest starts at the age of consent. The argument for applying any offence of familial abuse to children under 18 is overwhelming. Until that age they are still legally children and dependent in many ways on adult parents or guardians. Where children under 18 are involved in a prohibited sexual relationship under our proposed offence, the responsibility and the criminal culpability always must lie with the adult.

**Recommendation 36: For the purposes of the offence of familial sexual abuse, the prohibition on sexual relations with a child should apply until the child is 18.**

#### *Structure of the new offence*

5.5.8 In structuring our new offence we had several key objectives:

- To include and extend the present law of incest as it applies to blood relatives;
- To extend the scope to other formal family relationships such as step-parents and foster-parents;
- To encompass more informal or temporary relationships within the family – the de facto partner or live-in lover.

We thought that the offences should primarily be about protecting children under 18, but that we needed to consider whether any restrictions should be placed on adults (as they are in the current incest offence).

5.5.9 The first consideration was what kind of behaviour should be covered by this offence. The current offence of incest applies solely to vaginal sexual intercourse with girls. If we are seeking to protect all children in the family, we need to ensure that the offence can extend to all forms of sexual penetration. Our new offence should provide protection from all kinds of penetrative sexual activity by close family members. It should apply to men and women who sexually penetrate, or are sexually penetrated by, children in the family; and the adults must be held responsible by the law. We did consider whether the offence should extend to other forms of sexual activity, but thought that would broaden it unacceptably into potentially a very wide and uncertain range of behaviour. That does not condone inappropriate sexual behaviour and we are proposing offences that will provide a remedy against this for all children. It merely reflects that this serious offence, which traditionally has been limited to vaginal intercourse, should be restricted to the most serious and abusive behaviour. We are indeed widening it to include any form of sexual penetration, whether genital, anal or oral.

5.5.10 The key element of our familial sexual abuse offence is not just that it is serious sexual abuse perpetrated against children within the family unit. The offence is intended to preserve vital sexual boundaries in family situations and therefore making the rules clear to all and so maintaining safety zones for all of us.



### ***Replacing Incest***

**5.5.11** In looking at the policy aims, we thought that the way to define the different family relationships with the clarity and certainty needed by the law was to divide the offence into three sections. Our key policy aim was to increase protection within the family, including looser and more informal arrangements than the traditional family. That meant that the kind of definition linked only to bloodlines as in the offence of incest was no longer tenable on its own. We thought very carefully about the kind of definitions needed, and how we might need to define several different groupings within one offence.

**5.5.12** The first of these could be based on the traditional incest offence – of close blood relations. However we recognised that the present list in the 1956 Act was not necessarily the one to follow. In England and Wales, the offence of incest applies to blood relations, including half relations who are in the direct blood line. The equivalent Scottish offences are wider, and include adoptive parents and uncles and aunts. One idea mooted at our seminar was that we should consider those relationships where the act of marriage is prohibited as a starting point, but these proved to be so complex that it was impractical. There are, however, strong arguments for ensuring that uncles and aunts, nephews and nieces are included in the scope of the offence:

*'Russell found that abuse by uncles was the most prevalent form of abuse by relatives in her survey.<sup>110</sup> 46 per cent of the abuse for which they were responsible was classified as very serious. Similarly, West<sup>111</sup> found that in one of his two samples, sexual contact between a child and an adult uncle was the most prevalent form of such contact with relatives.'<sup>112</sup>*

**5.5.13** We considered the issue of uncles and aunts, with some concern that in many families friendly but unrelated adults are called uncle or aunt by the children. However we did not think this should be an objection because blood relatives are in a particular position of trust to their nieces and nephews; whatever the children may or may not know, the adults will understand the kinship and that any sexual relationship would be wrong. Accordingly we thought that any new offence should explicitly mention uncles and aunts who are blood relatives. Hence, the first limb of the new familial sexual abuse offence should outlaw sexual penetration of children under 18 by their blood relatives as in the present law with the addition of uncles and aunts.

***Recommendation 37: The offence of familial sexual abuse should apply to the sexual penetration of a child by all of those relations included in the existing offence of incest with the addition of uncles and aunts who are related by blood.***

**5.5.14** We found greater difficulty with those who join a family by marriage or de facto relationship. These 'uncles and aunts' may have access to children as members of the family, and would often be in a position of relative power and authority. We can see strong arguments on the basis of protecting children within the family that they should be included in the definition of this part of the offence on the basis of protecting children under 18. In section 5.8 below we argue for the retention of the prohibition on sexual relationships between close family members through concern about the imbalance of power and increased risk of abuse, and define those close relationships by the relationships caught in this part of the proposed offence. We did not think

<sup>110</sup> Very serious sexual abuse was defined as completed and attempted vaginal, oral or anal intercourse, cunnilingus, or anilingus, forced and unforced. The Russell survey consisted of interviews with 930 randomly selected adult female residents of San Francisco. Of these 20 had been abused by a brother/half-brother, 42 by a father and 46 by an uncle.

<sup>111</sup> D J West, *Sexual Victimization* (1985).

<sup>112</sup> Professor Jennifer Temkin, *Do we need the crime of incest? – Current Legal Problems* 1991 Vol 44.

that these considerations were sufficiently strong to justify a permanent adult prohibition on relationships with those who join a family by marriage or partnership (and who may also have left it again very quickly). We thought that we would seek views more widely on whether those who in joining a wider family by marriage or partnership to become an uncle or aunt should be caught within this specific offence of familial sexual abuse, in addition to the wider protection granted by our other proposals.

- *Should uncles and aunts by marriage or partnership be included in the offence of familial sexual abuse in relation to children under 18 only?*

## 5.6 Other formal family relationships

### *Adoptive Parents*

5.6.1 The second grouping of people we considered were those who join family units in a formal way, or who create new families by adoption or fostering. For all intents and purposes the law of England and Wales treats relationships by adoption as on a par with relationships by blood: legally the position of the adoptive parent is the same as that of a natural parent and there is a prohibition against marriage with an adopted child. Some children are adopted at a very young age and may have no idea that their adoptive parents are not their natural parents. In 1984 the CLRC recommended that the offence of incest should apply to adoptive relationships.

5.6.2 We thought that adoptive parents undertook lifelong trust and responsibility to the children they adopted, and that they should be treated on a par with natural parents. We recommend that adoptive parents be included within the first limb of our new offence on the same basis as blood relatives. There are also arguments that the relationship is so important that this responsibility should continue throughout life or after an adoptive relationship has been ended. If adoptive parents are considered as the same as the natural parents of the child, we also considered whether there should be a permanent prohibition on sexual relationships (see paras 5.8.3 below).

***Recommendation 38: Adoptive parents should be treated on the same basis as natural parents for the purposes of the offence of familial sexual abuse.***

### *Adoptive Siblings*

5.6.3 The question of adoptive siblings is rather different to that of adoptive parents; they have no ties of blood but are brought up together as part of the same family. Once of age they are able to marry. However we thought that they were so intrinsically part of the family, and many may not know that they or their siblings are adopted (or understand what that means even if they know it) that it was important that this part of the law apply to them. Sexual relationships between adoptive siblings under the age of 18 should be prohibited on the same basis as those between siblings.

***Recommendation 39: Sexual relations between adoptive siblings should be prohibited until the age of 18.***

5.6.4 We have proposed that adoptive siblings under the age of 18 should be prohibited from a sexual relationship. We did not extend this prohibition into adulthood, but they would of course be free to marry with consent over the age of 16. We would not seek to prevent sex within marriage, and although we think that such an early marriage between adoptive siblings is unlikely, it is not impossible. Hence there would have to be a defence of marriage for adoptive siblings over the age of 16.



**Recommendation 40: There should be a defence of marriage for adoptive siblings over the age of 16.**

### *Step-parents and foster-parents*

5.6.5 The CLRC did not think the offence of incest should be extended to step-relationships or foster parents. Unlike the lifelong prohibition on marriage found in close blood relationships and adoptive relationships, those involved in a step-relationship can bring a private Bill before Parliament in order to allow them to marry,<sup>113</sup> whilst many people might find it unreasonable to put a life-long prohibition on foster carers. The CLRC also felt:

*‘that it would not be practicable to extend the offence [of incest] ... to foster children or de facto adopted children or to the children of one of the parties to a “common law” relationship. Some of these relationships are too transitory to form the basis of a criminal offence. They are all difficult to define with the degree of precision required for the criminal law, especially where the adults involved are cohabiting outside marriage.’<sup>114</sup>*

5.6.6 As we were considering an offence not of incest but of familial sexual abuse, we did not think that these concerns were still relevant. Foster and step-parents may only come into a child’s life for a short time, and they may do so at any age – even when a child is 16 or 17. On the other hand they may be the child’s parent for much of its life, or be the only parents the child has known. Foster and step-parents are formal relationships (sanctioned by marriage, or organised by local authorities). It is widely recognised that new partners may present a risk of physical or sexual abuse to a child. Any sexual relationship with a foster-child or step-child is a particular abuse of trust, and that should be recognised by the criminal law. We therefore recommend that the second part of our offence of familial abuse should relate to step-parents and foster-parents who sexually penetrate (or are sexually penetrated by) their children under the age of 18. We also thought that this prohibition should extend to the age of 18 even where the foster (or step) relationship had ended because that adult would still be in a pseudo-parental role of authority over the young person.

**Recommendation 41: The offence of familial sexual abuse should apply to step-parents and foster-parents. If that relationship has ended, a prohibition should still apply until a child is 18.**

### *Other familial relationships*

5.6.7 We also gave very careful thought to those who do not enter into any formal relationships in a family such as marriage or adoption but may play very important role in a child’s life. It was put to us very strongly at our consultation conference that some of the greatest risks to children came from people, particularly men, who were in a short term relationship with a parent, or who have sought a position of trust in a family in order to gain access to children. If these people were to abuse a child under 16, then our proposed offences of sexual abuse of a child would apply, but that does not address the separate issue of how children within any kind of family structure should be protected by the law. While families may be loosely defined, we must look to ways to ensure that the law makes it crystal clear that abusing the trust of a child within the family is abhorrent and unacceptable. However as the CLRC noted the issue of clarity and certainty are important.

<sup>113</sup> In July 1980 a private Bill enabling a man to marry his step-daughter received the Royal Assent (Edward Berry and Doris Eileen Ward (Marriage Enabling) Act).

<sup>114</sup> Criminal Law Revision Committee fifteenth report – sexual offences, April 1984.

5.6.8 In order to maximise the protection the law gives children in families in England and Wales, the review considered whether an offence similar to the Scottish model (where an adult lives in the same household as the child under the age of 16 and is in a position of trust and authority over them) was a useful approach. The criminal law of England and Wales has in general not regarded a broadly defined offence such as this offered sufficient clarity and rigour to be acceptable. However, if the law is seeking to deal with more fluid modern families where it is not always possible to establish a position based on marriage, or other legally defined relationships, we need to think carefully about how an offence could be defined. It would leave an unacceptable gap in the protection offered in the family if there were no offence for live-in partners, and it would also risk creating a perverse disincentive to marriage.

5.6.9 It is worth noting that the Scottish offence was originally proposed by their Law Commission<sup>115</sup> who did not think that the phrase “living in the same household” should cause any difficulty. It was used in other legislation and seemed to draw a line between casual visitors, babysitters etc and those who formed part of a household whether on a temporary or permanent basis. The facts would need to be established in any given case. For ‘household’ Scots commentators have identified:

*‘There has been widespread recognition of the fact that one of the principal rationales behind the criminal law of incest is the protection of young persons against sexual abuse by those of whom they may be in awe or by those who occupy positions of trust in relation to them ... The Act does not define the circumstances in which the requirement that the accused was a member of the same household as the child will be satisfied. It would not do too much violence to the ordinary meaning of the words to hold that a lodger was a member of the household, particularly if all meals and all other facilities were shared with the family. A relative of the family, with no other home, but who spent long periods away might nonetheless be considered a member of the household, while an older cousin of the child, with a home of his own, who spent occasional periods as a visitor would probably not be so considered. In each case it must be a question of fact, to be decided according to criteria such as length of time spent in the same home and the confidence and status accorded by the family to the accused.’<sup>116</sup>*

Some commentators believe that physical presence within the household is important but not decisive. They thought that a person may be a member of a household even while temporarily absent, especially if such absence is involuntary, e.g. in hospital, in prison, on active service.

5.6.10 Another question is what constitutes a position of ‘trust or authority’:

*‘Any person who has custody of a child ought, in principle, to be treated as standing in a position of trust or authority towards the child, whether or not he or she had de facto control and care of the child.’<sup>117</sup>*

<sup>115</sup> Report on the Law of Incest in Scotland – 1981.

<sup>116</sup> Stair Memorial Encyclopaedia ‘The Laws of Scotland’.

<sup>117</sup> Christopher Gane ‘Sexual Offences’: Incest and related offences. The Scottish Criminal Law and Practice Series.



The Scottish Law Commission Report<sup>118</sup> envisaged a variety of cases where an adult might be in a position of trust or authority, but in the context of within a household said:

*'An adult such as a friend of the child's mother, or relative by marriage living in the same household might establish a relationship of trust or authority over the child'.*

This would certainly provide protection in looser familial relationships.

**5.6.11** There is also a similar offence in the New Zealand Crimes Act 1961, where the child is under the age of 20 years and at the time of the sexual intercourse lives with the accused as a member of his family and is under their care and protection. The phrase living with him as a member of his family is interpreted as referring to the relationship in which the persons concerned are living in the same domestic situation.<sup>119</sup> The family is the accused person's if they are a member of the group of people who comprise it, and children are not restricted to the natural children of the accused.

**5.6.12** In the light of the experience in Scotland, the offence has not proved difficult and is used, albeit occasionally. Although we recognised that the offence was broader than was customary in our law we thought that it was sufficiently clear and comprehensible for effective prosecution and to be fair to the defendant. We thought that the courts could readily establish on the facts whether any particular case met the conditions of the offence. Without such an offence children in families where there are transient relationships and there could be a higher risk of abuse would not have the protection offered to children in more stable families. And the last thing we wanted was for the criminal law to provide a perverse disincentive to marriage.

**Recommendation 42: The offence of familial sexual abuse should apply to sexual penetration with or of a child by any other person who is living in the household and in a position of trust or authority over that child.**

**5.6.13** In summary, the offence of familial sexual abuse should protect children under the age of 18 in a family from all forms of sexual penetration. This offence should fall into three parts to cover:

1. blood and adoptive relationships;
2. step-parents and foster-parents;
3. other persons living in the household and in a position of trust or authority over a child.

## **5.7 Where both parties are children under the age of 18**

**5.7.1** We recognised that familial abuse could take place between family members who were under the age of 18. The review considered whether such sexual activity could be compared to under-age sex between unrelated children, as discussed in Chapter 3 of this report. The evidence from research and the experience of those who worked in the child protection area was that incestuous penetrative sex between siblings was almost certainly exploitative and certainly not

<sup>118</sup> 'The Law of Incest in Scotland' Cmnd 8422 (1981).

<sup>119</sup> Adams on Criminal Law.



exploratory. The victims of such sibling abuse are primarily younger and weaker or more compliant; they seem usually to be girls. The acts are not mutually agreed and we did not think that there should be a diversionary route for under-age siblings. In such circumstances the culpability is clear: it lies with the dominant sibling. Such abuse is very serious, with potentially very harmful long-term consequences. It is essential that the victim is protected and the offending behaviour tackled and treated. Therapeutic intervention would almost always be essential. It is important however that there is a remedy in the criminal law to deal with this very serious behaviour, where necessary.

## 5.8 Should there be a familial sexual abuse offence between adults?

**5.8.1** It has been argued that the offence of incest should not apply to sexual activity between consenting adults, on the grounds that it is not harmful to society as a whole, and that adults have a right to make decisions about their own sexual behaviour in private. In 1984, the CLRC considered whether incest should cease to be an offence once both parties reached a specified age. A large body of research indicated that most of these relationships began when one of the partners was a child, and that often it represented a long-term abuse of power. It seems unjust to deny someone redress through the criminal law who later in life realises that the relationship they have been involved in has not been appropriate, or where they were unable to make a complaint until older, especially when they themselves might have been groomed or coerced into consenting to the act. The CLRC concluded in this instance that it is one of the functions of the law to uphold certain basic moral standards.

**5.8.2** The review also considered this point. One of our guiding principles was to uphold the rights of adults to consensual sexual relationships in private, reflecting the ECHR respect for private life. Siblings or half-siblings may meet as adults, not even knowing that they are related. They are attracted and a sexual relationship develops. It is important to recognise that that relationship would only be criminal if they knew they were related. This has even formed plots in soap operas. Such cases very rarely come to the attention of the law or are prosecuted. This may be an innocuous scenario, but evidence to us, and the CLRC, pointed to the fact that many adult incestuous relationships are based on long term grooming and pressure from childhood, and are not genuinely consensual. It is quite proper to argue that, in such situations, an adult's right to exercise sexual autonomy in their private life is not absolute, and that society may properly apply standards through the criminal law that are intended to protect the family as an institution as well as individuals from abuse. In addition to this, the ECHR ensures that the state must uphold its responsibility to provide a remedy in law so that a complainant can seek justice.<sup>120</sup>

**5.8.3** The review concluded that it would not be right to seem to legitimise sexual relationships between adult family members. The dynamics and balance of power within a family require special recognition, and we were concerned to ensure that patterns of abuse established in childhood were not allowed to continue in adulthood. Our new offence of familial abuse contains as its first limb an offence comparable to incest – sexual penetration between blood relatives and also between adoptive parents and their children. We thought that there was clear justification in terms of the protection of the family unit that such behaviour should continue to be illegal.

**5.8.4** The Scots offence of sexual intercourse by a step-parent applies until a child is 21, or in certain cases for the life of the child. We were less sure about the need for a lifelong ban on these sexual relationships. Recognising the risks of grooming and long term abuse of power, we also recognised that a step-parent may enter a child's life once he or she is a mature teenager, or indeed when adult. The Scottish offence applies a life-long ban if the child has been living in the household and treated as a member of the step-parent's family at any time before reaching their 18th birthday.

<sup>120</sup> X and Y v The Netherlands.



There is, however, a defence of marriage. We could envisage situations where a sexual relationship between an adult step-child and a step-parent could be equivalent to that with an adoptive or natural parent, for instance where the step-parent had been part of the family for much of the childhood, and was therefore unacceptable. We could also envisage situations where it would not, where the step relationship was much more tenuous. We were not convinced that such relationships should be criminal, even if they may not always be desirable.

- *The arguments as regards step-parents were more finely balanced and we would welcome views on whether the law should prohibit adult relationships with step-children and if so whether that should be limited to those who had lived as a child of the family of the step-parent for a given length of time.*

**5.8.5** The same arguments apply with even greater strength to foster-carers, where marriage is not prohibited, and we thought there was not a strong case for prohibiting sexual relations between adults. Similar reasoning applies with even more force to the third part of our proposed offence, that of a person in a position of authority in a household. We thought that should not be an offence in adulthood.

**5.8.6** One question which did concern us was the culpability of adult offenders who have sex with each other. In our main familial sexual abuse offence we have proposed that where a child is involved, the adult is culpable. However, when two adults have a relationship, either could be the dominant partner. It was suggested to us that the current offence (section 11 of the Sexual Offences Act 1956) which makes a woman over the age of 16 potentially culpable under certain circumstances prevents some victims from coming forward, and that women who were abused in childhood were later prosecuted for continuing the relationship into adulthood. Some submissions received by the review point out that women too can be instigators of the offence.

**5.8.7** There are very few prosecutions under this section. This may reflect the fact that little adult incest comes to the attention of the law, or that women are rarely perpetrators. In principle, however, the law should be able to deal with perpetrators of either sex. It must be for the police as investigators and the CPS as prosecutor to determine who was the instigator, and who should therefore be regarded as culpable, on the facts of each case. That decision must be informed by a full knowledge of the relationship, and the length of time it has been going on. The knowledge that adult incest was commenced or instigated when one person was a child must be a positive indication of long term abuse and that that person is the victim. A pattern of behaviour started in childhood should always be the responsibility of the adult.

**5.8.8** The present law only applies when the partners know that they are related. That seems an essential part of the offence, as adults are in general free to enter into sexual relationships, and without the knowledge of the relationship there would be no intent to commit the offence and hence no guilty mind. It is important that this element of intent be retained.

***Recommendation 43: Sexual penetration between adult close family members (defined as certain blood and adoptive relationships) should continue to be forbidden by law.***

***In the light of evidence about the early onset and abusive nature of incestuous relationships started in childhood, the responsibility for any offence should sit with the person who was adult at onset.***

## **5.9 Defences**

**5.9.1** Consent is not a defence to any of our proposed offences in this chapter.



# Chapter Six

## Issues of Gender and Discrimination

### 6.1 Introduction

**6.1.1** Sex offences are an important part of the criminal law. They are concerned with behaviour that society recognises as both unacceptable and criminally culpable. In our work, we have taken great pains to ensure that only behaviour that is criminally blameworthy attracts the heavy burden of a criminal offence. We recognise that it is possible for both men and women to perpetrate sexual crimes on others. We also operate within the dynamic framework of the European Convention on Human Rights, which sets out the rights of citizens and ensures that the enjoyment of these rights should not be the subject of unnecessary discrimination.

**6.1.2** The theme of the extent and nature of the discrimination in the law was a significant element in the responses to our initial consultation exercise (following the issue of the public consultation document 'A review of sex offences'<sup>121</sup>). We were given a consistent message that the law discriminates against certain sections of our society, most notably homosexual men. This message was supported by the research commissioned by the review, the views expressed at conferences and seminars, views of legal professionals, academics, social commentators and the personal experience of members of the review groups themselves.

**6.1.3** Our role was to consider the rights and responsibilities of individuals to make their own decisions about consensual sexual behaviour and the controls that society needs to impose in order to protect its more vulnerable members. In addition, the law needs to ensure that protection is offered to everyone regardless of gender, race, sexual orientation or any other factor and that it operates fairly and equitably. The basic set of assumptions underlying the work of the review which are of most relevance to issues of gender and discrimination were that:

- any application of the criminal law must be fair, necessary and proportionate;
- the criminal law should not discriminate unnecessarily between men and women nor between those of different sexual orientation;
- the law should not intrude on consensual sexual behaviour between those over the age of consent without good cause.

### 6.2 Problems in the present law

**6.2.1** Sexual offences are for the most part gender specific. Our law is cast in terms of men committing certain offences and women committing others. The offences for sex with an underage child are for men 'unlawful sexual intercourse with a girl' and for a woman 'indecent assault'. Similarly men and women (and in this context men and women also means boys and girls) may be victims of different offences with different penalties. This leads to anomalies and inconsistencies in the way offenders are dealt with for what is essentially similar behaviour. It was strongly argued that this kind of differential treatment was not justified; unless there was a specific reason, offences should be couched in gender-neutral terms.

<sup>121</sup> Dd 604402 CCN077828 1/99 C.2000.



**6.2.2** The law treats consensual sexual behaviour differently according to sexual orientation. It permits a wide range of heterosexual (and implicitly same-sex female) behaviour and sets out the exceptional situations when such behaviour is illegal. However, consensual same-sex adult male sexual activity is permitted only in certain narrowly defined circumstances, otherwise it is illegal. The most cited examples were the differential age of consent (which is being equalised in the Sexual Offences (Amendment) Bill) and by the requirement that only behaviour in private (which is defined as when no more than two people are present) is permissible<sup>122</sup>. In this way, the law restricts the private life of gay men and bisexuals in a way that it does not apply to heterosexuals. That in itself raises important questions under Article 8 of the ECHR which protects the right of a citizen to the enjoyment of his private life and this, combined with Article 14 which guarantees non-discrimination in the exercise of Convention rights, is a powerful impetus for ensuring that consenting adults are treated consistently by the criminal law.

**6.2.3** There are many inconsistencies in the law. The penalties for homosexual offences are higher than for equivalent heterosexual offences. There are also differences in the statutory defences available to the offences – although there is a statutory defence for the offence of unlawful sexual intercourse with a girl under the age of 16 (section 6(2) of the Sex Offences Act 1956) there is no equivalent defence for anal intercourse with a girl or boy under the age of consent.

**6.2.4** The key question to address is whether it is right for the criminal law to be used to regulate consensual sexual behaviour between consenting adults where there is no harm to either of them. The criminal law is not an arbiter of private morality but an expression of what is needed to protect society as a whole. In a tolerant and diverse society, the law should be based on a public morality that protects the individual from danger, harm, fear or distress, with additional safeguards for the younger and frailer members of the community. This would provide a structure that broadly permits consensual activity in private but is effective against force, coercion and harm. Respect for private life means that any regulation which is proposed must be limited to what is necessary in a democratic society and proportionate to the problem. Such a concept of the criminal law does not condone or advocate any particular form of sexual behaviour, but is based on principles of preventing harm and promoting public good.

## **6.3 Views expressed during public consultation**

**6.3.1** The public consultation exercise revealed a widespread concern about the extent of the discrimination in the law. One third of all the submissions to the review, 53 out of 160, were directly concerned with discrimination against homosexuals. They argued that this differential treatment was not only wrong in principle, it implied that those taking part in such behaviour were inferior and abnormal. This was counter to the Government's avowed principles of equality, and hindered the establishment of a safe, just and tolerant society. Differentiation in the law can be seen as justifying discrimination and homophobia in society; neither of which is acceptable in a civilised country. It was also pointed out that the attitudes in society towards sexual orientation were changing. Many more people seemed to be willing to accept homosexuals as themselves, and this change in attitude was supported by newspapers and opinion polls. There were indications of a greater openness towards and acceptance of differing sexual orientation.

**6.3.2** Respondents suggested that the role of the criminal law was to establish the broad standards of harm in society and where criminal culpability should apply. The law does not affect the beliefs of any faith that any particular sexual practices are wrong. Some faith groupings believe that same sex relationships are inherently and morally wrong. But there is considerable debate within many faiths about sexual orientation and attitudes vary widely.

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<sup>122</sup> Both issues have been referred to the European Court of Human Rights. *Sutherland v UK* (differential age of consent) and *ADT v UK* (privacy provisions).

**6.3.3** A number of contributors pointed out that anal intercourse should not be automatically correlated with male same sex relationships. Some heterosexual couples also practice anal intercourse, and some gay male couples do not. All unprotected sexual intercourse, whether anal or vaginal, carries health risks. Discrimination against gay men in the law is part of a wider social taboo, which can create a barrier to effective health promotion.

**6.3.4** The submissions received by the review show that the majority of gay men find the language of the current ‘homosexual offences’ extremely offensive in itself. Furthermore, it was argued that the drafting of these offences lacked the clarity required to ensure consistency of treatment, clarity which is called for under Article 7 of the ECHR.

## **6.4 Issues of gender and discrimination in other jurisdictions**

### ***Australia***

**6.4.1** Australia has a federal system of government, where the States and Territories are responsible for most of their criminal law. Commonwealth legislation has been introduced to protect consenting persons over 18 who are acting in private from intervention with their private sexual life. The policy of the Model Criminal Code was to have gender neutral offences. The Australian Capital Territory, Victoria, South Australia and Tasmania have no specific same sex offences. Tasmania had a total ban on homosexuality until 1997, when the law was changed following the UN Human Rights Commission finding in the case of Toonen that the State was in breach of the International Covenant on Civil and Political Rights (ICCPR). New South Wales, the Northern Territory, Western Australia and Queensland have differential ages of consent for heterosexual and same sex behaviour.

### ***Canada***

**6.4.2** The Canadian Criminal Code contains a differential age of consent for anal intercourse of 18 in contrast to the general age of consent of 14 (section 159 of the Canadian Criminal Code 1985). There is an exception where the act takes place in private between a husband and wife. This offence is under review because of court decisions indicating that the age should be consistent with the general minimum age. Canada had a very similar gross indecency offence to the UK, but this was repealed some time ago.

### ***European Union other than the United Kingdom***

**6.4.3** Austria repealed its total ban on homosexuality in 1971. It still has differential age of consent provisions. There are no specific laws in Belgium regarding homosexual activity. Article 372(2) of the Penal Code which applied a differential age of consent was repealed in 1985. Denmark made fundamental changes to its law as early as 1930 when consensual sexual relations between adult males were decriminalised, with full equality in relation to sentencing matters in 1981. Homosexual acts in the Federal Republic of Germany were decriminalised in 1994 (section 175 of the Strafgesetzbuch [German Penal Code]) and all men and women under the age of consent receive the same level of protection. The Greek Penal Code contains one offence (Article 347) relevant to consensual sexual activity between males, which contains a higher age of consent provision for ‘seduction’. In the Republic of Ireland the Criminal Law (Sexual Offences) Act 1993 abolished the offences of buggery and gross indecency and put in place an equal age of consent for male homosexual relations.



**6.4.4** The Italian Penal Code contains no specific homosexual offences. Luxembourg repealed its sodomy laws in approximately 1794. Although a differential age of consent was introduced in 1971, these provisions were abolished in 1992. There are no remaining homosexual provisions in Dutch Criminal law – differential age of consent provisions were repealed in 1971. In 1945, Portugal decriminalised homosexuality for the second time in its history (the first decriminalisation took place in 1852 but a total ban was reintroduced in 1921). The reform of the Penal Code in 1995 retained a higher age of consent for anal intercourse, when other ages were reduced. The criminal law of Spain contains no specific homosexual provisions. Sweden has no homosexual provisions in its criminal law and the age of consent has been equal since 1978.

### *New Zealand*

**6.4.5** New Zealand decriminalised all consensual sexual relations between adult males. Section 128 of the Crimes Act 1961 defines ‘sexual violation’ as the act of a male who rapes a female or the act of a person ‘having unlawful sexual connection with another person’ so that non-consensual acts are criminal. There are separate provisions for anal intercourse with children.

### *Republic of South Africa*

**6.4.6** The Republic of South Africa is reviewing its law on sexual offences. Homosexual provisions are contained in the Sexual Offences Act 1957. The South African Law Commission has recently published a discussion paper in which it recommends repeal of the offence of sodomy. Non-consensual anal intercourse is to be included in a revised definition of rape, and provisions to strengthen protection for children and vulnerable people are also being recommended.

## **6.5 The policy of the review**

**6.5.1** The review considered whether there was any justification for treating men and women differently in the criminal law, or for making different provision for those of differing sexual orientation. We could find no justification for doing so. Consensual sexual behaviour between adults is an important part of their private life. There must be powerful reasons for applying the weight of the criminal law to consensual behaviour between adults, with all the accompanying burden of a criminal record, (particularly for a sex offence). We do regard this as necessary to protect the most vulnerable members of society, those in receipt of care for example. That is necessary and proportionate. We could see no public policy justification for the criminal law entering into private consensual activity, which was causing no harm to those involved.<sup>123</sup>

**6.5.2** We have consulted various faith groups, and involved them in discussion on these issues. We fully recognise that individuals must abide by their own beliefs as to what is right and wrong. Nothing we would do should affect those beliefs. At the same time those who hold sincere beliefs also recognise that that the democratically constituted law of the land has to be obeyed. The role of the criminal law is not to criminalise activity because certain sections of society disapprove of it, but to define what society as a whole is not prepared to tolerate. We did not think that the criminal law, which is the means by which the state defines what is sufficiently blameworthy as to be criminally culpable, with all that entails, should treat consensual same sex or heterosexual behaviour differently. The key issue is that of consent: the law clearly should apply where there is none. We also accepted the argument that by describing a section of society as ‘unnatural’ the criminal law discriminates, legitimises prejudice and could be seen as a contributory factor to homophobia.

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<sup>123</sup> Some submissions to the review mentioned the issue of sado-masochistic sexual activity. This is outside our terms of reference as they relate to actual bodily harm which occurs in a sexual context. The law at present does not allow a person to consent to what would be actual bodily harm, and that issue is properly to be considered in the context of offences against the person and the law on consent.

**6.5.3** If we define offences as those where there is no consent (or where particular protection is required, e.g. for children and vulnerable people, or to deal with offensive behaviour in public) then it makes sense for offences to apply to victims and perpetrators of either sex wherever possible. In some instances we have thought it necessary and proportionate to identify some gender-specific offences, but for the most part it is easier and clearer to provide gender-neutral offences that apply to all kinds of sexual penetration or sexual activity. In all our proposals sexual penetration applies to any anal or genital penetration, or penile penetration of the mouth. Sexual activity is defined as activity which a reasonable bystander would consider to be sexual (as in the Sexual Offences (Amendment) Bill). We think this approach is simpler and clearer.

**Recommendation 44: The criminal law should not treat people differently on the basis of their sexual orientation. It should offer protection from all non-consensual sexual activity. Consensual sexual activity between adults in private that causes no harm should not be criminal.**

## 6.6 The homosexual offences

**6.6.1** The present law on homosexual behaviour has evolved slowly over time. Until 1967 all male same-sex conduct was illegal; the law reflected the then prevailing belief that such conduct was an abomination. Indeed many people believed that homosexuality was an illness that could be cured. It is, however, now recognised that homosexuality is an orientation rather than an illness, and that making same sex behaviour criminal is cruel and unnecessary. By 1957 the Wolfenden report was able to recommend that this use of the criminal law was no longer an appropriate social response and that homosexuality should no longer be proscribed. A decade of Parliamentary controversy followed until the Sexual Offences (Amendment) Act 1967 created the present structure of offences.

### *Gross indecency (section 13 of the Sexual Offences Act 1956 – Indecency between men)*

**6.6.2** This section creates two offences: one of committing, or being party to the commission of, an act of gross indecency; and one of procuring such an act. The offence is not committed if both parties are over 18<sup>124</sup> and the activity takes place in private. The definition of privacy in the Act makes it illegal for homosexual acts to take place:

- (a) Where more than 2 persons take part or are present;
- (b) In a lavatory where the public have or are permitted access, whether on payment or otherwise.

**6.6.3** These definitions mean that any kind of group or observed activity between men, however much it is conducted in conditions of actual privacy, is illegal. No such provisions exist for heterosexual or lesbian activity (except for anal intercourse, see below). The definition was included in the Sexual Offences Bill 1967 to meet fears about homosexual clubs and displays of sex. This provision has been the subject of a challenge to the ECHR, in the case of *ADT v UK* as a potential breach of Article 8, the right to a private life, and Art 14, discrimination in the enjoyment of those rights. We did not think its retention is justified in public policy terms. Other aspects of the offence relate to sexual activity in public, which raises very different concerns, and these are discussed in Chapter 8.

<sup>124</sup> The Sexual Offences (Amendment) Bill will amend this to 16 in England, Wales and Scotland, and to 17 in Northern Ireland.



**6.6.4** Gross indecency is not defined in law, and most people probably do not understand exactly what it means except that it sounds very unpleasant. The Wolfenden Committee concluded that the words had acquired a fairly fixed meaning in relation to male homosexual acts, including mutual masturbation and oral sex. The offence may also be committed without any physical contact, e.g. Hunt and Badsey<sup>125</sup>. The language of the offence is broad, unclear and regarded by many as offensive.

**6.6.5** It is not an offence for a woman either to be a party to, or to procure, the commission of the offence (although it is possible for a man to be guilty of that offence). Section 13 effectively creates a series of victimless crimes by criminalising behaviour between adult homosexual men which is within the law when the participants are men and women.<sup>126</sup>

**6.6.6** The review can find no justification for retaining an offence that deals solely with same sex behaviour between consenting adults in private. We have considered separately those elements of the offence that relate to sexual behaviour in public places, and make recommendations on that in Chapter 8 (Other Offences). We have also recommended separate offences to protect children.

#### ***Buggery (section 12 of the Sexual Offences Act 1956)***

**6.6.7** There are several key elements to the current offence of buggery, but only the two that deal with *consensual* sexual activity between adults are discussed in detail here. These are:

- anal intercourse by a man with a man;
- anal intercourse by a man with a woman.

**6.6.8** An offence is committed when either party is below the age of consent (which is currently 18 for both women and men, but the passage of the Sexual Offences (Amendment) Bill will equalise these with the age of consent for vaginal intercourse). An offence is also committed if both parties are over the age of consent but the act does not take place in private (defined as set out in para 6.6.2 above). (A replacement for the part of S12 which deals with sex with animals is proposed in Chapter 8, and the protection of children in Chapter 3).

**6.6.9** Anal intercourse with a girl or boy under the age of consent does not, unlike unlawful sexual intercourse with a girl under 16, have any form of statutory defence. Because the wording of the 1956 Act states that it is an offence for 'a person' to be charged with buggery, it means that both parties can be charged as principals. A child involved with an adult is potentially liable to prosecution – this inequity should be removed by the Sexual Offences (Amendment) Bill.

**6.6.10** Section 12 is fundamentally flawed. It deals in a discriminatory way with consensual same-sex activity, placing very different restrictions on anal intercourse to other forms of intercourse. It equates anal intercourse with bestiality, and includes all within the same unpleasant term of 'buggery'. It does however deal with some genuinely criminal matters of anal intercourse with children, and sex with animals. These are issues that the criminal law should address, but there are alternative ways of doing this that provide protection to children and animals without criminalising adult same sex behaviour. The review makes separate recommendations for how the criminal law should provide children with protection from all forms of sexual penetration, how the law should deal with sex with animals and sexual behaviour in public. We do not believe that there is any justification for retaining the offence of buggery, or anything like it, to deal with consensual adult anal intercourse, and every reason in terms of fairness and equity to remove it from the law.

<sup>125</sup> [1950] 34 Cr App R135: the defendants were convicted after being discovered in a shed indecently exhibiting themselves to each other.

<sup>126</sup> Mrs E Frances Russell; Review of Sexual Offences: Literature review of research into homosexual offences final report [March 1999].



**Recommendation 45: The present offences of buggery and gross indecency should be repealed, with separate provision made for the protection of children and animals and for regulating sexual behaviour in public.**

*Offences related to the current offence of buggery*

**6.6.11** Assault with intent to commit buggery (section 16 of the Sexual Offences Act 1956) and procuring others to commit homosexual acts (section 4 of the Sexual Offences Act 1967) are offences which rely on the existing offence structure for their purpose. We have recommended a separate new offence of an “assault to commit a serious sex offence” in Chapter 2 as a replacement offence which will replace assault with intent to commit buggery. Procuring others to commit homosexual acts relies on the definition of those acts being criminal; we are recommending that between consenting adults they should not be. The offence of procuring is therefore no longer needed. We have proposed other offences to deal with obtaining sexual penetration by threat or deception, or compelling others to do sexual acts (Chapter 2).

**Recommendation 46: S16 of the Sexual Offences Act 1956 and S4 of the Sexual Offences Act 1967 will no longer be necessary and should be repealed.**

*Soliciting by men (section 32 of the Sexual Offences Act 1956)*

**6.6.12** This offence appears to relate to soliciting for sex in a similar way that the Street Offences Act 1959 deals with soliciting by women. In fact this very broad offence is primarily used to regulate same sex behaviour in public. The offence was originally introduced to regulate the activity of men seeking the services of female prostitutes and the offence can only be committed by a man although the victim of the importuning may be another man or woman. In practice the charge is one laid almost exclusively against men soliciting other men. Case law indicates that even soliciting another man for lawful sexual activity can be considered an immoral purpose.

**6.6.13** Importuning and gross indecency are the two most commonly used offences used against men who are seeking sexual partners in or around public toilets (‘cottaging’) and ‘cruising’. In the case of *Crook v Edmondson* (1966)<sup>127</sup>, the Court of Appeal concluded that sexual intercourse with a female prostitute was not an immoral purpose, for the purposes of this section. By inference therefore the offence applied to soliciting for same-sex activity. The case of *R v Goddard* (1991)<sup>128</sup> later confirmed the offence as primarily one of regulating homosexual activity when it was held that the charge might only be used against a man soliciting a woman for **unlawful** sexual purposes i.e. where the woman was under the age of 16, or with an adult woman other than a prostitute. A man can be said to be ‘soliciting’ even by physical action alone: by a smile, wink, gesture or some other physical signal.

**6.6.14** There is also case law on whether a man can be soliciting or importuning for an immoral purpose if the purpose was to carry out lawful sexual activity (e.g. consensual sex in private between two male adults). In the case of *R v Gray* (1982)<sup>129</sup> the Lord Chief Justice confirmed that whatever the ultimate intention, the asking could be considered immoral:

*“these provisions are aimed at importuning rather than at the contemplated acts and that importuning for acts which are to take place in private may be as offensive to the public at large as importuning for acts which are to take place in public”.*

<sup>127</sup> All E.R. 833.

<sup>128</sup> 92 Cr. App. R. 185.

<sup>129</sup> 74 Cr. App. R. 324.



**6.6.15** The very broad wording of the section enables it to be interpreted very widely and section 32 has become a means of regulating behaviour between homosexual men which, if conducted between men and women would be seen as no more than ‘chatting-up’. The reasoning on the meaning of ‘immoral purposes’ seems to operate from a presumption that homosexual behaviour is inherently immoral. Although case law shows that the offence can be used for heterosexual soliciting, a man will only be guilty of soliciting a woman if his actions are unpleasant, offensive and disturbing to the victim. No such requirement has been applied to homosexual soliciting.

**6.6.16** The offence of soliciting by men is so broadly drawn that it does not provide certainty as to its meaning or intention. It has developed in use over the years to purposes that were not those intended when it was introduced. Its lack of clarity and certainty are problematic and make it open to inconsistency across the country. The role of the criminal law in this field is to deal with real nuisance, and to do so in a way that is readily understood by citizens and law enforcers. We are not persuaded that chatting up a person of the same sex in public should be criminal – such approaches to women are not criminal. We think that this offence does not stand up to scrutiny and that it should not be retained in the criminal law. We propose elsewhere (paragraph 8.4.11) a new public order offence to apply to inappropriate sexual behaviour in public that causes distress, alarm or offence.

**6.6.17** We do recognise that soliciting by men for sex for gain can cause a great deal of distress to local residents just as women soliciting in the street and public places can. The policy of successive Governments has been to retain legal controls on soliciting in public places to protect communities from nuisance and individuals from unwanted harassment in the streets. It would seem sensible that soliciting for the purposes of prostitution should be regulated similarly for men and women; we would suggest that the Street Offences Act 1959 should be extended to cover soliciting in public places by both men and women. In Chapter 8 we discuss the wider issue of sexual behaviour in public and recommend a new Public Order Act offence to enable the police to deal with it where it causes offence.

***Recommendation 47: Section 32 should be repealed.***

***Recommendation 48: Consideration should be given to the regulation of soliciting by men for the purposes of prostitution under section 1 of the Street Offences Act 1959 on the same basis as soliciting by women.***



# Chapter Seven

## Trafficking and Sexual Exploitation

### 7.1 Introduction

**7.1.1** This chapter looks at three different but interlinked topics. These are the trafficking of human beings for the purposes of sexual exploitation, the commercial sexual exploitation of children and the sexual exploitation of adults. The common theme for these three topics is that the sexual exploitation of individuals is often organised for financial gain by another. Indeed, there is increasing evidence to suggest that this is a growing area of transnational organised crime. It is important to emphasise that we are not looking at how or whether prostitution should be legal or illegal: that is beyond our remit. Therefore we have not looked at a swathe of offences in the Sexual Offences Act 1956 dealing with brothel keeping, etc., or parts of other Sexual Offences Acts that deal with kerb-crawling, or section 1 of the Street Offences Act 1959, except insofar as they link to the sexual exploitation of others. This whole area is a substantial one worthy of consideration.

**7.1.2** Trafficking and sexual exploitation are recognised internationally as important problems with transnational dimensions. The EU Joint Action on Trafficking in Human Beings and the Sexual Exploitation of Children<sup>130</sup> calls on EU Member States to review their laws on the sexual exploitation of children and on trafficking which is defined as any behaviour which facilitates the entry into, transit through, residence in or exit from the territories of a Member State with a view to their sexual exploitation or abuse. The Agenda for Action of the Stockholm World Congress on the Commercial Sexual Exploitation of Children required all signatories to develop a National Plan to combat the sexual exploitation of children, including the review of its law. This review of sexual offences is an important contribution to the development of the UK's National Plan.

**7.1.3** The sex industry is growing rapidly all over the world, and the International Labour Organisation has suggested that the sex sector is a significant component of many economies. Globalisation has seen a growth in the movement of people, capital and business. It has also seen a growing involvement of organised crime. The sharp divide between rich and poor, and the effects of economic and political disruption in Eastern Europe and beyond, both creates markets in the wealthy countries and people willing to supply those markets, aided by the ease of transportation.

**7.1.4** Trafficking for the purposes of sexual exploitation is a significant problem in many parts of the world. The Internal Office of Migration estimated that in 1995 half a million women were trafficked into the EU. We had the benefit of the first major UK research on trafficking in the UK, which estimated that between 142 and 1420 women a year were trafficked into UK to work in the sex industry.<sup>131</sup>

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<sup>130</sup> November 1996.

<sup>131</sup> Dr Liz Kelly and Linda Regan, Child & Women Abuse Studies Unit, University of North London, draft report, 'Stopping Traffic'. The numbers take as a baseline how many women came to the attention of the police, and then multiply by various factors to reach an assessment of the wider problem.



**7.1.5** We have also become increasingly aware of use of children in prostitution in recent years, as the children's charities have put in considerable effort to identify, tackle and publicise the problem. The Children's Society and Barnardo's have both published books, undertaken research and held conferences on the subject. The Association of Chief Police Officers has worked in partnership with the ADSS and other agencies to develop new multi-agency ways of working to treat children as victims rather than offenders. The Government is publishing new guidance for the police and social services and other agencies on how to deal with these children<sup>132</sup>.

## **7.2 Problems in the existing law**

**7.2.1** There is no specific law against trafficking people into the UK, but those trafficking women and then sexually exploiting them are breaking a very large number of laws. There have been some successful prosecutions for trafficking. The police told us that they found the following offences useful: sections 30 and 31 of the Sexual Offences Act 1956 (respectively 'a man living on the earnings of prostitution' and 'woman exercising control over prostitute'), section 25(1) of the Immigration Act 1971 (facilitation of illegal entry – although this can be complicated and technical to use), fraud and forgery, the common law offence of false imprisonment, and related offences of sexual and physical violence. They pointed out, however, that although the penalty for s31 was 7 years' imprisonment, in practice sentences were very low and 18 months was common even when large criminal organisations were involved.

**7.2.2** We had mixed evidence of the effectiveness of the present offences ss30 and 31 of the 1956 Act. The offences are complex and not readily understood. Those police forces with dedicated Vice Units who developed an expertise in the offences found them relatively straightforward and effective. Other forces without that degree of specialist knowledge found them too complex to be readily used. Police forces have to identify what priority to give to policing this area in the context of other conflicting priorities. We also noted that s30 places a reverse burden of proof on the defendant in certain circumstances to show he was not living off the earnings of a prostitute. This places a heavy burden on the defendant and raises fair trial questions under the ECHR. This provision has been considered in Strasbourg and found not to be a violation<sup>133</sup>, but the issue of whether a reverse burden is justifiable needs consideration.

**7.2.3** Some of the other existing offences in the Sexual Offences Act 1956 (s22 causing prostitution of women; s24 detention of woman in brothel or any other premises etc.) are very little used. In part, this may be because they carry low maximum penalties: two years' imprisonment, as opposed to seven years' imprisonment for living on the earnings or controlling a prostitute. Another reason is the fact that some of these offences rely heavily on the victims being willing to come forward and give evidence in court. This is a particular problem in relation to those who have been trafficked into this country. They are often too terrified to come forward on the basis that either the loved ones in their country of origin may be at risk, or that their families might be told of the work which they have been doing in this country, which can, in some instances, put the victims themselves at risk of harm when they return home.

**7.2.4** A number of people pointed out that there were few effective provisions in the law relating to the pimping or sexual exploitation of children. S28 Sexual Offences Act 1956 (offence of causing prostitution of a girl under 16) was very limited in its scope as it could only apply to a person in charge of the child, and it had a very low penalty. It was suggested that there should be increased focus on those who buy the services of children, such as the kerb-crawlers who looked for children and vulnerable young people. In this context the Government's commitment to provide a specific power of arrest for the police (which would apply to all acts of kerb-crawling

<sup>132</sup> Safeguarding Children in Prostitution, May 2000.

<sup>133</sup> X v UK (1972).

involving adults as well as children and vulnerable young people), was welcomed by most but not all commentators; some thought it would reduce the safety of women working on the street.

**7.2.5** The issue of children working in prostitution was raised on a number of occasions, with passionate arguments that those children should never face criminal sanctions, but should instead be treated as victims of sexual exploitation. That is an issue beyond this review, which acknowledges the risks that such action might encourage pimps and abusers to target such vulnerable people. Our prime aim is to increase the protection available to children. There was also evidence that young people could be involved in pimping, most recently in the Children's Society's report 'One Way Street' which indicated the importance of peer groups in inducing children into prostitution.

### 7.3 Contributions to the review

**7.3.1** The review held a consultation seminar on trafficking and sexual exploitation which generated lively debate and a number of proposals. (The report of this seminar is in Volume 2. Appendix H8). We also had some submissions on the law, some of which were critical of the limitations of our remit and sought a broader consideration of the regulation of the sex industry. Although our focus was on exploitation of individuals, many sex workers do not regard themselves as victims, and some feel that the current law denies them the right to a private life:

*'Section 30 (SOA 1956) also criminalises sex workers personal relationships in a way that could be challenged under Article 8 of the ECHR: the right to respect for private and family life.'*<sup>134</sup>

They felt that because the law made it wrong for a man to live off the earnings of a prostitute, potentially they were denied normal family relationships. They felt the law should differentiate between a person who lived alongside a prostitute as a loving partner and exploitative behaviour. We were told that the prosecution of genuine partners for living on the earnings of a prostitute was now unusual. However, domestic arrangements of 'pimps' should not provide a screen for their unscrupulous and exploitative activities. It would be all too easy for a pimp to intimidate a woman to claim she was agreeable to the exploitation, or for her to be so emotionally dependant on him that she would deny coercion. Some contributors suggested a separate offence or penalty for the mental control of another related to forcing them into prostitution.

**7.3.2** Contributors also felt that there were too few prosecutions using existing legislation:

*'... the law should afford as much protection from coercion to UK citizens as it does to others ... the activities of coercive and abusive pimps have been ignored by law enforcement agencies. Prosecutions under section 30 & 31 are in fact quite rare. That these sections do not necessarily reflect the seriousness of the offences committed against sex workers applies just as much to situations involving UK citizens as it does in the trafficking context. However, we would argue that the appropriate legislation to use in those cases would be that covering rape, kidnap, assault, threats to kill, abduction, etc. It may be that there could be useful changes in relation to these offences, to make it clear that the fact that the victim was a sex worker was NOT a defence, but an aggravating feature, especially if the victim was also a minor.'*<sup>1a</sup>

<sup>134</sup> UK National Co-ordinator for the European Network for HIV/STD Prevention in Prostitution (EUROPAP-UK): response to points raised at the Home Office seminar on trafficking and sexual exploitation, October 1999.

<sup>1a</sup> As above.



Part of this relates to the difficulty law enforcement agencies face in persuading victims to give evidence.

**7.3.3** Some expressed concern that enforcement seemed to be moving away from the victim being central in a prosecution. Not all women in the sex industry were happy with intelligence-led policing which did not require the co-operation of a victim. They suggested that strategies which bypassed victims were intrinsically problematic: fear of reprisal was not the only problem – hostile treatment by the authorities and the likelihood of being deported were serious barriers. Where a victim is willing to give evidence then she should be able to do so. Prosecutions based solely on police evidence and corroboration can be expensive and complex.

**7.3.4** There was general agreement about the need to build up international co-operation and to strengthen the law on the exploitation of children and adolescents where more serious penalties were needed. Exploiters' financial assets should be seized. Many of those behind the criminal organisations involved in trafficking were not based in the UK and could not be prosecuted, but the seizure of assets was an effective deterrent. Confiscation of criminal assets is a useful weapon in the fight against those who profit from sexual exploitation in this country as well as those involved in trafficking.

**7.3.5** The review was also able to draw on the expertise and specific knowledge of problems related to the sexual exploitation of children and trafficking given both by the children's charities and academics involved in the review. The police were generous in sharing their experience. We also had available specific research by the charities and the study commissioned by the review from Maggie O'Neill<sup>135</sup> as well as research from the Home Office on the issues concerned. Extracts from Barnardo's 'Who's Daughter Next?' were circulated to the review.

## 7.4 Legislation in other countries

### *Australia*

**7.4.1** There is a federal law on trafficking: the Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999 containing new federal offences directed at slavery, sexual servitude and deceptive recruiting. Where conduct amounts to 'slavery', or exercising a power of ownership over another person, the maximum penalty will be 25 years imprisonment. Where a person is engaged to provide sexual services because of force or threats and is not free to leave the arrangement, the sexual servitude offence provides penalties of 15 years imprisonment and up to 19 years if there is an aggravated offence, i.e. the offence was committed against a person below the age of 18. The deceptive recruiting offence applies to a person who, with the intention of inducing another person to enter into an engagement to provide sexual services, deceives that other person about the fact that the engagement will involve the provision of sexual services.

**7.4.2** The following definitions apply:

- **slavery** is the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.
- **sexual servitude** is the condition of a person who provides sexual services and who, because of the use of force or threats:
  - (a) is not free to cease providing sexual services; or

<sup>135</sup> Literature review of research on offences of sexual exploitation; Annex D3, Volume 2.

(b) is not free to leave the place or area where the person provides sexual services.

- **sexual service** means the commercial use or display of the body of the person providing the service is for the sexual gratification of others.

**7.4.3** There are limitations on both the offences of sexual servitude and deceptive recruiting (sections 270.6 and 270.7 of the Australian Criminal Code): the conduct has to take place outside Australia although the sexual services can be made available both within and outside the country. It also only applies to perpetrators who are Australian citizens; residents of Australia, etc. The sexual servitude offence has two elements:

- it applies to a person whose conduct causes another person to enter into sexual servitude or who intends to cause (or is reckless as to causing) that sexual servitude; and
- it applies to a person who conducts any business that involves the sexual servitude of others and who knows about, or is reckless as to, that sexual servitude.

**7.4.4** The conducting a business element refers to taking part in the management of, exercising control or direction over, or providing finance for it.

**7.4.5** Individual states have their own legislation. Tasmania has a set of procuring offences, including procuring a person to become a prostitute, either in Tasmania or elsewhere; procuring a person to leave Tasmania with intent that they become an inmate of/frequent a brothel elsewhere; and procuring another person to leave their usual abode in Tasmania, with intent that they may become an inmate of/frequent a brothel as a prostitute either in Tasmania or elsewhere. There are also offences of procuring unlawful sexual intercourse by threats or intimidation and by any false pretence or representation. Victoria has offences of procuring sexual penetration by using threats and intimidation or fraudulent means. Several Australian states have decriminalised prostitution.

### *Republic of Ireland*

**7.4.6** Following the Stockholm World Congress against the Commercial Sexual Exploitation of Children, and the EU Joint Action on Trafficking, the Irish Parliament passed the Child Trafficking and Pornography Act 1997. Part of this deals with offences of child pornography – including allowing a child to be used for the purposes of producing pornography. The specific trafficking offences make it an offence ‘to traffic children into, through or out of Ireland for the purpose of their sexual exploitation or to take or detain children for that purpose.’<sup>136</sup> Penalties proposed include a maximum of life imprisonment for the trafficking offence and up to 10 years for taking or detaining a child.

**7.4.7** Any person involved in the organisation of prostitution is liable to be penalised under a number of offences, e.g. organising prostitution or coercing or compelling a person to be a prostitute. They also have offences of knowingly living in whole or in part on the earnings of a prostitute.

**7.4.8** The review of sexual offences in Ireland considered the penalties for soliciting an under-age person, and thought that it was less likely for a complaint to be made in those circumstances. They instead proposed a totally new offence of soliciting a child for the purposes of prostitution with a penalty range that would make it an arrestable offence.

<sup>136</sup> Department of Justice, Equality and Law Reform: The Law on Sexual Offences, May 1998.



### *New Zealand*

**7.4.9** The Crimes Act 1961 contains several provisions relating to sexual exploitation. These include gender neutral offences of brothel keeping and living on earnings of prostitution. The offence of procuring sexual intercourse applies to a person, who, for gain or reward, procures or agrees or offers to procure any woman or girl to have sexual intercourse with any male who is not her husband. There are no specific trafficking offences.

### *Republic of South Africa*

**7.4.10** In its 1999 discussion paper, the South African Law Commission (SALC) made extensive recommendations about the commercial sexual exploitation of children. It was particularly asked to investigate sexual offences against and by children and to make recommendations to the Minister of Justice on this branch of the law. The SALC shared the sentiments of those making submissions and categorically stated that a complete ban should be placed on child prostitution and anyone involved in sexually exploiting a child, whether as a pimp or customer, should be severely punished for doing so. In order to portray uniformity with international instruments they have suggested that in the context of commercial sexual exploitation a child should be anyone under the age of 18 years.

**7.4.11** The SALC thought that commercial sexual exploitation implies sexual abuse of children based upon remuneration in cash or in kind and that the latter should be interpreted broadly to cover a variety of situations where there is some value, profit, benefit or consideration between the child and the adult or between the adult and another adult in regard to the child. They have included child prostitution, child pornography and trafficking in children as part of their proposals. The SALC takes the view that the commercially sexually exploited child is a victim in need of care and protection and not a criminal. As a consequence, they specifically propose that any person who commits a sexual act with a child for financial or other reward, favour or compensation be guilty of an offence; that any person who invites, persuades or induces a child to allow any person to commit a sexual act with a child for financial or other reward, favour or compensation be guilty of an offence; and that any person who participates in, or is involved in, the commercial sexual exploitation of a child be guilty of an offence.

**7.4.12** There are proposals to give extra-territorial jurisdiction and, like Australia, legal entities incorporated or doing business in the country are also included in the scope of persons who can be prosecuted under the act. The SALC also proposes certain auxiliary measures, such as the withdrawal of the passport of any South African citizen convicted of a sexual offence while abroad. The recommended offences follow certain broad themes:

- child prostitution;
- keeping a brothel for child prostitution;
- offering or engaging a child for commercial sexual exploitation of a child;
- facilitating or allowing commercial sexual exploitation of a child;
- profiting from commercial sexual exploitation of a child.

**7.4.13** The proposed offence of facilitating or allowing commercial sexual exploitation of a child relates both to any person who intentionally facilitates the offence, and to any parent, guardian or caregiver of a child who intentionally allows the commercial sexual exploitation of a child.



## 7.5 Trafficking

7.5.1 Trafficking for sexual exploitation involves several elements. Firstly it requires the recruitment of people from one place to work in another. Traditionally this has been understood to bring people in from one country to another, but there is no reason why the movement of people within a country from one geographical location to another (say Newcastle to London) should not be considered to be a form of trafficking. The recruiting process may involve deception as to the nature of the work: individuals sometimes believe that they are being recruited to act as domestic staff, waitresses, hairdressers, etc., whilst others are fully aware that they are to be offered for prostitution. Even if it is understood that they will work in prostitution, there is often deception relating to the conditions of work, and in particular the amount of money that can be earned. Often trafficking from abroad is arranged as a ‘package’ with travel, accommodation and support services in the UK. This can create a form of debt bondage that can be expressed in monetary terms or in a requirement to service a large number of clients in a given time.

7.5.2 The next step in the trafficking process is the arranging and facilitating of the transport of the person from the place of origin to the destination. Where this involves the crossing of international borders it may involve immigration offences, the corruption of officials and false documentation. The final element is the managing of sex workers in the destination. Individuals are often held in circumstances which effectively restrict their freedom: passports and identification papers are removed; there may be limits on their ability to refuse clients or certain sexual practices and violence may be used to control them. Victims often face significant ‘costs’, e.g. for accommodation, food, cleaning services, etc., which means that they receive very little money but are required to service a very large number of clients.

7.5.3 Other, more unusual, means may be used to bring women into the country. There is a burgeoning trade in bride trafficking aided by the Internet. This trade enables women to be ordered over the net, and although an extension of many existing schemes, provides greater volume, accessibility and opportunity for exploitation. Australian research indicates that Filipinas brought into Australia as brides are seven times more likely to be killed in domestic violence than their white Australian counterparts. There is also evidence that some men are serial sponsors. Such entry of ‘brides’ or ‘family members’ into countries may be a cover for sexual exploitation as well as for genuine introductions.

### *Is trafficking really a problem?*

7.5.4 It has been argued that because trafficking for sexual exploitation can already be dealt with under the law there is no need to have special legislation to deal with it. It has also been argued that because many of those who are trafficked come willingly, and are prepared to work as a prostitute there is no need to make special provision. Neither of these is tenable. Although working as a prostitute is not illegal, the law provides a range of remedies for dealing with exploitation through pimping, controlling, brothel keeping etc. We are working within this overall regulatory framework, and the public policy requirement is that the law needs to deal with this exploitation, to establish very clearly that such exploitative behaviour is unacceptable and that those who undertake it should face serious penalties. If we regard pimping and procuring as serious, the organised trade that brings people, usually women, from poorer parts of the world to the UK (or from poorer parts of the country to richer parts) in order to exploit them as sex workers is not acceptable in a civilised society.

7.5.5 People are not a commodity like drugs: yet trafficking treats them as commodities and solely as a means of servicing clients and earning large amounts of money with little or no regard for their human rights. The profits to be made from this trade are considerable. Estimates of



earnings from brothels in the Soho area of London alone are put at £1 million per calendar month, and that is thought to be conservative.<sup>137</sup> UN figures for trafficking in women for sexual exploitation are set at \$7 billion a year – equivalent to the global drug trafficking market. As the controls for trafficking in drugs become more and more effective, and the related penalties increase in severity, criminal syndicates are turning to the trafficking of women in particular as an easier and lucrative option. This trade should not be excused even if the women are willing to come for sex work because their expectation is that they will be able to benefit financially. In fact the money is made by the controllers and not the women, who are physically, psychologically and economically dependent on those who are exploiting them (who may or may not be those who brought them into the UK).

**7.5.6** It is important that the police and prosecutors should have effective tools to deal with traffickers. We were told that often it was not necessarily right or effective to rely on the testimony of victims of trafficking. As this involves transnational organised crime, victims from other countries were vulnerable – sometimes because families at home did not know of the trade they were in, or because their families were known to the traffickers and they feared reprisals against their loved ones. Either way, it means that victims are often too afraid to testify. Police forces in the UK recognise that it is often not acceptable to ask for the victim's co-operation because they cannot ensure her safety or that of her loved ones in the country of origin.

**7.5.7** There are separate issues relating to the treatment of victims of trafficking, in relation to victim support and immigration controls, which are beyond the remit of this review but deserve some reference. Witness protection costs a great deal of money. It has been tried extensively in some other European countries: Germany set up a protection system in Munich, but they are finding that women leave the programme. Both Belgium and Italy give temporary residence status to victims to enable them to give their testimony. They may then be removed. The UK does not have a similar policy, and although some victims do stay, are protected and give evidence, most elect to be removed to their country of origin under Immigration Act powers. Although there have been calls to grant permanent residency status to victims if they wish for it, this raises large questions of the evasion of immigration control, and whether it is right for those who may knowingly have been involved in immigration offences to have a right to stay. The likelihood of being allowed to remain in the UK if discovered may, ironically, give those seeking to recruit women an additional incentive to offer them.

**7.5.8** We thought that it was important for all the aspects of the criminal behaviour that is involved in trafficking to be subject to the criminal law. To combat recruitment by deception in the UK (seeking for nannies or bar staff abroad who when they arrive are given no option but to work in prostitution) we have recommended (Chapter 2) a new offence to replace s3 of the Sexual Offences Act 1956 (procurement of a woman by false pretences or false representations to have sexual intercourse in any part of the world).

**7.5.9** One proposal made at our seminar was that facilitating transport for trafficking, i.e. arranging or providing transport for a person knowing that he or she was to work in prostitution, should be made an offence. This would rely on proving the fact of the transportation, which would be relatively simple, but would also require the knowledge that it was for the purposes of prostitution. We thought there were circumstances when this could be useful, perhaps in the context of a large case where there was other evidence that the organisation was running prostitutes, but would otherwise be of limited value. For international trafficking one suggestion was that the transportation of people for the purposes of sexual exploitation could become an aggravating feature in Immigration Act offences. On a local level, one of the problems related to taxi-drivers, where there was conflicting evidence. We were concerned not to reduce the safety

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<sup>137</sup> Metropolitan Police: Clubs and Vice Squad. Research indicates that the profit from the London area ranges between £¼ billion and £½ billion.

of women working as prostitutes whose work exposes them to high levels of risk. We did not want to prevent women from using taxis as a safe means of transport by making the taxi driver an accessory if he knew her trade. Nor did we want to affect the use of taxis by lone women if it meant that taxi-drivers refused to take these fares on the grounds that they might be sex workers. However, there is evidence from several sources that taxi-drivers can be involved in the sex-trade as pimps or indeed as clients<sup>138</sup>. One way of approaching the problem might be to establish whether those facilitating transport not only knew it was for the purposes of prostitution but also that they were receiving some direct financial gain, either in money or as a reward which could be given a monetary value.

**7.5.10** We discuss below proposals for new offences of sexual exploitation which would replace Ss30 and 31 and which can be used to prosecute traffickers. Any new pimping/controlling offence would be an important tool in acting against those who operate the prostitution end of trafficking in this country. The offence should be formulated so that the evidence can be based on observation and examination of financial records, allowing it to be used without the testimony of the victim if necessary. We would also advocate the use of other serious offences such as rape, sexual assault by penetration and grievous bodily harm which should also be used, recognising, however, that such charges may require the victim to give evidence.

**7.5.11** Trafficking is by its nature organised, and often forms part of major international operations. It will be important to ensure the penalties reflect the seriousness of the offence, and that they are higher than those now available. We think that substantial penalties are justified for trafficking and that if there are elements of trafficking in pimping/controlling, that should be taken account of as an aggravating feature in sentencing.

**7.5.12** We then considered whether we needed an overarching offence for trafficking, with a high penalty, which could be used in association with the offences discussed above. Although the fact that the law enables traffickers to be punished at present argues that a specific offence may not be essential, there are other considerations that could make a specific offence a valuable tool. If, as we believe, the trafficking of people is a very lucrative international trade where the money leaves the country very quickly, then it would be important to apply special powers such as those in the Drug Trafficking Act (concealing or transferring the proceeds of drug trafficking or assisting another to retain the benefits of trafficking, etc.) in addition to other money laundering offences. Confiscation of assets can already be used for prosecutions under the present law, although the international dimension can make these difficult to trace and to seize. Detailed recommendations of these issues are beyond the scope of this review but we think that tackling trafficking in people effectively will require transnational organised crime to suffer significant financial penalties including the confiscation of assets, and the international flow of money has to be traced in order to do this. Any new trafficking offence ought to attract the same kind of money tracing and seizure powers as other kinds of trafficking.

**7.5.13** We concluded that there should be an over-arching trafficking offence to work alongside other offences of sexual exploitation. We looked carefully at the model set out by the recent Australian legislation but were not convinced that it offered an effective solution. Their definitions of sexual servitude offered an intellectually coherent model of the problem, but it is too soon to judge how effective they would prove. One aspect which concerned us was that the offences seemed to rely on the willingness of the victim to testify, and we have already identified this as a problem which reduces the effectiveness of the law. However we welcome the conceptual framework it provides by setting out some of the key elements of trafficking: deception, coercion and force.

<sup>138</sup> The kerb-crawlers rehabilitation scheme in Leeds suggests a disproportionate number of taxi-drivers are clients, and they often use the excuse of transporting women.



7.5.14 We therefore recommend that there should be an offence of trafficking that relates to the bringing of a person from one place to another for the purposes of gaining reward from the sexual exploitation of that person or for working as a prostitute. The fact of trafficking should be sufficient to prove the offence. Evidence of deception, coercion and force would add to the seriousness of the offence. We also recommend that any offence of trafficking should be able to trigger financial powers similar to those used in drug trafficking.

**Recommendation 49: There should be a specific trafficking offence. This offence could involve bringing or enabling a person to move from one place to another for the purposes of commercial sexual exploitation (e.g. knowingly facilitating transportation), for reward.**

**Any such new offence should have attached powers to trace assets overseas.**

## 7.6 Sexual exploitation of children

7.6.1 We have all become far more aware of the extent of the commercial exploitation of children in recent years. Thanks to the work of the Children's Society, Barnardo's, other children's charities, ACPO and the ADSS we are recognising the problem and seeking to tackle it. The Government regards the children involved in prostitution as victims of others<sup>139</sup>. The criminal law has an important role to play in ensuring that those who introduce, use and abuse children in prostitution can be dealt with appropriately.

7.6.2 We were unanimous that it was important to create a set of specific offences relating to the sexual exploitation of children rather than relying on the general offences of sexual exploitation. This would set an unambiguous standard in society that it was wrong for an adult to expect to buy or deal in the sexual services of a child. In this context we thought that a child should be defined as anyone under the age of 18. This would reflect the definition in the Children Act, international agreements such as the United Nations Convention on the Rights of the Child, and the abuse of trust measure in the Sexual Offences (Amendment) Bill. The issue was not of restricting consensual activity but saying that young people under 18 should not sell sex or be sold for sex.

7.6.3 We also considered whether these offences should be limited to the use of children in prostitution or whether we should have a wider definition of sexual exploitation. This could include the use of children in a variety of exploitative situations, including the making of pornography done for gain. This would not restrict the freedom of young people over the age of 16 to engage in consensual activity, but to limit the possibilities for their exploitation while they are still legally minors and without the necessary knowledge or maturity to appreciate the longer term effect of actions and images on their later life. The definition of sexual exploitation would therefore cover the use of children in prostitution or the use of a child in the production of commercial pornography.

7.6.4 We also thought whether or not to define the exploitation as commercial: i.e. for financial gain or other reward, favour or compensation which could be given a monetary value. The term commercial would catch most exploitation in prostitution and pornography (or indeed trafficking), but would not catch those who exploited children for their own gratification. However, we thought that our recommendations to protect children in Chapter 3 and on compelling sexual acts in Chapter 2 which do not require a commercial element provide adequate protection.

<sup>139</sup> New guidance on children in prostitution 'Safeguarding Children involved in Prostitution' is to be published in May this year.

**Recommendation 50: The review considers that the commercial sexual exploitation of children should be dealt with by specific offences in which ‘child’ should refer to any person up to the age of 18, and where sexual exploitation means the use of a child in prostitution or in the making of pornography.**

7.6.5 We identified the behaviour that should be prohibited by law as:

- Buying the sexual services of a child (for the gain of the child or another person);
- Recruiting, inducing or compelling a child into commercial sexual exploitation;
- Participating in, facilitating or allowing the commercial sexual exploitation of a child; and
- Receiving money or other reward, favour or compensation for the sexual exploitation of a child.

7.6.6 We thought that these offences should apply when a child is recruited here for sexual exploitation in any part of the world, or indeed when they are exploited here but brought from elsewhere. We thought that introducing or facilitating the sexual exploitation of a child was so harmful and potentially damaging to the child and its future that these offences should not require any financial reward. However, where money or other reward was involved then the last offence could also be used. As with victims of trafficking, there are some important issues about the need for the testimony of the child. In some cases, a coercer (pimp) will develop a relationship with a child, particularly a girl, introduce her to sex and then pimp her. She, however, may operate out of both love and fear, being emotionally and physically dependent. In such cases she is unlikely to want or be willing to give evidence. We thought it was important that prosecutions could be taken without the evidence of the child, and that any child should not have to be stigmatised by being proved in court to be a prostitute. She, or he, is the victim of exploitation. Our structure of offences is designed to recognise that fact.

7.6.7 We also thought that, given our definition of sexual exploitation which includes the production of pornography, these offences could be used in cases where it was possible to trace the making of pornography involving children, and would provide a specific offence targeted at the use of the child rather than the taking of pictures.

7.6.8 We considered if it was necessary for someone buying sex from a child to have a mistake of fact offence available, or whether this should be an offence of strict liability. There were arguments on both sides, but the prevailing view was that if the offence was not one of strict liability there would be real problems in using it effectively. There was a distinction to be drawn between those entering into a passionate consensual relationship and mistake of fact, and the purchase of sexual services, when the onus was very clearly on the buyer. Clients, who are really child abusers, actively seek very young looking girls and boys in order to buy sexual services. If it was proved that a child had lied about their age, this could be used as a mitigating factor in sentencing. In ECHR terms it was felt that when considering the balance between fairness for the defendant and the needs of society to protect children, an offence of strict liability could be accepted as necessary and proportionate.

**Recommendation 51: It should be an offence to:**

- buy the sexual services of a child;
- recruit, induce or compel a child into commercial sexual exploitation;
- participate in, facilitate or allow the commercial sexual exploitation of a child; or
- receive money or other reward, favour or compensation for the sexual exploitation of a child.



## 7.7 Sexual exploitation of adults

7.7.1 The key offences for consideration were Ss 30 and 31 of the Sexual Offences Act 1956 ('living on the earnings of prostitution' and 'controlling a prostitute'). We thought that these offences should be replaced by a modern, gender-neutral offence that could apply to either sex. In public policy terms this needed to affect:

- those who exploit others by receiving money or reward from men and women who are prostitutes;
- those who, for money or reward, manage or control the activities of men and women who are prostitutes; and
- those who recruit men or women into prostitution whether or not for reward or gain.

None of those is free from difficulty. Views about these issues vary widely, and the exchange of sexual services for money is not against the law, even though there are stringent limitations on the way the sex trade can be carried out.

7.7.2 We heard two very different viewpoints when it came to the offence of living off the earnings of prostitution. The first was that anybody who lived off the earnings of a prostitute was a pimp, no matter the circumstances of the relationship. The second said that some prostitutes made their own choice of work, and had the right to a private life with a partner – which the present law denied them.

7.7.3 In determining how the law could and should be drafted, we considered both the question of exploitation and the right of all citizens to a private life. We recognised that there were relationships where prostitutes may earn money for partners or family; there were others where the partner or husband was actively exploiting the prostitute. In equity there could be no exemption for partners, etc. as the law had to make provision for those who were coerced by their partners into entering or remaining in prostitution. We thought that in practical terms, there was less likely to be criminal investigation or prosecution of a partner unless there was strong evidence of coercion. Exploitation in this context should relate to abuse, pressure, force, deception and coercion. The review agreed that the offence needed to be based on the financial relationship, and the application of police and prosecution policies should be linked to exploitation. We thought that it was no longer justifiable to retain a reverse burden of proof condition that would apply to those who lived with prostitutes to prove that they were not living off her money. We were also told that it was rare to rely on that provision in a prosecution.

***Recommendation 52: There should be offences of:***

- **exploiting others by receiving money or reward from men and women who are prostitutes;**
- **managing or controlling the activities of men and women who are prostitutes, for money or reward; and**
- **recruiting men or women into prostitution whether or not for reward or gain.**

7.7.4 There are existing offences of procuring women for sex work abroad (s22 SOA 1956) or for a girl under the age of 21 for unlawful sex abroad (s23 SOA 1956). If our proposed offence of recruitment into prostitution applied to recruitment to anywhere in the world, we would replace s22 with a more appropriate offence, and cover much of the behaviour caught by s23. These offences are very rarely prosecuted today. It may be possible to consolidate an offence around procurement in terms of recruiting or procuring anyone to work for sex in any part of the world.

## 7.8 Other issues

**7.8.1** We heard a range of evidence about other aspects of the law on prostitution. A number of organisations, notably the Josephine Butler Society, the English Collective of Prostitutes, the Sexual Freedom Coalition and Europap suggested that there should be a much more radical consideration of the law on prostitution. In recent years there have been recent significant changes in the law around the world. The Netherlands and Germany allow regulated prostitution and Sweden has changed the law to criminalise those who buy sex rather than those who sell it. Some Australian states now regulate and allow prostitution as a trade. It is suggested that regulating prostitution enables the more effective action against trafficking and the exploitation of children, greater safety and less stigma for those sex workers who fully exercise their choice to do that work. Others argue such regulation increases the use of men and women as commodities of trade, that allowing a legal market merely increases the illegal activity and that selling sex is unacceptable in a civilised society. Communities are very concerned about overt prostitution in their midst, and about the linkage between sex markets and other forms of criminality including drugs. There was no consensus across a set of widely diverging views.

**7.8.2** We also heard about the way in which the law on kerb-crawling is working (the Government has undertaken to introduce a power of arrest for the police to deal more effectively with kerb crawling) and the archaic nature of the law on soliciting and loitering for women with its demeaning description of a common prostitute. We have also suggested that male and female prostitution should be dealt with in a similar fashion.

**7.8.3** These are all large issues outside our remit. But we wished to record the passion with which they have been raised, and that there are major and important issues of social policy to be considered. We have recommended elsewhere that male and female prostitution should be regulated by the law in an equitable fashion. That may provide an opportunity to consider the wider aspects of the law on prostitution, which were beyond our remit to consider. Changes may be desirable but in a way which does not produce unintended adverse consequences for either those who are exploited through prostitution, or for the communities which can suffer its side effects. We therefore recommend that there should be a further review of the law on prostitution.

***Recommendation 53: There should be a further review of the law on prostitution.***



# Chapter Eight

## Other Offences

### 8.1 Introduction

**8.1.1** In addition to the offences we have discussed in the previous chapters, there are a number of specific offences which we thought should be considered as part of a thorough review of the law. Some of these are long established but set out in archaic law (like indecent exposure), and others have been rolled up with other offences (like bestiality) but justify separate treatment. We also identify the potential developments of the law to deal with some other behaviour that is not now criminal but causes deep concern, such as observing others when they thought they were in private.

**8.1.2** This chapter therefore discusses the law on indecent exposure and how it should apply to sexual activity in public. We look at the justification for a new offence of voyeurism to deal with peeping tom behaviour; whether, and if so how, an offence of bestiality should be framed and whether we should seek to protect human remains from sexual interference.

### 8.2 Indecent Exposure

**8.2.1** Indecent exposure is often called “flashing” – a term that carries with it connotations of pathetic and inadequate men who expose themselves but need not be taken seriously. In fact, the offence can be used to describe a wide range of unacceptable behaviour, of which the essential element is the exposure of the penis in public. The law is archaic, and is largely set out in nineteenth century statutes in terms that are inexplicable to a modern audience, e.g. ‘exposing the person’. The offence tends to be regarded as very minor and harmless but research indicates that this offence may have a serious impact on those who witness it, and that some men commit this offence as part of wider pattern of sexual offending, some of which is very serious.

**8.2.2** The present law is set out in:

- Vagrancy Act 1824 (willfully, openly, lewdly and obscenely exposing the person<sup>140</sup> with intent to insult any female – penalty 3 months or a fine; a second offence will qualify the accused as an “incorrigible rogue” and he can be sentenced for up to 1 year at the Crown Court); and
- Town Police Clauses Act 1847 (willfully or indecently exposing the person in a street to the obstruction, annoyance or danger of the residents and passengers). Penalty a fine or 14 days.

The purpose of the law was not to prohibit any exposure (say for the purpose of urination) but that which caused offence. It was also possible for the common law offence of outraging public decency to be used.

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<sup>140</sup> Person is defined as penis in case law.





**8.2.3** These nineteenth century offences of indecent exposure now seem quaint, and this contributes to the overall impression that indecent exposure is a minor nuisance rather than genuinely criminal behaviour. We do not think that this is a valid assumption. We were impressed by the evidence of research amongst victims that it can indeed be a very traumatic experience. It is not just the unpleasantness of the experience: in incidents where the exposed penis is erect or being masturbated, the effect is to induce fear, shock, disgust and a powerful fear of rape or death. Jennifer Temkin's research study for the review<sup>141</sup> also demonstrated that the common perception of men who expose themselves as sad and lonely but not dangerous was not valid. Studies have identified two types of exposers, one of whom is sad and humiliated; the other however is much more aggressive, who may expose an erect penis sometimes accompanied by obscenities. From practical experience, the police felt that many of the more aggressive exposers were potentially dangerous and likely to be involved in other sexual offending.

**8.2.4** Research amongst those convicted of serious sex offences certainly shows that many had committed "nuisance" offences such as exposing or voyeurism. In one study<sup>142</sup> it is estimated that 80% of rapists began with non-contact behaviour, and another identified previous and concurrent nuisance offences in 30% of rapists and child molesters in his sample<sup>143</sup>. We thought therefore that it was important for us to take both exposure and voyeurism seriously, not merely as precursor behaviour, but as part of a set of more dangerous behaviour. We certainly did not assume that all those who expose are serious sex offenders, but there is a clear link between exposure and other serious offending behaviour in some offenders.

**8.2.5** There are other types of public exposure that are not intended to threaten and are not targeted at individual victims. Naturists were concerned that the review should not affect their enjoyment of their chosen way of living. Indeed our terms of reference oblige us to take full account of their right to a private life under article 8 of the Convention. There is also a valid distinction to be made between those who expose for sexual gratification, or to frighten women, and streakers and other exhibitionists who strip off in public for fun or to shock. That kind of behaviour is different in kind to the more serious kind of exposure. The courts need to be able to deal with exhibitionist behaviour as a social nuisance when necessary, but a more serious offence that is properly contained in sexual offences is needed to replace the old offences of indecent exposure.

**8.2.6.** The Home Office Working Party on Vagrancy and Street Offences in 1974, and the Law Commission<sup>144</sup> both recommended the abolition of the existing offences and their replacement by a new summary offence of exposing the genitalia, where the person knew or should have known that other people were likely to see and to be offended. In their draft Criminal Code Bill<sup>145</sup>, the Law Commission set out a modern offence as:

*"113: A man is guilty of indecent exposure if he exposes his penis to a woman, intending, or being aware that he is likely, to cause her alarm or distress."*

**8.2.7** The review thought that this offence was a useful model to consider. We thought that any such offence needed to be carefully but broadly defined. In the light of the degree of fear caused to victims we considered defining the offence in terms of harm. However, although we

<sup>141</sup> Professor Jennifer Temkin: 'Rape and Other Sexual Assault' Vol 2.

<sup>142</sup> Driebblatt.

<sup>143</sup> Abel, Mittelman and Becker in *Clinical Criminology: the assessment and treatment of criminal behaviour*: Ben-Aron et al, Toronto.

<sup>144</sup> LC 76 (1976).

<sup>145</sup> LC 177 (1989).

recognised that harm was caused, we also thought that including harm in the definition could lead to extensive cross-examination in court or presentation of expert evidence that harm had been committed. We thought that it was better to rely on the more traditional and immediate test of alarm at the time of the exposure as the right test to apply. That is relevant to the incident and easier to prove in court. We also thought that the degree of intent for this offence, which may involve compulsive as well as overtly intentional behaviour, needed careful thought. A purely subjective test has its difficulties. Proving intention to cause fear, alarm or distress could be difficult even when that outcome occurred. A more objective test that he knew or should have known that it would cause fear, alarm or distress provides an appropriate lower threshold whereby certain types of exposure (such as to an individual woman or child in a lonely place), which would undoubtedly cause fear, alarm or distress, would be clearly criminal.

**8.2.8** We also considered very carefully whether an offence of indecent exposure should be extended to include the exposure of female genitalia, but found limited evidence that such an offence was required. Exposure of the genitalia by women was not common, and did not seem to imply the same degree of threat as exposure of the penis by a man. Although exposure by women may take place as part of a wider pattern of sexual offending (and so be very disturbing to those who may have been victims), that seems to be relatively unusual and to take place in private as part of an abusive situation. We thought that was a different kind of behaviour to that normally considered as indecent exposure. Public exposure by women may take the form of social exhibitionism (such as streaking), or disturbed behaviour. Where these are criminal, we think these kinds of behaviour should be dealt with as part of public nuisance/public order which would apply to men or women, rather than a sexual offence. (Indeed at present women may be charged under S4 of the Public Order Act 1986 for “insulting behaviour likely to cause a breach of the peace”.) Although our general approach is that offences should apply generally to perpetrators of either sex, on balance we thought an offence of indecent exposure should continue to apply to the exposure of the penis.

- *We would welcome information and evidence to refute or support this conclusion.*

**8.2.9** We also considered whether the offence should be extended from exposure to women only to include exposure to men. There is a strong case for doing so. Exposure to a boy or vulnerable man or boy could be threatening and frightening, and cause fear, alarm and distress. However, we would not want to criminalise any same sex exposure, which would make the use of communal urinals for example, very problematic. A law that is drafted in terms of fear, alarm and distress should relate only to those incidents where there is an element of threat. It would not apply to same sex activity or use of urinals or communal showers unless the necessary elements were present. These practical difficulties should not deny boys and men the protection of the law from indecent exposure.

**Recommendation 54: There should be a new offence of indecent exposure relating to exposing the penis when he knew or should have known that he might cause fear, alarm or distress to another person.**

### 8.3 Voyeurism

**8.3.1** Voyeurism or ‘peeping’ is an activity which is normally regarded as a nuisance, and in many instances is not criminal in England and Wales. We had a number of instances drawn to our attention by MPs and the police where considerable nuisance and distress had been caused when unwanted observation of people in intimate surroundings had been discovered: it seemed that the law offered no remedy unless the proceedings were recorded and could be considered as indecent or obscene material. Bob Blizzard MP sent details of cases involving landlords fixing



spyholes into tenant's bathrooms. We were told of covert observations in changing rooms (both in shops, market stalls and schools), of hidden cameras filming in public changing areas and beaches and of course of the classic "Peeping Tom" looking into houses.

**8.3.2** Rather like flashing, our traditional attitude to such activity has been to regard it as unpleasant but a nuisance rather than criminal, possibly because of difficulties in definition. We were however impressed by the degree of evidence that linked a range of offending behaviour, from the most serious sex crimes to voyeurism and indecent exposure. We thought that there was a genuine problem in the secret observation for the sexual gratification of the watcher of people, particularly women and children, when they had a reasonable expectation of privacy. The experience of victims, particularly those observed in their own homes, was of a violation not only of their privacy but of their sense of personal safety and integrity

**8.3.3** We looked to see what other jurisdictions had done about the problem, and found that many US states had provisions relating to voyeurism. Florida has an offence whereby:

*"A person commits the offence of voyeurism when he or she, with lewd, lascivious, or indecent intent, secretly observes, photographs, films or videotapes, or records another person when such other person is located in a dwelling, structure or conveyance and such location provides a reasonable expectation of privacy."*

This could be used in a number of contexts, for example using a hidden video camera (placed in a bag) to secretly film up women's skirts in a shopping mall. A number of other states including Iowa also have an offence of criminal voyeurism. The offence normally applies to visually observing or recording someone who has a reasonable expectation of privacy. The Iowa statute specifies that the victim must be in a dwelling or occupied structure.

**8.3.4** California has a slightly different offence that does not rely on proof of lewd and indecent intent:

*"Anyone who looks through a hole or opening, into, or otherwise views, by means of any instrumentality... the interior of a bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside".*

**8.3.5** We were not able to find any evaluations of these offences or statistics of their use. It may well be quite a difficult offence to prosecute unless there was evidence of the voyeurism like recordings, or two-way mirrors.

**8.3.6** There is no mention of a similar offence in either the Canadian Criminal Code, or the new Australian Model Code. The Canadian Code is quite interesting as it makes nudity in a public place an offence (even if on private property but exposed to public view). When we raised the issue of voyeurism in the State of Victoria, Australia, they said they dealt with voyeurs either under a law prohibiting people being "unlawfully on property", or as a form of stalking. They were seeking to establish that there could be harassment even if the person observed was not aware of it; this was not established law however.

**8.3.7** There is research evidence that like exposure, serious sex offenders report previous or concurrent nuisance behaviour (as in para 8.2.4 above) that includes voyeurism. In Abel's study 14% of child molesters and 20% of rapists had committed voyeurism. We therefore had evidence of a problem that the law could not readily tackle here; that peeping behaviour formed a continuum of behaviour with other sex offences, and that other jurisdictions were either introducing specific laws or trying to deal with the problem by using other laws. We were also aware that there were real difficulties in defining a proper criminal offence to catch the kind of behaviour that we considered should be subject to a criminal sanction without intruding on other more innocent behaviour, or indeed the growing use of cameras and other security devices.

**8.3.8** We thought that the first element of any offence would have to be that any observation would have to take place where there was an expectation of privacy. Hence in a changing room, if there was a notice saying that video surveillance was in use then that was known and understood. If however there were no notices then there could be an expectation that a place where people changed their clothing was private. A person may expect privacy in their own home or bathroom – but not if there was open view to outsiders. Draw the curtains and different conditions apply. Certainly any structural alteration (like making a spyhole into a bathroom or mounting a camera for recording or remote viewing of what was happening within) would be evidence of an intent to contravene any expectation of privacy. There would however have to be safeguards regarding necessary surveillance for the purposes of preventing and detecting crime.

**8.3.9** Many of the US offences relate to observation of people who are inside buildings or other structures, or to specific types of facilities such as changing booths or tanning booths. We thought that it was sensible to limit the offence to observation of a person in a building or other structure; being in the open, even in a private garden, does not create the same expectation of privacy. Nor did we think it reasonable to regard observation, or even covert filming, on beaches or public places as offensive unless the resulting images were indecent or obscene. There is legislation to deal with this aspect of the problem already<sup>146</sup>. This had been raised in the context of the covert filming of children on a beach and we thought that any such filming, while unwelcome, was not necessarily criminal. The listing of protected places such as tanning booths or changing rooms was another possible approach, and does create a degree of certainty, but on the other hand the creation of such lists could give undue prominence to certain nuisances at the expense of others, and unless there was a catch-all category could be unnecessarily restrictive.

**8.3.10** We also considered whether there should be any requirement of lewd and lascivious intent. The observation may well be for sexual gratification, but this was an element that could be difficult to prove. Nor did we think it was absolutely necessary – the observation in the circumstances of privacy was sufficient, and the fear and distress its discovery could cause was sufficient in itself to justify the offence. This is not an offence which would be intended to create any kind of right to privacy but to protect people going about their ordinary lives from unwanted and unacceptable intrusion. However we also recognised the risk that a broader offence, without a requirement for the observation to be done for sexual purposes, could intrude into the work of a free press, which was not our intent.

***Recommendation 55: There should be an offence of voyeurism where a person in the interior of a building or other structure has a reasonable expectation of privacy and is observed without their knowledge or consent, whether by remote or mechanical means or not. There should be an exception for authorised surveillance.***

- *We would welcome views on the framing of an offence of voyeurism to ensure protection for victims without curtailing the freedom of the press to investigate issues of public concern.*

## 8.4 Privacy and sexual activity in public

**8.4.1** We discuss the application of the criminal law to adult sexual behaviour in private in Chapters 1 and 6. The present criminal law of gross indecency and buggery include privacy provisions that relate not only to the number of people present but to the place in which the behaviour takes place, and in particular to the restriction on male same-sex activity in public lavatories. This raises some important questions about how the law should deal with sexual activity in public, whether that is same sex or heterosexual. The present law distinguishes between

<sup>146</sup> Protection of Children Act 1978.



male same-sex soliciting, cruising and cottaging, and soliciting by women. Different offences and penalties apply to homosexual and heterosexual public behaviour: there are evident questions of fairness, necessity, proportionality and discrimination to consider.

**8.4.2** We all share social space in public places, and there is clearly a need for the law to protect members of the public from being unwilling witnesses to sexual behaviour, or to be harassed or intimidated in their use of public space and facilities. The law that is used at present to deal with sexual activity in public tends to be:

- Ss 12 and 13 of the Sexual Offences Act 1956 (Gross indecency and buggery) which is used to prosecute cottaging and overt gay sex;
- S32 of the SOA 1956 soliciting by a man;
- S5 of the Public Order Act – behaviour likely to cause a breach of the peace;
- Common law offence of outraging public decency;
- Common law offence of public nuisance.

Although the law is available to deal with both same sex and heterosexual behaviour in public, the present structure is seen as unjust and unfair. (We have already recommended the abolition of ss12,13 and 32 in chapter 6.) There is a strong perception, particularly in the gay and lesbian community, that it can be used in an unfair and discriminatory way, and there is clear evidence that it has been so used in the past. The present law derives from a time when male homosexuality was illegal and to be openly homosexual was extremely difficult. Meeting places tended to operate around public facilities like lavatories. These meeting places could become nuisances, and prosecutions would be undertaken on the basis of observation by police or by agents provocateurs. With changing social and legal attitudes, there are alternative meeting places now available to gay people. The policing of public facilities has also changed with much greater attention being paid to managing a problem to tackle the nuisance. However some public facilities are extensively used for sexual purposes, and the law needs to be able to deal with this problem as part of wider powers to deal with sexual activity in public places.

**8.4.3** The law already draws perfectly valid distinctions between what adults do in private and what they do in public. Many sexual acts are punishable if committed in circumstances which outrage public decency. The common law offence of outraging public decency includes ‘all open lewdness, grossly scandalous behaviour, and whatever openly outrages decency or is offensive and disgusting, or injurious to public morals by tending to corrupt the mind and destroy the law of decency, morality and good order.’<sup>147</sup> The common law is used for approximately 60 prosecutions a year, often for situations such as sexual intercourse in very public places, prostitutes ‘advertising’ themselves in the window, or a person masturbating at the window of a private house. Although there are arguments that such common law offences are flexible and available for use in a wide range of circumstances, that very width and flexibility makes it an uncertain offence, without the clarity required of modern law.

**8.4.4** Our overall approach is to look at the essential criminality of behaviour. Sexual behaviour in public should fall within the criminal law – society requires controls on overt sexual behaviour in public because of its effect on others. However, that criminal law should apply to all sexual behaviour in public and not in particular to same sex behaviour. The Wolfenden Committee said:

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<sup>147</sup> Archbold.

*‘The law should continue to regard as criminal any indecent act committed in a place where members of the public may be likely to see and be offended by it, but where there is no possibility of public offence of this nature it becomes a matter of private responsibility of the persons concerned and as such, in our opinion, is outside the proper purview of the criminal law. It will be for the courts to decide, in cases of doubt, whether or not public decency has been outraged, and we cannot see that there would be any greater difficulty about establishing this in the case of homosexual acts than there is at present in the case of heterosexual acts.’<sup>148</sup>*

**8.4.5** The fifteenth report of the Criminal Law Revision Committee (1984) recommended a new offence to regulate sexual activity in public which would include acts on private premises but observable from a public place (or from other private premises such as a private dwelling). They did not intend to put at risk every courting couple who choose a secluded spot for their courting merely because the public have a right or the ability to access it.

**8.4.6** In looking at how the criminal law should apply in this area we adopted several principles. The first was that this was an issue of public order/nuisance; it should not be considered a sex offence with all that entails. There is no abuse or exploitation of another person – the issue is essentially of public decency. The law should be able to tackle these public order/decency issues whether they relate to heterosexual or same sex activity. Finally, we thought it unnecessary and disproportionate to prohibit all sexual activity in public. Like the CLRC we thought the discreet couple should not be penalised, the nuisance was not the sexual activity itself but the fact that it is seen by others and that it occurs in situations where it is likely to cause distress or offence.

**8.4.7** We identified two possible ways of achieving this approach. One would be to rest on a definition of a public place and to add in the likelihood of being seen. We thought this was fraught with potential difficulty. Is any public park or open space out of bounds, even at 1 am? Would a couple have to go into the bushes, and if so how far? On the whole we felt that was too prescriptive and difficult. The alternative approach is, like the present Public Order Act offences, to rely on a third party to be offended. We thought that this was a useful concept, but it raised questions about the applications of differing standards of public morality to sexual behaviour in public. Some people find public displays of same sex affection such as kissing or handholding objectionable when the same behaviour by a boy and girl might be accepted.

**8.4.8** There is a risk in using a test that someone is offended that you can effectively create different local standards. What is acceptable behaviour in London may not be elsewhere. Although that is not strictly equitable, it may reflect very different views and standards of acceptable behaviour around the country, and hence provide the protection of the law to the local community. However we were anxious to ensure that the law should not be used unfairly or in a discriminatory way. It may be that where an offence relies on a complaint that someone has been offended, the trigger for action should not be a solitary complaint but, as in issues of public nuisance, to rely on a broader degree of complaint from the community. This may however be an element of the way in which any new offence would be policed, and reflect the way in which individual and community concerns relate to local policing. Such an approach is already part of the current problem-centred policing approach. We also thought that those members of the public who complained should not have to be witnesses in court, but could be represented by the police. We recognised that there are concerns about policemen and third parties being offended but we thought that with a fair and equitable law, and effective community policing, such concerns were less relevant today than ever before.

<sup>148</sup> Wolfenden Committee report cmdnd. 247, paragraph 64.



**8.4.9** We thought that the present Public Order Act 1986 provided a useful model for the kind of offence we envisaged. Offensive behaviour under section 5 of the Public Order Act is only unlawful when there is a third person present who is (or is likely to be) distressed by it. Section 5 also gives the police a special power to warn a potential offender before arresting him. In most cases this will be a more appropriate and effective way of dealing with indecency; the aim except for those who are persistently causing nuisance is to resolve the problem on the spot. If the warning is ignored then there is the option of prosecution. We thought this was a useful model, but that rather than rely on the existing tests in the Public Order Acts we should recommend the creation of a new offence. This should not only apply to open displays of sexual acts in public, but also behaviour leading up to it.

**8.4.10** It will be important that any new or amended offence should operate in a gender and sexuality neutral way. A man and a man – or a woman and a woman – kissing and holding hands in public should no more be criminalised than a man and a woman behaving in the same way. It will be equally important, not least to satisfy the clarity required by the ECHR, that as far as possible the test and standards applied to any new offences should be national and not merely local.

**8.4.11** Any new offence would need to reflect the fact that it was concerned with behaviour in public places, that it contains a degree of objectivity in the test (knew or should have known) and that it causes distress, alarm or offence to other people. The offence would be triggered by complaints to the police. It is also important that, like s5, the new offence enables a warning to be given in order to end the nuisance before any offence is committed.

***Recommendation 56: A new public order offence should be created to deal with sexual behaviour that a person knew or should have known was likely to cause distress, alarm or offence to others in a public place.***

## **8.5 Bestiality**

**8.5.1** Any sexual penetration of or by an animal is an offence under s12 of the Sexual Offences Act 1956 (the offence of buggery). We have recommended elsewhere that this offence should be repealed in its entirety, and the elements that relate to the protection of children and sex with animals be separately considered.

**8.5.2** There has been some discussion as to whether the offence of having sex with animals should be criminal at all or whether it should be part of the law on the protection of animals. It has long been recognised, not least by the CLRC that the present offence has too harsh a penalty with the potential for a life sentence. We considered whether there was a justification for retaining the offence, and in particular whether if the behaviour was criminal it should form part of the law relating to the protection of animals rather than sex offences. We concluded that the behaviour was properly criminal.

**8.5.3** It was an act that offended against the dignity of animals and of people. Working as we do on the principle of free agreement to sexual activity, this was simply not possible with animals. An offence of bestiality would seek to protect animals but we thought that it was primarily a sex offence reflecting some profoundly disturbed behaviour. These are not simply the acts of loneliness and propinquity. There is evidence of a linkage between abuse of animals and other forms of sexual offending. Research has shown a link between abuse of animals and abuse of children. In some instances severe physical mutilation of horses has been accompanied by sex with them. We felt that society had a profound abhorrence for this behaviour and that it should continue to be a criminal offence. This echoed the views of the CLRC who also considered that it should remain

criminal but with a much-reduced penalty. We share this view. We also agree with the CLRC that there should be a more serious offence of compelling sexual activity with animals, and we discuss this in more detail in section 2.20.

**Recommendation 57: A specific offence of bestiality should be retained.**

## 8.6 Necrophilia

**8.6.1** An issue that was raised with us during the course of the review was whether the law should prohibit sexual interference with human remains. It came as a surprise to most members of the review that there was no such protection in law for human remains and that necrophilia was not illegal. We were given some anecdotal evidence that necrophilia did take place from time to time, and that it could be associated with some other very serious offending – notably murder that was followed by sexual acts.

**8.6.2** There is an offence of exhuming dead bodies without lawful authority, but no other criminal law protection for the body of a person once they are dead. In general the dead body ceases to have rights in law, and it is arguable that it is not a victim. It does seem that occasionally dead bodies are violated for sexual gratification. These are rare and unusual occurrences, but when they do occur the absence of law is thrown into relief.

**8.6.3** Other common law countries have specific statute law to protect dead bodies. The Canadian Criminal Code<sup>149</sup> makes it an indictable offence to “*improperly or indecently interfere with or offer any kind of indignity to a dead human body or human remains, whether buried or not*”. (The same section also creates an offence of omitting to carry out duties imposed by law relating to the burial of a body.) New Zealand has the same provision. Both of these form part of their law on sexual offences.

**8.6.4** We considered whether this was an activity that was sufficiently serious to be criminally culpable, and if it justified an offence that is specifically targeted at the sexual molestation of human remains. We were agreed that human remains should be shown respect, and that relatives and friends would be deeply distressed were the remains of their loved ones to be molested in this way. We thought that society should be able to say that certain kinds of sexual behaviour are so deviant as to be unacceptable. Our fundamental principle is that sexual activity should be mutually agreed – in this context, and that of bestiality, there is no possibility of mutual agreement. We are recommending a comprehensive set of offences that set out society’s standards for the next millennium, and it seemed only right that we should consider this subject.

**8.6.5** We had no firm evidence of the nature or the extent of the problem, but that is not surprising if the law is silent on the issue. We wondered whether its absence from the law reflected the lack of a real problem, but concluded that we could not infer that. We found the whole idea of sexual activity with a dead person profoundly repugnant, but that in itself was not an argument for making it criminal.

**8.6.6** The strongest arguments for the offence are that the families of those who have died have every right to expect human remains to be treated with respect and propriety. We thought that most people would expect necrophilia to be an offence and would be surprised that it was not. It is certainly associated with other very deviant behaviour and there is no present possibility, for example, of those who kill and then have sex with the bodies of their victims being formally

<sup>149</sup> S182(b).





recognised and treated as a sex offender. Advances in DNA and forensic technology should enable evidence gathering in the absence of other testimony. As we consider that the offences we recommend should reflect an understanding of risk and of the nature of the offending behaviour, we thought that this kind of behaviour should be caught by the criminal law. Accordingly we recommend that sexual interference with human remains should be an offence.

***Recommendation 58: Sexual interference with human remains should be an offence.***



# Chapter Nine

## Further issues

### 9.1 Introduction

9.1.1 This chapter considers the penalties that we thought should be associated with our new offences, and explains the principles we have adopted in coming to those conclusions. Our terms of reference require us to recommend penalties that will allow abusers to be effectively punished. We therefore consider some of the wider issues of treatment of sex offenders in prison and the community, and the requirement placed on certain sex offenders to notify the police of their name and address and any changes of them (the so-called “sex offenders’ register”).

9.1.2 In looking at all these issues that are consequential on the recommendations we make for new offences, we have used the evidence and knowledge we have gained in doing the review. We have considered the relative seriousness of offences in the light of their impact on victims and at some of the wider issues around the sentencing and treatment of offenders. In doing this we have raised some issues that should be looked at in the separate reviews of sentencing and of the Sex Offenders Act 1997 that are now being undertaken.

### 9.2 Penalties

9.2.1 In considering our new offences we have inevitably thought in some depth about the nature of the offences, the kind of behaviour that should be caught by them, the likely consequences of that behaviour on the victims and the risk it may present to other people in the community. To help us we have studied research, contacted policy makers and practitioners in other countries and worked with victims’ and survivors’ groups. Putting those factors together has given us an indication of the relative seriousness of the various offences. We have also set our proposed penalties in the context of s2 of the Crime Sentences Act 1996 which requires a mandatory life sentence on a second conviction for certain offences, including serious sex offences.

9.2.2 We thought it important that we propose penalties for the offences we recommend. This allows us to set out our view of their relative seriousness and also their relative importance in the overall context of offences more generally. In many cases we are recommending increased penalties. This reflects in part the fact that many sex offences have comparatively low penalties that are now out of step with our, and the public’s, understanding of the nature and seriousness of sex offending. In recent years penalties for sex offences have been increased to address particular problems, but without an overall revision of the structure. This review enables both offences and penalties to be reconsidered in the light of current knowledge. We were particularly concerned to take account of the risk presented by some offending behaviour.

9.2.3 In looking at what we thought would be the right penalty for any offence we took account of:

- the overall sentencing framework, which on the whole provides for a stepped approach to penalties;



- the existing penalties for the equivalent offences, which gave us a starting point;
- our assessment of the relative seriousness of an offence as against others;
- the need for the maximum penalty to be high enough to enable the courts to deal with the most serious incidents of a particular offence;
- whether there were any particular aggravating features that would justify a higher sentence within the penalty range.

Comments on all these aspects are included in our commentary and recommendations. We set out below a summary of the offences we propose.

**9.2.4** The penalties we propose are maxima. They are set to give the courts power to sentence in the very worst instance of any case. Sentences for individual defendants will of course reflect the circumstances of each particular case.

### **9.3 Proposed new offence/penalty structure**

#### **Rape**

Oral, genital or anal penetration by the penis without consent.

Proposed penalty: **life** (no change).

#### **Sexual assault by penetration**

Any other form of genital or anal penetration, without consent. The offence to be charged if there is any doubt about the nature of penetration.

Proposed penalty: **life** (this is a new offence that is as serious and equivalent to rape).

#### **Sexual assault**

Any assault which is sexually inappropriate.

Proposed penalty: **10 years** (no change from indecent assault. The most serious behaviour that is now prosecuted as indecent assault has been included in redefined rape and sexual assault by penetration.)

#### **Assault with intent to commit a serious sex offence**

An assault with the intention to commit a rape or sexual assault by penetration.

Proposed penalty: **10 years** (this replaces the common law offence of assault to commit rape and the statute offence of assault to commit buggery (10 years). The most serious assaults represent highly dangerous behaviour which can be considered an attempted rape).

#### **Trespass with intent to commit a sex offence**

Replaces burglary to commit rape (in Theft Act); will apply to intent to commit rape/sexual assault by penetration/sexual assault.

Proposed penalty: **life** (this is very serious and dangerous behaviour. This is an increase of the penalty in the Theft Act –14 years).

**Sex by threat or deception**

Obtaining sexual intercourse/penetration by threat or deception in any part of the world.

Proposed penalty: **10 years** (a significant increase over the existing penalty of 2 years for ss2 and 3 of SOA 1956. The highest penalty is justified for offences involving trafficking of people).

**Using drink or drugs to stupefy or overcome a person for the purposes of sex**

Replaces S4 SOA 1956.

Proposed penalty: **7 years** (the existing penalty of 2 years is inadequate).

**Abduction with intent to commit a serious sex offence**

Taking a person in order to carry out rape or sexual assault by penetration.

Proposed penalty: **10 years** (this offence replaces ss 17,19 and 21 SOA 56. It will complement the child abduction offence in the Child Abduction Act.)

**Adult sexual abuse of a child**

An adult (over 18) who:

- Penetrated or was (consensually) penetrated by a child under 16;
- Caused or induced a child (under 16) to perform a sexual act;
- Performed a sexual act at a child under 16 or who made a child witness such an act.

Proposed penalties: (a) **life** where the child is under the age of 13;

(b) **10 years** where the child is between the ages of 13 and 16.

(A new offence with penalties that would represent an increase over *usi* with a girl under 16 (currently 2 years), but similar to *usi* with girl under 13, indecency with a child or buggery with a child.)

**Sexual activity between minors**

A child aged less than 18 who:

- Penetrated or was penetrated by a child under 16
- Caused or induced a child under 16 to perform a sexual act
- Performed a sexual act at a child under 16 or who made a child witness such an act;

Proposed penalty: (a) **10 years** where the child is under the age of 13;

(b) **2 years** where the child is between the ages of 13 and 16. (The normal maximum sentence for a juvenile.)

(A new offence which replaces *usi*, buggery etc. It relates to a range of activity from consenting behaviour to abusive or coercive behaviour which is on a lesser scale to the serious sex offences such as rape. It has a lower penalty maximum than the equivalent adult offence to reflect the age of the perpetrator. Mutually agreed sexual behaviour between children of 13 to 15 should not normally be prosecuted, but prosecution would be appropriate where there was evidence of coercion or exploitation.)



### **Persistent sexual abuse of a child**

A course of conduct offence of repeated sexual abuse of a child over time.

Proposed penalty: **14 years** (a new offence to reflect the long-term nature of the abuse. It should enable the courts to recognise that in certain circumstances individual charges reflect a pattern of behaviour.)

### **Abuse of trust**

A person in certain positions of care and authority in sexual activity with a child under 18 in his care – replicating the new offence in the Sexual Offences (Amendment) Bill.

Existing proposal in SO(A) Bill: **5 years**.

### **Sexual activity with a person without capacity to consent**

A person having sexual activity with another who has no capacity to decide or give free agreement.

Proposed penalty: **10 years** (this merges existing offences of usi, buggery and indecent assault on a mental defective).

### **Breach of a relationship of care**

- A member of staff (whether paid or unpaid) of a hospital or residential care establishment who has a sexual relationship with a patient with a mental disorder, (whether inpatient or outpatient), or a person in residential care;
- A person (whether paid or unpaid) providing designated care services who has a sexual relationship with a person receiving certain care services in the community;
- A medical practitioner or person who provides medical or therapeutic services who has a sexual relationship with a patient or client.

Proposed penalty: **7 years** (a new offence which replaces and extends S128 of Mental Health Act 1959 which carries a 2 year penalty (and is hardly used).

### **Obtaining sex with a mentally impaired person by threat or deception**

A new offence intended to enable the law to deal with the lower level of threat or deception against mentally impaired people.

Proposed penalty: **10 years** (new offence).

### **Familial sexual abuse**

- Sexual penetration between persons related by blood or adoption:
  - (a) children, siblings (and half-siblings), parents, natural aunts and uncles, grandparents, grandchildren, adoptive parents and adoptive children during their lifetime;
  - (b) adoptive siblings to the age of 18;
- Sexual penetration between step-parents/step-children and foster-parents/foster-children where the child is under the age of 18;
- Sexual penetration between a child under the age of 18 and other persons living in the household and in a position of trust and authority over that child.

- Proposed penalty: (a) **life** with a child under 13;
- (b) **14 years** with a child over 13 but under 18
- (c) **7 years** with a person over the age of 18.

(These represent overall increases on the existing penalties for incest – by man with girl under 13 – life (attempt 7 years); otherwise 7 years (attempt 2 years); incest by a woman – 7 years (attempt 2 years); inciting a girl to commit incest – 2 years/6 months.)

### **Trafficking**

Bringing or enabling a person to move from one place to another for the purposes of commercial sexual exploitation.

Proposed penalty: **14 years** (a new offence to cover a range of criminal behaviour that can involve trans-national organised crime and generate very large profits.)

### **Commercial sexual exploitation of children**

A set of new offences relating to:

- buying the sexual services of a child under 18;
- recruiting, inducing or compelling a child under 18 into commercial sexual exploitation;
- participating, facilitating or allowing the commercial sexual exploitation of a child under 18;
- receiving money or other reward, favour or compensation for the sexual exploitation of a child.

- Proposed penalties: (a) **life** where the child is under the age of 13;
- (b) **10 years** where the child is over 13 but under 18 except:
- (c) **5 years** for buying sexual services with a child over the age of 16 but under 18.

### **Sexual exploitation of adults**

A range of offences to replace ss22, 29, 30 and 31 of SOA 56, and s5 SOA 67.

- Recruiting a person into prostitution whether or not for reward or gain;
- Managing or controlling the activities of men or women who are prostitutes, for money or reward;
- Exploiting others by receiving money or reward from men and women who are prostitutes.

Proposed penalty: **7 years** (the exploitation of a vulnerable person should be an aggravating feature).



### **Indecent Exposure**

Exposure of the penis when he knew or should have known that it would cause fear, alarm or distress to a person.

Proposed Penalty: (a) **6 months** for first offence;  
(b) **2 years** for persistent offending.

(The existing penalty (Vagrancy Act 1824) is 3 months/1 year on second conviction. The penalty for this offence caused us some problem because although we regard it as more serious than it has traditionally been regarded; any one incident may not be very serious. We thought that there was justification for a higher penalty for persistent offending. We also thought that there were strong arguments for this offence remaining as a summary offence – magistrates were well equipped (and accustomed) to dealing with it. It could where necessary be referred to the Crown Court for sentencing.)

### **Sexual activity in public**

To undertake any sexual activity in public place that causes fear, alarm and distress to others

Proposed penalty: **6 months or a fine** (summary only).

### **Bestiality**

To penetrate, or be penetrated by, an animal.

Proposed penalty: **5 years** (this is a reduction on the present penalty – life).

### **Voyeurism**

To view others without their consent in situations where there is a reasonable expectation of privacy.

Proposed penalty: (a) **6 months** for the first offence;  
(b) **2 years** for persistent offending.

### **Sexual Interference with human remains**

A new offence.

Proposed penalty: **2 years**.

### **Compelling sexual acts**

A new offence of compelling another person to do a sexual act to perpetrator, self, a third party or an animal;

Proposed penalties: (a) **life** for compelling sexual penetration with a person or an animal;  
(b) **10 years** for compelling other sexual acts.

(New offence that needs to reflect the seriousness of the compelled acts. In order to keep the relationship between the penalty and the nature of the offence in balance we propose two levels of offence and penalty.)

## 9.4 Sex Offender Treatment

**9.4.1** In considering the offences and penalties we also looked at the related issues of the treatment of sex offenders, whether in the community or in prison establishments. The issue of the how far treatment should form part of the sentence of the court, or the regime available in prisons and in the community is not for us to determine. However, a number of the submissions made to us had registered the point that treatment was an important tool for reducing the risk of future offending, particularly for young people, and the subject had arisen in discussion. We have had an opportunity to consider some related issues which should be of wider interest.

**9.4.2** The Prison Service in England and Wales has one of the leading programmes of sex offender treatment (SOTP) in the world. The programme has been continuously monitored and developed over recent years, and an evaluation was published in 1999<sup>150</sup>. The evaluation stated that “the Core Programme is recognised internationally as probably the most systematically delivered, well managed and evaluated sexual offender treatment programme”.

**9.4.3** The Probation Service too has developed a number of sex offender treatment programmes for those serving community sentences, released on licence or serving part of their sentence in the community. These have been evaluated in the past and the quality has proved variable: the best have been good and the worst were ineffective. The Probation Service has adopted the “what works” approach, and are developing a number of Pathfinder schemes which have been evaluated and are considered to be effective. These schemes will be accredited and should then be adopted for use in other probation areas.

**9.4.4** In addition there are other providers of sex offender treatment programmes – in hospitals and specialist clinics such as the Wolvercote and the Portman Clinics; the NSPCC and other agencies who work with young abusers. The evidence from discussions with psychiatrists working in this field is that the strongest likelihood of successful intervention is with young people.

**9.4.5** It is difficult to know how effective sex offender treatment is. The early evidence was not promising; studies in 1989<sup>151</sup> indicated that treatment was not effective, although programmes were not then of very good quality. More recent studies do seem to indicate that treatment can have an impact on those factors believed to be associated with re-offending and may result in fewer re-convictions and/or a reduction in the seriousness of offending. The SOTP programme is regularly evaluated, and is being developed and improved over time, but has not been going long enough to have long-term analysis of reconviction rates. (Reconviction rates for sex offences are low; we do not of course know the re-offending rate.) The most recent SOTP evaluation showed that benefits in attitudes to offending were maintained over nine months. Longer-term research would be needed to identify the effects over time.

**9.4.6** We thought that it was important that appropriate sex offender treatment should be available for as many offenders as could benefit from it. We welcomed the progress that the prison and probation services are making towards improving and increasing the provision of treatment, and support its use wherever possible. We recognise that treatment is not a panacea: sex offending can result from deeply ingrained patterns of behaviour. However, in working to create a safe, just and tolerant society it is important that all that can be done to reduce the risk of future re-offending and harm to victims should be done. We also recognise that some people may be unsuitable for treatment programmes. However, we thought that it was important that early professional assessment of the need and the suitability for treatment should be an integral part of any sentence for a conviction for sex offending.

<sup>150</sup> STEP 3: An Evaluation of the Prison Service Sex Offender Treatment Programme: Beech, Fisher and Beckett.

<sup>151</sup> Furry et al, quoted in PRG paper 99 – Sex Offending against children, Understanding the risk: Grubin.





9.4.7 We also thought it was important that the Prison Service and Probation Service should develop their links and work together to ensure that the work done with offenders in prison and in the community can be linked and developed. This was particularly important given the opportunity for periods of extended supervision in the community to be awarded by the courts when supervising sex offenders.

**Recommendation 59: Sex offender treatment should continue to develop and be made available to those convicted of relevant offences and early professional assessment of the need and suitability for treatment should be part of any sentence for such offenders.**

## 9.5 Implications of our proposals for the Sex Offenders Act 1997

9.5.1 The Sex Offenders Act 1997 requires all those who are cautioned or convicted of a sex offence against a child, or of certain very serious offences like rape and serious indecent assault against any person (with a sentence of over 2½ years), to inform the police of changes of name and address for a given period of time. The offences which trigger the registration requirement are set out in Schedule 1 of the Act. The policy underlying the Act was to increase the protection that the police and other agencies could give to the public, and particularly children, by knowing the whereabouts of those convicted of sex offending.

9.5.2 Our role was to consider which of our proposed offences indicate the kind of serious public risk that should carry a requirement to register. We have thought carefully about the nature of the offending behaviour in setting out the offences, and legislation that changes the Sexual Offences Act 1956 will require Schedule 1 of the Sex Offenders Act 1997 to be amended. It will impact on the definition of a Schedule 1 offender in the Children and Young Persons Act 1933, which has significant life-long effects on those to whom it applies.

9.5.3 In looking at which of the offences we recommended should carry the requirement to register, we had in mind that contributors to the review had identified certain gaps in the original schedule (notably for the non-inclusion of burglary with intent to rape and pimping offences against children) and the concerns expressed about the inclusion of consensual offences. We also considered the question of children and the requirement to register. We recognised that the Act was being separately evaluated and reviewed.

9.5.4 We started by eliminating certain of the offences we recommend. Recognising that the 1997 Act is aimed at preventing the risk from those who offend sexually we suggest that the new Public Order offences we recommend are not suitable for registration. These are offences of public nuisance rather than offence against individuals. The other offences we have recommended include behaviour that is sufficiently serious or indicative of potential risk as to warrant registration, including those of sexually exploiting children and trafficking. The evidence from interviews with convicted sex offenders seems to indicate that offenders may display a wide range of behaviour from voyeurism and exposure to rape, and that many are not selective about their choice of victim and may have a repertoire of offending behaviour<sup>152</sup>. It therefore becomes increasingly difficult to identify degrees of risk to the public by differentiating between offences. We consider that the offences we have recommended represent a robust portfolio on which to base any new registration requirements. We hope that the review of the Act will consider the policy and practical implications of our recommendations in full.

**Recommendation 60: All of the offences that we recommend, except for those which we recommend as public order/public nuisance offences, carry some degree of risk that would justify their consideration as part of a review of Schedule 1 of the Sex Offenders Act 1997.**

<sup>152</sup> Abel et al, in Ben-Aaron et al "Clinical Criminology", Toronto 1985; Bagel and Thrust "Understanding and Preventing Child Sexual Abuse" 1996; Weinrott and Saylor, 1991.

**9.5.5** The Sex Offenders Act requires all of those convicted of a relevant offence to register with the police regardless of age or ability. This is a clear and certain requirement that achieves a high degree of compliance. However, reservations have been expressed about including all children who commit certain sex offences in the registration requirements. In looking at offences against and by children we have recommended keeping the offence of under-age sex to maintain the age of consent, but have also recommended that mutually agreed activity should not normally be prosecuted. We also recognised that serious and coercive sexual offending was carried out by children, who could present a continuing risk. We thought, therefore, that there were children who should be on the register, and there was no easy answer to suggest that all children should or should not be registered.

**9.5.6** We also considered if the court should have discretion whether or not to require a child to register. We thought that if the courts were to exercise such discretion, it should be informed by evidence-based guidance. This is a question that merits careful in-depth consideration, and is a task for the separate review of the Sex Offenders Act. We recommend that that review looks carefully at the issue of the registration of children convicted of sex offences and considers whether there should be discretion for the court to decide in individual cases.

***Recommendation 61: The issue of the requirement for children to register under the Sex Offenders Act should be separately considered in a review of the Act.***

## 9.6 Alternative Verdicts

**9.6.1** The Criminal Law Act 1967 provides that where a jury finds a defendant not guilty of an indictment for one crime, and the indictment includes, expressly or by implication, an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that offence. This is potentially an important provision in sex offences where for children and some vulnerable people there are charges that rely on the proof both of the act of sexual penetration and lack of consent (such as rape), whilst other offences require only the act to be proved, but not consent. For example, under the present law, if the principal charge of rape of a girl under 16 is not proved, it is possible for the jury to substitute indecent assault as an alternative verdict even if the defendant was not actually charged with that offence.

**9.6.2** We think that these arrangements are particularly important in sex offences where the law makes particular provision for the protection of children or other vulnerable people. We fully support the use by the prosecution of the most serious appropriate offence in any case – which may be rape or sexual assault by penetration. Both of these offences rely on a jury being satisfied that there was no free agreement. Where that element of the charge is not proved, we recommend other offences that do not require consent to be proved (and where the sexual act itself was an offence – such as a familial sexual abuse where the defendant and victim fall within the prohibited relationships) should form an alternative verdict. Other examples include where a man is accused of rape of a girl under 16: if it is proved that intercourse took place, but the issue of free agreement could not be resolved, a jury may find him not guilty of rape but guilty of adult sexual activity with a child.

**9.6.3** Our general policy is that the law should be transparent as to its content and application. The Sexual Offences Act 1956 contained specific provisions about alternative verdicts, some of which were repealed by the Criminal Law Act. Accordingly we recommend that in the preparation of any new sexual offences legislation, for the avoidance of doubt, alternative verdicts should be set out in statute.

***Recommendation 62: The provision of alternative verdicts should be considered in the preparation of new legislation, and for the avoidance of doubt that they should be set out in statute.***



# Annex One

## Membership of the Review and Costs

### **Membership of the Sex Offences Review**

Betty Moxon OBE (Home Office) **Chair**

Su McLean-Tooke (Home Office) **Secretary to the review**

Haydee Scarsbrook (Home Office) **Administrative support to the review**

### **Steering Group:**

Catherine Allen (Women's Unit) (until November 1999)

Chris Atkinson (NSPCC) (from August 1999)

Sarah Bateman (Department of Health) (until August 1999)

Melvyn Barker OBE (Department for Education and Employment)

Martin Bowley QC

Yasmin Alibhai-Brown (until June 1999)

David Brown (Home Office)

Shami Chakrabarti (Home Office)

Bruce Clark (formerly NSPCC, then Department of Health after August 1999)

Tia Cockrell (Legal Secretariat to the Law Officers) (from May 1999)

Sally Cole (Crown Prosecution Service)

Det Supt Mick Creedon (Association of Chief Police Officers) (from November 1999)

Stephen Dawson (Metropolitan Stipendiary Magistrates and The Law Society)

Gerry Egan (Department of Health)

Helen Goodman (Lord Chancellor's Department)

The Rev Canon Dr Donald Gray CBE

Andrea Humphrey (Department of Health)

Terry Lee (Northern Ireland Office)

Maura McGowan (General Council of the Bar)

Stephen Parkinson (Legal Secretariat to the Law Officers) April 1999

Christine Pulford (Lord Chancellor's Department) (until December 1999)

Dame Helen Reeves (Victim Support)

Caroline Ricketts (Women's Unit) (from November 1999)

Gerry Robb (Department of Health)

Det Supt Malcolm Ross (Association of Chief Police Officers) (until October 1999)

Robert Street (Research, Statistics and Development Directorate, Home Office)

Tracy Wallace (Department of the Environment, Transport and the Regions)

Stephen Wooler (Legal Secretariat to the Law Officers) (until March 1999)

Anna Worrall QC (General Council of the Bar)



### **External Reference Group**

Julie Barnard (Rape Crisis Federation) (from April to September 1999)  
Nick Bent (from May 1999)  
Mark Blake (Blackliners) (until December 1999)  
David Congdon (Mencap)  
Penny Dean (The Children's Society)  
Dina Gold (Board of Deputies of British Jews)  
Steve Hodges (NCH Action for Children) (from March until October 1999)  
Helen Jones (Rape Crisis Federation) (from September 1999)  
Dr Liz Kelly CBE (University of North London)  
Shaun Kelly (NCH Action for Children) (from November 1999)  
Dan Lambeth (Solicitor)  
Sandra McNeill (Campaign to End Rape)  
Anita Mansley (St Mary's Sexual Assault Referral Centre, Manchester)  
Angela Mason OBE (Stonewall)  
Deryk Mead (NCH Action for Children) (February 1999)  
Dr Gillian Mezey (Royal College of Psychiatrists) (from July 1999)  
Margaret Pedler (Mind)  
Nerys Rees (Women's National Commission & Soroptimist International)  
Dr Deborah Rogers (British Medical Association)  
Imam Dr Abduljalil Sajid JP (Muslim Council of Britain) (from September 1999)  
Sara Swann MBE (Barnardo's)  
Professor Jennifer Temkin (Department of Law, University of Sussex)  
Ruth Vincent (Association of Directors of Social Services) (from May 1999)  
David Watts (Essex Social Services)(from July 1999)  
Rev Neil Whitehouse (Kairos in Soho and The Methodist Church)  
Claire Wilson-Thomas (CARE, Christian Action, Research and Education)

### **Papers also sent to:**

British Medical Association  
British Transport Police  
Department for Culture, Media and Sport  
HM Customs and Excise  
HM Inspectorate of Constabulary  
Justice & Victims Unit (Home Office)  
The Law Commission  
Law Reform Committee, General Council of the Bar  
National Assembly for Wales  
Operational Policing Policy Unit (Home Office)  
Scottish Executive  
Teenage Pregnancy Unit

**Cost of the Review**

	£
Conferences and Seminars	31025
Research	
• Research commissioned	17500
• Australia and New Zealand	8321
• Translation services	1081
• Conferences attended	300
• Research materials	250
Travel and subsistence	6000
Reprographics, etc	5000
Printing (approx)	50000



# Annex Two

## Offences and Penalties

### COMPARATIVE TABLE OF EXISTING AND PROPOSED OFFENCES AND PENALTIES

Existing offence (paraphrased)	Penalty maximum	Recommended action	Proposed offence	Proposed penalty maximum
<u>Rape</u> : anal or vaginal intercourse by a man without consent,  (s1 SOA 1956)	Life  Attempt: life	Extend scope of offence to include oral penetration	<u>Rape</u> : penile penetration of another person's mouth, anus or vagina without consent.	Life
<u>Indecent assault</u> : (on a woman)  (s14 SOA 1956)	10 years	Replace with 2 new offences, one for the most serious sexual assaults, and one for non-penetrative assaults.	<u>Sexual assault by penetration</u> : anal or genital penetration with any part of the body or an object without consent.	Life
<u>Indecent assault</u> : (on a man)  (s15 SOA 1956)	10 years			
			<u>Sexual assault</u> : a person who sexually assaults another person without consent.	10 years
<u>Assault to commit rape</u> : (common law offence fallen into disuse)	Life	Replace	<u>Assault with intent to commit a serious sex offence</u> : (rape or sexual assault by penetration).	10 years
<u>Burglary with intent to commit rape</u> :  (s9 Theft Act 1968)	14 years (if a dwelling) 10 years (for any other building)	Replace – extend to cover rape and sexual assault by penetration	<u>Trespass with intent to commit a serious sex offence</u> :	Life
<u>Procurement of sexual intercourse from a woman by threat or intimidation</u> :  (s2 SOA 1956)	2 years	Replace both offences, extend to protect male victims	<u>Obtaining sexual penetration by threats or deception</u> : in any part of the world	10 years



Existing offence (paraphrased)	Penalty maximum	Recommended action	Proposed offence	Proposed penalty maximum
<u>Procurement of sexual intercourse from a woman by false pretences or false representations:</u>  (s3 SOA 1956)	2 years			
<u>Applying drugs etc., to a woman to obtain sexual intercourse:</u>  (s4 SOA 1956)	2 years	Replace and extend to protect males	<u>Administering drink or drugs to overcome a person for the purposes of sex:</u>	7 years
<u>Indecent exposure:</u> wilfully, openly, lewdly and obscenely exposing a penis with intent to insult any female.  (s4 Vagrancy Act 1824) (s28 Town & Police Clauses Act 1847)	3 months (1 year for second or subsequent conviction)	Replace and extend to include exposure to males.	<u>Indecent exposure:</u> exposure of the male genitalia that he knew or should have known would cause fear, alarm or distress to any person.	2 years
		<b>New</b>	<u>Compelling sexual acts:</u> compelling another person to carry out a sexual act.	Life for any sexual penetration Otherwise 10 years
		<b>New</b>	<u>Voyeurism:</u> to view others without their knowledge or consent inside a building where there is a reasonable expectation of privacy.	2 years
		<b>New</b>	<u>Sexual interference with human remains.</u>	2 years
s5 Public Order Act 1986: behaviour likely to cause harassment, alarm or distress to a person who is present.	Fine	Add a new specific offence to cover sexual behaviour in public places	<u>Sexual activity in public:</u> to undertake any sexual activity in a public place (including public toilets) which was likely to cause fear, alarm and distress to another.	6 months
<u>Outraging public decency:</u> common law offence	Life	No change		
<u>Buggery (1):</u> consensual anal intercourse not in private.  (s12 SOA 1956)	2 years	Repeal for consenting adults	Protective elements for those under the age of consent, and for those with severe learning disability retained in other offences. Activity in public places would be caught under new Public Order Offence	

Existing offence (paraphrased)	Penalty maximum	Recommended action	Proposed offence	Proposed penalty maximum
<u>Gross indecency (1):</u> consensual act of indecency between men not in private (s13 SOA 1956)	2 years	Repeal for consenting adults	Protective elements for those under the age of consent or with severe learning disability retained in other offences. Activity in public places would be caught by new Public Order Offence	
<u>Procuring others to commit homosexual acts:</u>  (s4 SOA 1967)	2 years	Repeal	Protective elements for those under the age of consent or for non-consensual activity retained in other offences.	
<u>Assault with intent to commit buggery:</u>  (s16 SOA 1956)	10 years	Replace	<u>Assault with intent to commit a serious sexual offence:</u> as above	10 years
<u>Buggery (2): bestiality.</u>	Life	Replace this element	<u>Bestiality:</u> to sexually penetrate or to be sexually penetrated by an animal. (Links to the new offence of compelling sexual acts)	5 years
<u>Sexual intercourse with a girl &lt;13:</u> (s5 SOA 1956)  <u>Sexual intercourse with a girl &lt;16</u> (s6 SOA 1956)  <u>Buggery (3)– anal intercourse with a child under the age of consent</u>	Life  2 years	Replace all 3 offences with generic offences to protect children from sexual activity	<u>Adult sexual abuse of a child (1):</u> where a person over the age of 18 has sex with a child under 16.  <u>Sexual activity between minors (1):</u> where a person under the age of 18 has sex with a child under the age of 16.	Life if child aged < 13 years 10 years if child aged >13 but <16.  10 years if child <13 5 years if child >13 but <16
<u>Indecency with child under 14:</u> any person who commits an act of gross indecency with or towards a child, or who incites a child to such an act with him or another.  (s1 Indecency with Children Act 1960)	10 years	Replace and raise age of protection to 16	<u>Adult sexual abuse of a child (2):</u> where a person over the age of 18 causes or induces a child to perform a sexual act.  <u>Sexual activity between minors (2):</u> where a person under the age of 18 causes or induces a child to perform a sexual act.  <u>Adult sexual abuse of a child (3):</u> where a person over the age of 18 performs a sexual act towards or makes a child witness a sexual act.  <u>Sexual activity between minors (3):</u> where a person under the age of 18 performs a sexual act towards or makes a child witness a sexual act .	10 years  5 years  10 years  5 years





Existing offence (paraphrased)	Penalty maximum	Recommended action	Proposed offence	Proposed penalty maximum
		New	<u>Persistent sexual abuse of a child</u> : a course of conduct of repeated abuse of a child over time.	14 years
<u>Abuse of trust</u> : people in certain position of trust and responsibility (as defined by the Act, ) who engage in sexual activity with a child in their care. (SO(A)A 2000)	5 years	Retain unchanged	<u>Abuse of trust</u> : as at present.	5 years
<u>Incest</u> : sexual intercourse with a woman he knows to be his grand-daughter, daughter, sister (including half-sister) or mother.  (s10 SOA 1956)	Where victim is <13: life Otherwise 7 years	Replace with redesigned offences to protect children in families and households, and adults in certain close relationships.	<u>Familial sexual abuse (1)</u> : an offence for a person to sexually penetrate (or to consent to being sexually penetrated by ) a person who he/she knows to be a grandparent, parent, sibling (including half-sibling), child, grandchild, natural aunt or uncle, adoptive parent or adoptive child at any time, or an adoptive sibling who is under the age of 18.	Child <13: life Child >13 but <18: 14 years Adult: 7 years
		New	<u>Familial sexual abuse (2)</u> : an offence for a person to sexually penetrate (or to consent to being sexually penetrated by) a child under 18 who he/she knows to be a step-parent, foster parent, step-child or foster child.	Child <13: life Child >13 but <18: 14 years
		New	<u>Familial sexual abuse (3)</u> : an offence for any person living in the household and in a position of trust and authority over a child under 18 to sexually penetrate (or be sexually penetrated by ) that child.	Child <13: life Child >13 but <18: 14 years
<u>Incitement of girls &lt;16 to commit incest</u> :  (s54 Criminal Law Act 1977)	2 years	Replace	<u>Adult sexual abuse of a child (2)</u> : see above  Sexual activity between minors: see above	10 years  5 years
<u>Incest by a woman</u> : with her consent.  (s11 SOA 1956)	7 years	Replace	<u>Familial sexual abuse (1)</u> :	Child <13: life Child >13 but <18: 14 years Adult: 7 years

Existing offence (paraphrased)	Penalty maximum	Recommended action	Proposed offence	Proposed penalty maximum
<u>Intercourse with a defective:</u>  (s7 SOA 1956)	2 years	Replace	<u>Sexual activity with a person with severe mental incapacity:</u> where a person knows or ought to have known that the victim is severely incapacitated.	Life
<u>Sexual intercourse with patients:</u> a man who is a member of staff, etc., of a hospital or mental nursing home having sexual intercourse, or committing gross indecency with a patient  (s128 Mental Health Act 1956)	2 years	Replace and strengthen	<u>Breach of a relationship of care (1):</u> an offence for a member of staff, whether paid or unpaid, to engage in sexual relationships with a patient with a mental disorder.	7 years
		<b>New</b>	<u>Breach of a relationship of care (2):</u> an offence for a person to engage in sexual relationships with a person to whom they are providing treatment, therapy or certain care services because of their mental or physical incapacity.	7 years
		<b>New</b>	<u>Breach of a relationship of care (3):</u> an offence for a person in a position of care and responsibility, whether paid or unpaid, to engage in sexual relationships with a person in residential care.	7 years
		<b>New</b>	<u>Obtaining sex with a mentally impaired person by threat or deception:</u>	
<u>Abduction of woman: by force or for the sake of her property.</u>  (s17 SOA 1956)	14 years	Replace, strengthen, apply to males	<u>Abduction with intent to commit a serious sex offence:</u>	10 years
<u>Abduction of unmarried girl &lt;18:</u> from parent or guardian  (s19 SOA 1956)	2 years	Replace, strengthen, apply to males		
<u>Abduction of defective:</u> from parent or guardian.  (s21 SOA 1956)	2 years	Replace and strengthen		



Existing offence (paraphrased)	Penalty maximum	Recommended action	Proposed offence	Proposed penalty maximum
<p><u>Causing prostitution of women:</u></p> <p>(s22 SOA 1956)</p> <p><u>Causing or encouraging prostitution of (etc) a girl under 16</u></p> <p>S28 SOA</p>	<p>2 years</p> <p>2 years</p>	<p>Replace and apply to males</p> <p>Replace and strengthen; apply to boys</p>	<p><u>Commercial sexual exploitation of a child (1):</u> recruiting, inducing or compelling a child under the age of 18 into commercial sexual exploitation (eg prostitution or pornography).  <u>Commercial sexual exploitation of a child (2):</u> receiving money or other reward, favour or compensation for the sexual exploitation of a child  <u>Commercial sexual exploitation of a child (3):</u> participating in, facilitating or allowing the commercial sexual exploitation of a child.</p>	<p>14 years</p> <p>10 years</p> <p>10 years</p>
<p><u>Procuration of girl under 21: for unlawful sexual intercourse in any part of the world.</u></p> <p>(s23 SOA 1956)</p>	<p>2 years</p>	<p>Replace and strengthen</p>	<p><u>Commercial sexual exploitation of a child (1):</u>  <u>Commercial sexual exploitation of a child (2):</u>  <u>Commercial sexual exploitation of a child (3):</u> as appropriate  <u>Commercial sexual exploitation of a child (4):</u> buying sex with a child (for the gain of the child or another person)  <u>Recruiting a person into prostitution:</u> whether or not for reward or gain.  <u>Managing or controlling:</u> the activities of men or women who are prostitutes, for money or reward.  <u>Exploiting others:</u> by receiving money or reward from men and women who are prostitutes.</p>	<p>14 years</p> <p>10 years</p> <p>10 years</p> <p>10 years</p> <p>7 years</p> <p>7 years</p> <p>7 years</p>
		<p><b>New</b></p>	<p><u>Trafficking a person for the purposes of sexual exploitation:</u> arranging, facilitating or aiding the movement of a person from one place to another for the purposes of sexual exploitation.</p>	<p>14 years</p>

Existing offence (paraphrased)	Penalty maximum	Recommended action	Proposed offence	Proposed penalty maximum
<u>Causing or encouraging prostitution:</u> of a defective.  (s29 SOA 1956)	2 years	Replace	<u>Recruiting a person into prostitution:</u> whether or not for reward or gain. <u>Managing or controlling:</u> the activities of men or women who are prostitutes, for money or reward. <u>Exploiting others:</u> by receiving money or reward from men and women who are prostitutes	7 years 7 years 7 years
<u>Man living on the earnings of prostitution:</u>  (s30 SOA 1956)	7 years	Replace and strengthen for pimping children	<u>Commercial sexual exploitation of a child (2):</u> receiving money or other reward, favour or compensation for the sexual exploitation of a child	14 years
		Replace	<u>Exploiting others:</u> by receiving money or reward from men and women who are prostitutes. <u>Managing or controlling:</u> the activities of men or women who are prostitutes, for money or reward.	7 years 7 years
<u>Woman exercising control over prostitute:</u>  (s31 SOA 1956)	7 years	Replace	<u>Commercial sexual exploitation of a child (2):</u> receiving money or other reward, favour or compensation for the sexual exploitation of a child <u>Commercial sexual exploitation of a child (3):</u> participating in, facilitating or allowing the sexual exploitation of a child.	10 years 10 years
		Replace	<u>Exploiting others:</u> by receiving money or reward from men and women who are prostitutes. <u>Managing or controlling:</u> the activities of men or women who are prostitutes, for money or reward.	7 years 7 years



Existing offence (paraphrased)	Penalty maximum	Recommended action	Proposed offence	Proposed penalty maximum
<p><u>Living on earnings of male prostitution:</u>  (s5 SOA 1967)</p>	7 years	Replace	<p><u>Commercial sexual exploitation of a child (2):</u> receiving money or other reward, favour or compensation for the sexual exploitation of a child  <u>Exploiting others:</u> by receiving money or reward from men and women who are prostitutes.  <u>Managing or controlling:</u> the activities of men or women who are prostitutes, for money or reward.</p>	<p>10 years  7 years  7 years</p>
<p><u>Solicitation by men:</u> for immoral purposes.  (s32 SOA 1956)</p>	2 years	Replace with new offence similar to soliciting by a woman		

