



## **Appendix D2**

# **Literature Review of Research into the Law on Sexual Offences Against Children and Vulnerable People**

*A report commissioned by the Research,  
Development and Statistics Directorate of the  
Home Office for the Review of Sexual Offences*

**By Dr Caroline Keenan and  
Lee Maitland  
University of Bristol**

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# Contents

	<b>Pages</b>
<b>Summary</b>	128
<b>Introduction</b>	133
<b>Rape</b>	135
<b>Unlawful sexual intercourse</b>	143
<b>Incest</b>	149
<b>Sexual intercourse with the mentally handicapped</b>	155
<b>Indecent assault, acts of gross indecency with children and the mentally handicapped, and buggery</b>	159
<b>Abduction offences which deal specifically with children and the mentally handicapped</b>	163
<b>Prostitution and procuring offences which deal specifically with children and the mentally handicapped</b>	165
<b>Indecent photographs of children</b>	167
<b>The law and the European Convention of Human Rights (ECHR)</b>	168
<b>Conclusion</b>	172
<b>Bibliography</b>	174



## SUMMARY

### Introduction

Children and vulnerable adults (those who suffer some sort of mental disability) are clearly especially at risk of sexual exploitation. In some instances the law has recognised this vulnerability by framing offence specifically criminalising sexual activities involving these groups. However, the majority of sexual offences are not age or capacity specific. For example, for the offences of indecent assault, rape or incest the complainant may be either a child or an adult. This has inhibited effective statistical monitoring of the number of reported sexual offences against children in particular. It has therefore been difficult to study the success of innovations such as reforms to the manner in which children can give evidence, or to identify problems with the operation of a particular law as it relates to children. It should also be noted that details of the complainant are not recorded with the offence and so we have no information about the number of reported offences where the victim is a 'vulnerable' adult.

### Rape

#### *Consent: the issues*

Following the Court of Appeal's decision in *R v Olugboja* the fact that a complainant submits to sexual intercourse without the threat of force or violence is not now considered in law to denote the complainant that consented. This decision has been subject to a number of criticisms:

- The meaning of 'consent' is now left undefined and is a matter of fact to be determined by a jury. The jury is not required to take account of any fixed factors indicating situations where consent could not be freely given. Decisions on whether a complainant consented may thus be based in practice on a variety of different criteria.
- This test may be particularly problematic in relation to children and vulnerable adults. Jury members may have little or no experience of the behaviour of vulnerable adults or of children who have been sexually abused on which to base a decision.

#### *Suggested reforms*

- A non-exhaustive list of situations in which consent can be negated may be beneficial and may help to guide juries in judging behaviour. An adoption of this reform could mean that the law would fail to recognise that different people respond differently to the same pressures.
- The offence of rape should only relate to situations where consent to sexual intercourse has been obtained by explicit or implicit threats of force, against the complainant. Alternatively the evidential burden of establishing consent should be shifted onto the shoulders of the defence in cases, where force or threat of force is used.

#### *Capacity to Consent: the Issues*

Before a person is able to give a valid consent to sexual intercourse they must have the capacity to consent. As with consent, whether a person has capacity to consent to sexual intercourse is a question of fact for the jury to decide.

- Children: In order for a child to be deemed to have the requisite capacity to consent to sexual intercourse they must have a sufficient degree of understanding and knowledge about the act which is to take place.
- The mentally vulnerable: The decision of the Supreme Court of Victoria in *R v Morgan* (woman who was mentally handicapped) held that in order to establish lack of capacity the prosecution must prove that she had not sufficient knowledge or understanding to comprehend that what was proposed was the physical fact of penetration, or the act of penetration was of a sexual nature as opposed to an act of a totally different character.
- Some commentators criticise the current position on the basis of uncertainty. The degree of knowledge required is a matter of some dispute. *R v Morgan*, for example, may require little more than a basic knowledge of the facts of life and it may be that this decision offers insufficient protection to some women. Other commentators believe, however, that the level of knowledge is appropriately set quite low to ensure that women of lower intelligence are permitted freedom of sexual expression.

#### ***Capacity to consent: suggested reforms***

- The current definitions of capacity could be reformed in two ways. One alternative is to define capacity to consent according to *status*. Thus anyone under a defined age, or having been diagnosed with a specific condition would be considered incapable in law of giving valid consent to sexual intercourse, irrespective of their actual competence.
- Alternatively capacity could continue to be defined in terms of individual *understanding*, but the criteria on which the court makes the decision could be refined. For example the Law Commission has recommended that a jury must be sure that a child or person who suffers from a mental disability has sufficient understanding and intelligence to understand the information relevant to the decision and the foreseeable consequences of making the decision.

#### ***Capacity to consent: criticisms of proposals for reform***

- Were the first model to be adopted, it would deny sexual freedom to those who fall within a defined category, irrespective of their individual capacity to consent. It may also be argued that when the legislation does not reflect a complainant's capacity to consent, enforcement practice will impose it.
- In order for the Law Commission's proposal to be acceptable one has to be confident that the jury are competent to perform this task, which is arguable one that should be determined by an expert.

#### ***Changing the definition of rape: the issues***

- The success of a charge of rape depends upon a determination that penetration by a penis actually took place. This causes particular problems for children or members of other vulnerable groups who know that they have been penetrated, but do not describe clearly in their evidence what they have been penetrated with. The prosecution may therefore more readily accept a reduction in the charge down from rape to one of indecent assault.



- Some commentators believe that it is necessary to restrict the offence of rape to situations where there has been penile penetration of the vagina or anus on the grounds that rape is a distinct offence which should not be diluted by the inclusion of other forms of assault such as oral penetration by the penis or penetration by objects into the vagina or anus.
- Other commentators believe that the current restrictions are untenable. Oral penetration or penetration otherwise than with the penis may involve an act of sadism which may cause the victim greater distress and degradation than an act of rape.

### **Other Sexual Offences**

The literature review identified common features of other offences which have been highlighted as potentially problematic.

#### ***Gender specificity***

- The majority of sexual offences against children and vulnerable adults are gender specific: the victim must be female and the perpetrator male (e.g. unlawful sexual intercourse; incest; sexual intercourse with a defective). A few offences are framed so that one provision covers offences where the perpetrator is male and another provision applies when the perpetrator is female (e.g. indecent assault). Many commentators believe that this discrimination against males is untenable. Such arguments will gain greater force following the implementation of the Human Rights Act 1998.

#### ***Inconsistency with the reformed definition of rape***

- The majority of sexual offences considered in this review only cover acts of vaginal penetration by a penis. There is argument that all sexual offences concerning intercourse should cover anal, as well as vaginal intercourse, thus reflecting the changes made to the definition of rape by the Criminal Justice and Public Order Act 1994.

#### ***Antiquated laws***

- The term 'defective' used in s7 Sexual Offences Act 1956 (prohibition of sexual intercourse with a defective) stems from a bygone, unscientific age and is now both insulting and unhelpful. It leaves the decision to be made by the jury when determining someone's status in such circumstances requires the knowledge and skill of an expert.
- Some commentators criticise the law as it relates to the abduction of young women as 'antiquated'. These offences, premised on a concept of rights of possession of a parent in their child, conflict with the principles which underlie modern child law and undermines a young person's right to decide when she wishes to have sexual intercourse and with whom.

#### ***Criminalising sexual experimentation***

- Commentators have suggested that some offences can criminalise non-exploitative sexual experimentation between adolescents, and in doing so can place the teenage boy who engages in such experimentation into the same offender category as an older man who takes advantage of a girl by abusing his superior age or experience.

- However, the legal age of consent is of course set at 16. Furthermore, a presumption that the similar age of the parties is indicative of a relationship of sexual experimentation could be dangerous as such relationships can also be exploitative.

### *Other offence-specific criticisms*

#### **Unlawful Sexual Intercourse with a Girl Under 16**

- A prosecution for unlawful sexual intercourse with a child under may not be commenced more than 12 months after the offence charged. The provision can act against sexually abused children as evidence suggests that many such children delay complaint for some considerable time.
- The maximum sentence for this offence is two years, thus sentencers have little scope to reflect the severity of an offence within the sentence. It is also incompatible with the ten-year maximum sentence for indecent assault.

#### **Vulnerable Groups**

- Any new law should uphold the right of all people even those severely mentally disabled to choose to have a sexual relationship. The current law ignores this right.

#### **Indecent Assault**

- Indecent assault is a ‘catch-all’ offence. It can include on the one hand minor infringements such as a stolen kiss, and on the other, extremely serious assaults such as forced oral sex.

#### **Incest**

- Incestuous relationships where a familial relationship is exploited for sexual advantage are not merely sexual offences, but arguably one of the deepest breaches of trust which can occur in a family-based society. In view of this, there seems to be a strong argument for a specific offence outlawing sexual abuse within the home, irrespective of biological ties.

#### **Challenges to the law on the grounds of its incompatibility with the European Convention of Human Rights**

A child and or vulnerable adult could potentially challenge the current legislation on the grounds of its failure to fulfil its obligations under Article 8 of the European Convention of Human Rights (ECHR) to ensure that person’s right to respect for his private life. The concept of ‘private life’ covers a person’s sexual life, as well as their physical and moral integrity.

The most likely challenges would come on the basis of Article 8 being allied with Article 14. Distinctions may be made between groups provided that such discrimination is made on an ‘objective and reasonable’ basis. We would argue that the restrictions which the current law places on the sexual life of young women and those categorised as demonstrating ‘severe mental impairment’ might be considered to have no reasonable justification. A more fundamental challenge may be made on the grounds of the lack of protection offered by the criminal law for boys suffering certain types of sexual assault (e.g. incest).



### **Conclusion**

The law in this area fails to label some types of sexual assault as criminal and does so poorly in the case of others. In doing so, the law can fail victims and potential victims in two ways. Firstly it may inadequately recognise the effects of some assaults on their victims. Secondly, it may undermine the protection that the Sex Offenders Register can offer. Offenders pose different types and levels of risk. If they are charged just with indecent assault, as the majority of those who offend against children and vulnerable adults are, these details can be lost.

The net effect of these and other shortcomings is that the current law is ineffective in protecting children and vulnerable people from sexual assault. In some areas it is also unfairly discriminatory.

## INTRODUCTION

The legal framework of offences applying to a sexual assault of a child, or vulnerable person, is currently made up of some age specific offences, such as unlawful sexual intercourse, some complainant specific offences, such as unlawful sexual intercourse with a ‘defective’, and some universal offences, which may be charged irrespective of age or status of the complainant, such as rape.

The current offences relating to children and to vulnerable adults are the product of a bygone age. Whether justice is dispensed today depends largely on whether the assault experienced by the victim was one within the contemplation of the legislators who introduced the Sexual Offences Act 1956. In many respects the law does not reflect the nature of sexual exploitation as we now understand it. Legislators imagined that the victims of sexual exploitation would primarily be female and the exploiters male. They did not know what we know now about the sexual abuse of girls and boys by both men and women. Furthermore the law did not anticipate the changing nature of society. The legislators did not, for example, foresee the growth in step-families. Thus there is the specific offence of incest, which punishes a man who has exploited his privileged position of trust and has had sexual intercourse with a female relative. However there is no offence which reflects a breach of trust when a man abuses his position and has sexual intercourse with an adoptive, foster, or step-child. Finally the law did not anticipate the growth in the concept of rights. It did not consider the right of some adults with learning difficulties, to have consensual sexual relationships.

In practice, some of the offences discussed below live a dusty existence on the statute book, barely used. At present a majority of those who offend sexually against children or vulnerable adults are charged with the catch-all offence of indecent assault. Many convictions for sexual assault may therefore fail to reflect the nature of the assault perpetrated and this has fundamental implications for the level of protection which the Sex Offenders Register may offer children and vulnerable adults. Police and prosecutors’ practice of charging within a narrow band of offences may be linked to the failure of many of our current offences to reflect the nature of the acts committed. It may also be attributable to the existence of a very wide range of offences, many of which relate to very specific circumstances. This may mean that criminal justice practitioners do not have a regular opportunity to familiarise themselves with some of the offences in practice.

This review examines the academic criticism of the offences which may be charged when the defendant has had sexual intercourse with a child or vulnerable adult namely: rape, unlawful sexual intercourse with a girl under the age of 13 and under the age of 16, incest and sexual intercourse with a ‘defective’. It then goes on to consider the law relating to other applicable sexual assaults, which are indecent assault, gross indecency with a child and buggery. Finally it examines the laws which prohibit child abduction and the facilitation of the prostitution of girls under the age of 16. In the two concluding sections we examine the possible challenges to the current legislation under the European Convention of Human Rights (ECHR) and the extent to which we consider that the current law protects children and vulnerable adults from assault.

### Definitions

There is no definition within the current law of what a ‘vulnerable group’ would be in the context of a sexual offence. For the purposes of this review we have expanded upon the definition adopted by the Law Commission when describing capacity to consent. The Law Commission defined mental disability as a disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning.<sup>1</sup> We have included in addition those who, because of a physical disability, are unable to manifest their lack of consent.

<sup>1</sup> The Law Commission (1995) *Consent in the Criminal Law. A Consultation Paper 139* (London: HMSO).



A 'child' has been defined as a person under the age of 16, unless stated otherwise.

### **Reforming the legal framework**

There are several questions which are particularly relevant when framing new sexual offences against children and vulnerable adults:

- When, if at all, a child should be considered capable in law of consenting to sexual acts.
- When an adult should be considered incapable of giving true consent.
- Whether a distinction between the offences relating to girls and boys would ever be justifiable in the framing of an offence.
- What acts should be considered more grave than others when committed against children.
- Whether the relationship between the defendant and the complainant should be an aggravating factor in an offence, and if so what type of relationship should qualify.
- What defences should be retained, in particular whether the age of the defendant should be a defence when it is similar to that of the complainant and whether a defendant's lack of knowledge of the complainant's status should be a defence when the complainant is a considered to be a child, or vulnerable adult, in law.

## RAPE

**Section 1 Sexual Offences Act 1956** – it is an offence to have *sexual intercourse* with the complainant without her consent when the defendant either knew that she did not consent or did not care less whether she was consenting or not.<sup>2</sup>

A number of questions may be raised about the law of rape when the victim is a child or a vulnerable person:

- How may a child or vulnerable adult's capacity to consent be measured?
- What test should be used to establish whether or not the complainant consented?
- Should the definition of sexual intercourse only include penile penetration?

### 2.1 Prevalence

6,337 offences of rape against a female complainant and 342 offences against a male were reported to the police in 1997 and recorded by them as offences<sup>3</sup>. However no other categorisations are made in the figures, beyond gender. The absence of categorisation of rape offences by complainant group has long been the subject of criticism. It was a finding of the Pigot Committee (an advisory group which looked at the videotaping of children's evidence) ten years ago, that the statistical monitoring of offences against children had been completely inhibited by the failure to record the age of the complainant when the offence in question was not age specific.<sup>4</sup> Should new sexual offences be introduced, which are neither age nor status specific, the knowledge base on which decisions are made about the treatment of these groups would be enhanced by new recording rules specifying that the age of the complainant should be recorded with the offence. Such a process could also be used to identify complainants' membership of other vulnerable groups, provided judgements on qualification could be standardised in a reliable way.

### 2.2 Capacity to consent

When the complainant is either a child or is someone who suffers from mental incapacity then the jury needs to determine whether the complainant (a) has the capacity to form a valid consent<sup>5</sup>; and (b) if the capacity to consent is present, whether they did in fact consent to sexual intercourse.<sup>6</sup>

<sup>2</sup> *R v Breckenridge* (1984) 79 Cr.App.R. 244; *R v Satnam S, Kewal S* (1984) 78 Cr App R 149.

<sup>3</sup> Povey, D. Prime, J. and Taylor, P. (1998) *Notifiable Offences in England and Wales 1997* (London: Home Office).

<sup>4</sup> Home Office (1989) *Report of the Advisory Group on Video Evidence* (London: HMSO).

<sup>5</sup> *R v Harling* 26 Cr. App. R 127. *R v Howard* 50 Cr. App. R. 56. *R v Lang* (1975) 62 Cr. App. R. 50. *R v Ryan* (1846) 2 Cox 115  
*R v Barratt* (1873) L.R. C.C.R. 81.

<sup>6</sup> *R v Olugboja* (1981) 3 W.L.R. 585.



### Capacity of a child

As Scarman LJ stated in *R v Lang*<sup>7</sup> “the critical question is...whether she understood her situation and was capable of making up her mind”. The prosecution must show in cases where the girl is under sixteen that her “understanding and knowledge were such that *she was not in a position to decide whether to consent or resist*”.<sup>8</sup> The test to determine a child’s capacity to consent to sexual intercourse is similar to the test for a child’s capacity to consent to medical treatment, as defined in *Gillick v West Norfolk and Wisbech Health Authority*.<sup>9</sup> The case determined that ‘when a child achieves sufficient understanding and intelligence to enable him or her to understand fully what is proposed’, the child may be considered capable of making a decision about whether or not to receive medical treatment. It may therefore be subject to the same criticism of uncertainty as the ‘Gillick’ guidance.<sup>10</sup>

Most fundamentally the grounds on which a court’s decision on capacity is based may be questioned. It may be considered that the younger the child the greater the assumption will be that she does not understand the nature of the sexual act and its biological, social and moral context. However, given there is no fixed age below which a child can be considered capable of forming a valid consent, the issue must be decided on a case by case basis. Temkin has suggested that not all courts may be sufficiently stringent in their determination of whether a child has the requisite level of understanding, and the evidence that they rely upon. She describes, as illustration, the unreported case of *R v Watson-Sweeney*<sup>11</sup> where the complainant was a 7-year-old girl. The defendant pleaded not guilty to a charge of rape on the grounds that the child had consented to sexual intercourse with an understanding of what that entailed. The court accepted that the girl’s statement that “she knew what mummies and daddies did in bedrooms” was sufficient evidence of her understanding of the true nature of the situation in which she was placed.

### Capacity of the mentally disabled

The case law definition of when an adult is mentally unable to consent to sexual intercourse is both underdeveloped and shrouded in arcane language. The current test for capacity was laid down in *R v Ryan*<sup>12</sup> as being whether the complainant was in “a state of utter unconsciousness, whether occasioned by the act of the prisoner, or otherwise”. Evidence of the complainant’s “utter unconsciousness”, and thus inability to consent, was considered by the court to be found in the fact that she was “an idiot”, who, when asked questions in the witness box, was unable to understand their meaning, and was unable to distinguish between “right and wrong”. In *R v Barratt*<sup>13</sup> the Court of Appeal concluded that the complainant was incapable of giving consent because she passively obeyed all instructions given to her and was incapable of either dressing or undressing herself.

There has been an attempt by the Supreme Court of Victoria, Australia in *R v Morgan*<sup>14</sup> (per Winneke, C.J.) to define capacity more specifically in relation to the mentally impaired. However it is questionable whether it provides significantly more protection, than the very limited law in

<sup>7</sup> (1975) 62 Cr. App. R.50.

<sup>8</sup> *R v Howard* 50 Cr. App. R.56.

<sup>9</sup> [1986] AC 112.

<sup>10</sup> Fortin J (1998) *Children’s Rights and the Developing Law* (London: Butterworths).

<sup>11</sup> Unreported; *The Times*, December 17, 1983 in Temkin, J. (1987) *Rape and the Legal Process* (London: Sweet and Maxwell) page 72.

<sup>12</sup> (1846) 2 Cox 115.

<sup>13</sup> (1873) L. R. C.C. R.81.

<sup>14</sup> [1970] V. R. 337.

England and Wales. It does not appear to require much more than a knowledge of the basic facts of life for capacity to be established. It does not require, Temkin suggests, that the complainant be able to appreciate the significance of sexual intercourse or the implication which it might have for her.<sup>15</sup> It states that:

“ where capacity to consent is in issue...it must be proved that she has not sufficient knowledge or understanding to comprehend:

- (a) that what was proposed to be done is the physical fact 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 and act of a totally different character.

**The Crown may prove both (a) and (b), but if it fails to satisfy the burden as to (a) it may still establish incapacity to consent by proving she had not sufficient knowledge or understanding to comprehend (b). The court went on to state that the knowledge or understanding required need not be a complete or sophisticated understanding.**

### Reform of the definition of capacity

The current definitions of capacity could be reformed in two ways. One alternative would be to determine capacity to consent according to *status*.<sup>16</sup> Thus anyone under a defined age, or having been diagnosed with a specific condition would be considered incapable in law of giving valid consent to sexual intercourse, irrespective of their actual competence. Such reform of the law on capacity has been adopted, for example, in relation to children under 14 in the Canadian Criminal Code<sup>17</sup>, with some exceptions.<sup>18</sup> A status definition of consent may be justifiable in relation to children on the grounds that the law should recognise an intrinsic difference in experience and understanding about sexual acts between adults and children, however great a child’s knowledge about sexual intercourse may appear to be. However it may be both practically impossible and open to challenge under the European Convention of Human Rights (ECHR) to create a similar status offence in relation to vulnerable adults, as discussed in detail in parts 4 and 9 of this review. There does not appear to be a group of illnesses or disabilities *automatically* imbuing an adult with characteristics which mean that they are unlikely to understand the consequences of intercourse. In fact as Ashton has noted “most individuals have some level of capacity which should be identified and respected”.<sup>19</sup> Such a criticism may also be levelled at any *status* definition of capacity in relation to children. Some children may, in reality, have the capacity to consent and even if this capacity is not recognised in law, it may be recognised by a jury, who may choose not to convict the defendant of anything, rather than to convict him of an offence which they do not feel reflects his crime. This dilemma is further discussed in part 2 and the conclusion of this review.

<sup>15</sup> *Ibid.* page 71.

<sup>16</sup> Law Commission (1991) *Mentally Incapacitated Adults and Decision Making: An Overview* Consultation Paper No 119.

<sup>17</sup> Criminal Code of Canada Criminal Code. [R.S.C.C. 34] s150.1 (1).

<sup>18</sup> S150.2 In relation to sexual assault the consent of the complainant who is twelve years of age or more may be a defence if the accused (a) is twelve years of age or more but under the age of sixteen years; or (b) is less than two years older than the complainant. However it is no defence for sexual assault with a weapon (s272), or aggravated sexual assault (s273).

<sup>19</sup> Ashton, G, and Ward, A, (1992) *Mental Handicap and the Law* (London: Sweet and Maxwell).



The sexual offences law could continue to define capacity in terms of individual understanding, but to refine the criteria on which the court makes the decision on capacity. The Law Commission has put forward revised criteria on which the capacity of children (under 18) and vulnerable adults to form valid consent, to both sexual offences and other offences against the person, could be judged<sup>20</sup>:

### Capacity and minors

They suggested that the question for the court should be whether the child has sufficient understanding and intelligence to understand the information relevant to the decision, including information about the reasonably foreseeable consequences of making the decision. The court should, in deciding whether the child has sufficient understanding take into account the child's age and maturity, as well as the seriousness and implication of the matter to which the decision relates.

### Capacity and the mentally disabled

They suggested that the test for an adult should be whether his disability is such that he is unable to understand or retain the information relevant to the decision, including information about the reasonably foreseeable consequences of making any decision or he is unable to make a decision based on that information.<sup>21</sup>

## 2.3 The meaning of consent

Following the decision in *R v Olugboja*<sup>22</sup> it is now clear that in cases of rape it is sufficient for the prosecution to prove that sexual intercourse took place without consent. The fact that a complainant has merely submitted to sexual intercourse without the threat of force or violence, does not necessarily imply that the complainant consented to sexual intercourse. The court held that the question of consent is one for the jury to determine, with, where appropriate, a direction from the judge. The nature of the direction should reflect the circumstances of each case. The judge should focus the attention of the jury upon the state of mind of the victim immediately preceding the act of sexual intercourse, having regard to all the relevant circumstances and the complainant's reaction to them. It is for the jury to decide whether consent was present, applying their good sense and knowledge of human nature to all the relevant facts.

The decision in *R v Olugboja* is particularly pertinent to a discussion of the rape of children or other vulnerable groups because they may more readily submit to sexual intercourse, without the offender resorting to threats of violence. *Olugboja* allows the jury to concentrate on the subjective state of mind of the particular complainant, rather than requiring specific acts such as threats of violence to have occurred, before consent can be said to be vitiated.

### Criticisms of the decision

However the decision has been criticised for the lack of clarity in its definition of consent and its reliance upon juries to determine what the ordinary meaning of consent really is. It has been argued that:

- The boundaries of consent following the decision in *R v Olugboja* are “most uncertain”. Ashworth suggests that resort to such concepts as ‘common sense’ and

<sup>20</sup> The Law Commission (1995) para 5.21.

<sup>21</sup> The Law Commission defined mental disability as a disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning.

<sup>22</sup> (1981) 3 W.L.R. 585.

‘knowledge of human nature’ is little more than a veiled admission that no satisfactory criteria have been found.<sup>23</sup>

- The ‘judge can direct the jury with great laxity, uttering a series of platitudes without giving them any real guidance’.<sup>24</sup>
- Uncertainty will be engendered on the periphery of the offence in that judges may differ as to whether there is evidence of rape to go to a jury and juries may return different verdicts on comparable facts.<sup>25</sup>

In relation to child victims, or victims with learning disabilities, the definition in *Olugboja* is particularly problematic. It is doubtful whether the general knowledge and experience of a jury would usually be sufficient aid in decisions on whether a child or vulnerable adult consented. The jury members may not have much experience of the behaviour of vulnerable adults on which to be able to make such a judgement. Similarly, although jury members should be expected to make some judgement based on the normal behaviour of children, it is very likely that they would have little or no experience of the behaviour of children who have been sexually abused. Juries could be misled into concluding that a child’s sexual precociousness and conditioned responses to a sexual approach, themselves both the product of abuse, were evidence of the child’s consent.<sup>26</sup>

### **Reform of the definition of consent**

The decision in *R v Olugboja*, that threats other than threats of force may be sufficient to vitiate consent, is particularly pertinent when considering the validity of the consent of children and other vulnerable groups whose submission to sexual intercourse may be easily obtained.

### **Reintroducing the requirement of threats or fear of force**

However because of the ambiguity of the *Olugboja* definition of consent, the Criminal Law Revision Committee (1984) proposed that the law should be changed so that:

- The offence of rape should only relate to situations where consent to sexual intercourse has been obtained by explicit or implicit threats of force, against the complainant; but should not be rape if the threats could not be carried out immediately.<sup>27</sup>
- All other cases of sexual intercourse obtained by threats not amounting to rape should fall to be dealt with under s2 of the Sexual Offences Act 1956. The CLRC recommended that if their proposals for the reform of the law of consent in rape were adopted the maximum penalty for an offence under s2 (currently 2 years) should be extended to five years.

<sup>23</sup> Ashworth, A (1995) *Principles of Criminal Law* (2nd Ed) (Oxford: Clarendon Press).

<sup>24</sup> Above page 554.

<sup>25</sup> Criminal Law Revision Committee (1984) *Fifteenth Report – Sexual Offences*. (London: HMSO) para 2.26.

<sup>26</sup> Davis, G. Hoyano, L. Keenan, C. Maitland, L. and Morgan, R. (1999) *An Assessment of the Admissibility and Sufficiency of Evidence in Child Abuse Prosecutions* Occasional Paper 100 (London: Home Office).

<sup>27</sup> This reform was also supported by the Law Commission (1995) paras 6.42–6.49.



This would represent an entirely retrograde step in the law on rape. To link lack of consent again with violent threat may merely perpetuate an image of 'real rape' as necessarily accompanied by physical force. This is unjustified by current knowledge of reported rapes, a significant proportion of which are not accompanied by violence.<sup>28</sup> It is particularly unjustifiable in terms of children and vulnerable adults, who may more readily submit to sexual intercourse, without any threat of violence being made.<sup>29</sup> To perpetuate an image of 'real rape' as always accompanied by physical violence or threat of physical violence could result in injustice for a number of complainants. The use of s2 Sexual Offences Act would inevitably lead to plea bargaining which would undermine the victim's right to justice for the crimes committed against them.<sup>30</sup> Furthermore as Grace has argued, juries may already deny justice to complainants whose attack does not accord with a stereotypical image of stranger assault accompanied by violence.<sup>31</sup> In our understanding of the pattern of rape, particularly against children<sup>32</sup>, there is no justification for this limitation.

### Creating a fixed formula to establish consent

It was suggested by the Heilbron Committee that legislation should be enacted which emphasised that lack of consent (and not violence) is the crux of the matter.<sup>33</sup> Temkin has suggested that this could take the form of a non-exhaustive list of situations in which consent will be negated.<sup>34</sup> Such a list appears for example in the Canadian Criminal Code 273.1 (2) in relation to aggravated sexual assault. However an examination of this list must raise questions about whether a non-exhaustive list would really improve our current definition of consent considerably. The code suggests that consent could not be considered to have been obtained if (a) the agreement is expressed by the words or conduct of a person other than the complainant; (b) the complainant is incapable of consenting; (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority; (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

In addition Gardener has argued that an approach which uses a fixed formula to dictate what vitiating factors are both necessary and sufficient fails to recognise that different people both respond differently to the same pressures, and attach differing priorities to the matters about which they may be mistaken. He states that a fixed formula would protect such people's autonomy only to the extent that autonomy comes in a standardised package.<sup>35</sup> However the advantage of some form of non-exhaustive list is that it gives the jury a framework around which to begin their deliberations on whether the complainant consented. It is an area which may be particularly

<sup>28</sup> Harris, J. and Grace, S. (1999) *A Question of Evidence? Investigating and Prosecuting Rape in the 1990's* Home Office Research Study 196 (London: Home Office). This study found that in 61% of the sample studied some violence had been used during the offence, but that in 20% no violence had been used. It was unknown whether violence had been used in a further 19% of the cases (Table C6).

<sup>29</sup> In Harris and Grace's study a complainant was under 12 there was evidence of the use of violence in 19% of cases and evidence that violence was not used in 26%, with 55% remaining unknown.

<sup>30</sup> Women Against Rape (1996) *Response to the Law Commission Consultation Paper* (London: WAR).

<sup>31</sup> Grace, S. Lloyd, C. and Smith, L. J. F. (1992) *Rape: From Recording to Conviction*, Research and Planning Unit Paper No 71 (London: Home Office).

<sup>32</sup> Temkin (1987) p.118.

<sup>33</sup> Report of the Advisory Group on the Law of Rape (1975) (London: HMSO).

<sup>34</sup> Temkin (1987) p.118.

<sup>35</sup> Gardener, G. (1996) 'Appreciating Olugboja' 16(3) *Legal Studies* 275.

subject to judgements on the basis of stereotypes and one in which jury members may fail to consider all aspects of the complainant's position at the time in determining whether the complainant consented. Whilst as we have argued specific lists which are currently in existence may be open to criticism, in principle a non-exhaustive list may be a mechanism to guide juries through the process of judging consent.

### **Shifting the evidential burden of establishing consent on to the defence**

Temkin has also suggested that there may be a case for shifting the evidential burden of establishing consent onto the shoulders of the defence in certain cases, such as where there is evidence of injury inflicted by the defendant, where weapons are used, or where sexual intercourse takes place in the context of the commission of another grave offence. Generally speaking the defence will have to produce evidence of consent in these circumstances in any case but where an evidential burden exists, a failure to produce such evidence will ensure that the issue of consent is not left to the jury. She propounds the view that legislation could provide that evidence of resistance need not be adduced by the prosecution in order to establish lack of consent and that in those cases where the evidential burden of establishing consent is on the defence, evidence of lack of resistance should not suffice.<sup>36</sup> However the situation in which there is clear evidence of force or violent threats remains the least problematic one in which to establish that the complainant did not consent. It seems unlikely that the undermining of the rights of the defendant could be justified by the benefits that it would produce.

## **2.4 Sexual intercourse**

At present rape is defined as penetration by a penis and not by any other object, hand or tongue.<sup>37</sup> Supporters of this definition of rape have argued that:

- The concept of rape, as a distinct form of criminal misconduct, is well established in popular thought and corresponds to a distinctive form of wrongdoing.
- The risk of pregnancy is a further and important distinguishing characteristic of rape.<sup>38</sup>

However, as Temkin has suggested, the risk of pregnancy cannot be of overriding significance in any definition of rape as pre-pubertal, menopausal, sterilised or infertile woman are all covered by the law of rape.<sup>39</sup>

<sup>36</sup> Criminal Law Revision Committee (1980) Working Paper on Sexual Offences (London: HMSO) supported by Criminal Law Revision Committee (1984). Temkin (1987) p.118.

<sup>37</sup> s44 Sexual Offences Act 1956.

<sup>38</sup> Criminal Law Revision Committee (1980) supported by Criminal Law Revision Committee (1984).

<sup>39</sup> Temkin (1987) *above*.



Critics of the current law such as Card<sup>40</sup>, Temkin<sup>41</sup>, Ashworth<sup>42</sup>, Leng<sup>43</sup> and Lees<sup>44</sup> have argued that a crime of rape should focus instead on the aspect of bodily violation, and the risk of psychological harm of a degree which is equivalent to, if not greater than, that involved in non consensual vaginal intercourse by a penis.

Such arguments are particularly pertinent to children and vulnerable adults, not only because penetration in other forms can be as equally traumatic as penetration by a penis, but also because of their testimonial capacity. As Davis et al found, child witnesses may know that they have been penetrated and have been traumatised as a result, but may not always be clear in testimony about what exactly they have been penetrated with.<sup>45</sup>

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<sup>40</sup> Card comments on the fact that penile penetration may involve distress and damage equivalent to vaginal penetration but these comments have been excluded from this discussion because of the widening of the offence of rape to include anal penetration by the penis. Card, R, 'Sexual Relations with Minors'. [1975] *Criminal Law Review* 370.

<sup>41</sup> Temkin, J. (1982) 'Towards a Modern Law of Rape' 45 *Modern Law Review* 399.

<sup>42</sup> Ashworth (1995) *above*.

<sup>43</sup> Leng, R. (1985) 'The Fifteenth Report of the Criminal Law Revision Committee: Sexual Offences (1) The Scope of Rape' *Criminal Law Review* p.416.

<sup>44</sup> Lees, S. (1996) *Carnal Knowledge* (London: Hamish Hamilton).

<sup>45</sup> Davis, G. Hoyano, L. Keenan, C. Maitland, L. and Morgan, R. (1999).

## UNLAWFUL SEXUAL INTERCOURSE

**Section 5 Sexual Offences Act 1956** – it is an offence for a man to have unlawful sexual intercourse with a girl under the age of thirteen.

**Section 6 Sexual Offences Act 1956** – it is an offence...for a man to have unlawful sexual intercourse with a girl...under the age of sixteen. (A prosecution may not be commenced more than 12 months after the offence charged was committed).

A number of aspects of the current law, as defined by s5 and s6 Sexual Offences Act 1956 have been considered problematic:

- For an offence to be established the complainant must be female.
- Elements of the offence and the sentences available are irreconcilable with those of other existing offences.
- A prosecution under section 6 may only be brought within a year of the sexual act in question.

**More fundamentally it has been asked:**

- Whether there should continue to a legal presumption in Section 6 that children under 16 cannot consent to sex.
- Whether a defence should be available for both offences, and how such a defence should be framed.

### 3.1 Prevalence

There has been a decline in the number of offences of unlawful sexual intercourse, both reported to the police and recorded by them as offences.

#### **USI with a girl under 13**

In 1987 312 offences of USI with a girl under the age of 13 were recorded by the police, this dropped to 148 offences in 1997.

In 1997 there were 16 men were cautioned for USI (with a girl under 13) and 44 men were convicted in all courts.

#### **USI with a girl under 16**

In 1987 2,699 offences of USI with a girl under the age of 16 were recorded by the police, this dropped to 1112 offences in 1997.

In 1997 there were 273 men were cautioned for this offence and 199 were convicted in all courts.



Commentators have noted the extensive use of discretion in the decision to prosecute reported cases of USI.<sup>46</sup> Walmsley and White's study found that the younger the child, the more appropriate a prosecution and custodial sentence was considered to be.<sup>47</sup> Card has found that few prosecutions have been instigated when the parties are of similar ages. However as this research is based on 1972 figures it may be no reflection on current practice.<sup>48</sup> Ashworth has suggested that the vast majority of reported offences of unlawful sexual intercourse with a girl of 16 involve young men of a similar age or a few years older<sup>49</sup>, and that the general trend is to administer a formal caution to such persons rather than prosecute them. Prosecution is reserved for the cases in which some unfair advantage has been taken of the girl, particularly where the man is considerably older than the girl or where there is some element of deception involved. Ashworth comments that the law does not specify any of these elements, everything being left to prosecutorial discretion. This, he argues, results in the sacrifice of the principle of maximum certainty to the supposed dictates of practicality. He questions the current wide framing of the law in the expectation that it will be enforced selectively.

### 3.2 Some criticisms of the current law

#### Gender specificity

At present the offence of unlawful sexual intercourse is gender specific. It can be committed as principal only by males<sup>50</sup> and against females. A girl cannot be convicted for aiding and abetting unlawful sexual intercourse contrary to either s5 or s6 SOA 1956.<sup>51</sup> The law has been described as "anomalous and in need of reform"<sup>52</sup> by a number of commentators. It has been suggested that a solution would be to create offences involving intercourse with boys under 16 and 13 which would parallel the offences of intercourse with girls under those ages.<sup>53</sup> This solution was rejected by the Criminal Law Revision Committee (1984) on the grounds that the number of offences in this area of the law should not be added to.<sup>54</sup>

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<sup>46</sup> CLRC (1984) *above*.

<sup>47</sup> Walmsley, R and White, K (1979) *Sexual Offences, Consent and Sentencing* (London: HMSO) HO Research Study No 54.

<sup>48</sup> *Above* p.371.

<sup>49</sup> Ashworth (1995) p.351.

<sup>50</sup> Rook P. and Ward R. (1997) *Sexual Offences* (2nd Ed). (London: Sweet & Maxwell) para 6.6.17.

<sup>51</sup> *R v Tyrrell* [1894] 1 QB 710.

<sup>52</sup> Howard League (1985) *Unlawful Sex. The Report of a Howard League Working Party* (London: Waterlow Publishers Ltd). The CLRC (1984) who discussed raising the relevant ages in s1 Indecency with Children Act 1960 from 14 to 16 years of age and Card (1975) page 379.

<sup>53</sup> Hogan, B. 'The Fifteenth Report of the Criminal Law Revision Committee: Sexual Offence (2) Sexual Offences other than Rape' [1985] *Criminal Law Review* 425.

<sup>54</sup> *Above* para 7.23-7.25.

**Time limits**

A prosecution for a s6 offence, whether for the full offence or for an attempt, may not be commenced more than 12 months after the offence charged.<sup>55</sup> This time limit can discriminate against children and other vulnerable groups as they may delay complaining about an alleged incident of unlawful sexual intercourse until they feel that they are in a safe position to do so. This may be years after the offence.<sup>56</sup>

The CLRC recommended the retention of the current 12-month period of limitation for this offence (s6 only). The committee considered it of value to ensure that prosecutions were not brought in respect of events that had become stale.<sup>57</sup>

**Inconsistency with the new definition of rape**

Unlike the offence of rape s5 and s6 are restricted to vaginal intercourse. The same arguments discussed in relation to the rape apply to s5 and s6 offences as to whether the ambit of the offence should be widened to include penetration of the anus.

**Incompatibility between the maximum sentences for USI <16 and indecent assault**

The two-year maximum sentence available to sentencing judges when the complainant was aged between 13 and 16 at the time of the offence has been subject to criticism. As Longmore JJ stated in his judgement in *R v Palmer*<sup>58</sup>:

“It is somewhat ironic that Parliament has recently increased the maximum sentence for indecent assault to one of ten years, but the maximum sentence for unlawful sexual intercourse remains at two years.”

As Ashworth, has recognised this difference is “an anomaly”, resulting in indecent assault being treated “as more serious than intercourse itself” in sentencing.<sup>59</sup> Longmore JJ in *Palmer* argued that the maximum sentence length should be extended as two years gave judges little opportunity to reflect either the gravity of the particular offence or offences, or the contrition of the offender within the sentence.

**3.3 Should all under 16 year olds be considered unable to consent?**

Under the current law it is immaterial to the establishment that a s5 and s6 offence whether sexual intercourse took place with or without the girls consent.<sup>60</sup>

**Arguments for retaining the current age structure**

The Criminal Law Revision Committee has argued for the retention of the current two stage grading of gravity of s5 and s6 offences. They comment that they have no doubt that there is an age below 16 at which point unlawful sexual intercourse with a girl becomes much more serious and merits treatment under a separate heading. They conclude that the dividing line should remain at 13.<sup>61</sup>

<sup>55</sup> s37 and Sch. 2 para. 10(a), (b) Sexual Offences Act 1956.

<sup>56</sup> La Fontaine, J. (1990) *Child Sexual Abuse* (London: Polity Press).

<sup>57</sup> Above para 5.22.

<sup>58</sup> (1994) 16.Cr. App. R.642.

<sup>59</sup> Ashworth (1995) p.350.

<sup>60</sup> *R v Prince* (1875) LR 2 CCR 154.

<sup>61</sup> CLRC (1984) paras 5.5 and 5.6.



### Arguments against retention

It is an unreal legal fiction that boys and girls under 16 are incapable of consenting to any sexual act. In reality they may be perfectly capable of giving full consent at earlier ages, and they frequently do.<sup>62</sup>

A great deal of sexual experimentation has always gone on amongst children and young people, to brand it all as criminal because the 'victim' lacked consent, when plainly it is not, while doing little or nothing to stop it in practice, is no way to encourage the young to respect the law.<sup>63</sup>

### Suggestions for reform

The Howard League suggested a modification to the Indecency with Children Act 1960. This statute makes it an offence to commit any act of indecency with a child under 14 or incite that child to commit indecency, regardless of the sex of the child, or the offender.

The Howard League proposed that these provisions should be extended to protect young persons from 14 up to 18 by introducing a single, comprehensive offence of 'unlawful indecency' with a person of either sex who is under 18.

A separate and graver offence of unlawful sexual intercourse with anyone under 18 should also be added. However the Howard League go on to suggest that these offences should be subject to a number of defences discussed below.

## 3.4 What defences should be available?

### Mistake

At present a mistake as to the age of the girl, even if based on reasonable grounds, cannot be a defence if the girl is under 13 years of age. In effect this is an offence of strict liability.<sup>64</sup>

However in relation to a s6 charge there is what is known as a 'young man's defence'. Section 6(3) provides that a man is not guilty of an offence under this section if he has unlawful sexual intercourse with a girl under the age of sixteen, and he is under the age of 24 years, has not previously been charged with a like offence, believes her to be of the age of sixteen and has reasonable cause for that belief.

- The majority view of the Criminal Law Review Committee was that this defence of mistake should, in justice, be extended to offences against those under the age of 13. However the defence would continue to be that the defendant believed that the complainant was aged 16 or over. The CLRC thought it unlikely that this argument could be raised in many cases.<sup>65</sup>

<sup>62</sup> Howard League (1985) p.129.

<sup>63</sup> Above p.129.

<sup>64</sup> Rook, P. and Ward, R. (1997) para 6.22.

<sup>65</sup> CLRC (1984) para. 5.17.

- Furthermore the CLRC concluded that that a defendant charged with unlawful sexual intercourse with a girl under 16 should have a defence if, irrespective of his age, he believed the girl to have attained the age of 16. The defence should be available to a man who was genuinely mistaken about the girl's age.<sup>66</sup>

However, we would argue that the imposition of a duty on a man to ask the girl about her age, before entering into sexual relations, even though the answers may be untruthful in some cases<sup>67</sup> would provide much greater protection for children, than a simple defence of mistake. Furthermore, it would be consistent with a legislative principle to uphold a child's right to sexual integrity. We would argue that an expectation that a defendant would ask a child's age, just as he should make sure of any person's consent, would also be less injurious to his rights than the current law.

### **The similar age of the defendant as mitigation or complete defence?**

At present the limited 'young man's defence' is the only legal recognition that some children engage in non-exploitative adolescent sexual experimentation. The argument has been made that whilst children need the protection against older people, and against persons in positions of authority, they do not need the same protection against those of roughly similar age, neither of whom is in authority over the other.<sup>68</sup> It has been argued that by imposing an absolute prohibition on sexual relations with girls under 16, the criminal law lumps together the teenage boy who engages in non-exploitative sexual relationships, with the older man who takes advantage of a girl by abusing his superior age or experience.<sup>69</sup>

The law could be reformed to provide a defence for those who have sexual intercourse with a child who is less than two years younger than themselves, as has been suggested by the Howard League<sup>70</sup>, or to exclude defendants under 17 from its ambit as suggested by the CLRC. The CLRC also considered amending the law so as to remove from its ambit cases when the complainant has reached 13.<sup>71</sup> This amendment was considered on the basis that this would reflect the manner in which discretion was exercised found by Walmsley and White (see above) to be taking place at the prosecution and sentencing stage.

As the current offence of USI is based on status, the complainant as a child is considered in law to be unable to consent. Thus suggestions for a defence have necessarily been phrased in terms of status again, this time the comparative ages of the complainant and suspect. The problem is, of course, that, as the CLRC have argued, sexual exploitation can occur between boys and girls of similar ages. An absolute defence would deny that sexual coercion can take place within this age group. However to base a defence on the reality of the relationship between the complainant and the defendant would be a legal acknowledgement that a child could consent to sexual intercourse. However, as the law already recognises a child's potential capacity to consent in framing a defence to rape, there could be a young man's defence where the difference in age is less than two years which would be based on the legal presumption that the intercourse was consensual experimentation. Such a presumption could be rebutted by evidence to the contrary. A less radical alternative would be for the relative ages of the complainant and the defendant to become a factor which to be raised by the defence in mitigation of a sentence.

<sup>66</sup> Above para 5.12. Also welcomed by Card (1975) p.368.

<sup>67</sup> Ashworth (1995) p.351.

<sup>68</sup> Howard League (1985) p.129.

<sup>69</sup> Card (1975) at 375.

<sup>70</sup> Howard League (1985) p.129.

<sup>71</sup> Above para. 5.20.

**Abolition of evidence of ‘good character’**

The defendant could no longer be allowed to derive any benefit from the fact that he has not been convicted of an offence of USI in the past. Such a test remains an unconvincing mechanism for determining his honest motives in this case. Thus at present a man below 24 years of age, who has been charged with USI, is precluded from raising the defence if he has previously been charged with, but not necessarily convicted of, a USI offence, or if mistake of age was not in that instance an issue.<sup>72</sup>

**Abuse of Trust as an aggravating factor**

Conversely the CLRC have suggested that the law might usefully provide a presumption, in the absence of evidence to the contrary, that a child has been unduly influenced, when they have had sexual intercourse with someone in a position of trust. This could apply in the case of teachers, employers, youth workers, hostel wardens and the like. It could also apply if the accused was 7 or more years older than the young person; if the young person was offered some material inducement or had been kept away from home against the wishes of parents or guardians. These proposals would maintain absolute protection for children under 14, and in many cases, for all young persons up to 18. They believe that this would better reflect of the realities of life than does the present archaic law.<sup>73</sup>

These proposals may appear to have been superseded, by the provisions of the Sexual Offences (Amendment) Bill which makes it an offence for anyone over the age of 18 to engage in sexual activity with anyone under the age of 18 towards whom he stands in a position of trust. However ‘position of trust’ is limited in section 3 to positions where a person is employed to look after a person under the age of 18, in an institution, in accommodation provided by the Local Authority, a hospital, residential home or educational establishment. It excludes friends and relatives and other older people which the CLRC definition does not (see also following discussion on incest).

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<sup>72</sup> Above para 5.10.

<sup>73</sup> Card (1975 ) at 375.

## INCEST

**Section 10 Sexual Offences Act 1956** – it is an offence for a man to have sexual intercourse with a woman whom he knows to be his granddaughter, daughter, sister or mother.

**Section 11 Sexual Offences Act 1956** – it is an offence for a woman of the age of sixteen or over to permit a man who she knows to be her grandfather, father, brother or son to have sexual intercourse with her by her consent.

**Section 54 Criminal Law Act 1977** – it is an offence for a man to incite to have sexual intercourse with him a girl under the age of sixteen whom he knows to be his grand-daughter, daughter or sister.

A few aspects of the current law have been questioned:

- The current restriction of the offence to vaginal intercourse.
- The further restriction of the offence to female complainants.
- The criminal liability of a woman over 16 who agrees to incestuous sexual intercourse.
- The consideration in the determination of sentence on whether the child had been ‘corrupted’ by the incestuous sexual intercourse.
- The necessity of a law which prohibits incest.

### 4.1 Prevalence

As the Howard League has stated, relatively few cases of incest come to light and fewer still are prosecuted.<sup>74</sup> The number of offences of incest reported to the police and recorded by them has also declined in the last ten years. In 1987 511 were reported and this had decreased to 183 by 1997. However, it should be noted that the statistics do not differentiate between incest offences where the victim is child or a member of another vulnerable group.

The Criminal Law Revision Committee (1984) suggested that the official statistics completely under represented the extent of the problem. Citing a survey carried out by Beezley-Mrazek, Lynch and Bentovim in 1981 the committee concluded that the number of cases of incest were nearer 1500 per year.

### 4.2 Some criticisms of the current law

#### **Only vaginal intercourse is included within the terms of the Act**

Ashworth argues that the restriction of incest is to vaginal intercourse, is indefensible within the logic of incest – first because eugenic reasons no longer provide the main grounds for criminalisation;<sup>75</sup> and secondly because the primary rationale of punishing the sexual exploitation

<sup>74</sup> Above para 8.30. See also Bailey, V. and McCabe, S. ‘Reforming the Law of Incest’, [1979] *Criminal Law Review* p.749 who state official statistics offer no guidance about the real prevalence of incestuous behaviour.

<sup>75</sup> Ashworth (1995) para 353, Temkin (1987) argues on the same grounds p.29.



of children within the family applies no less to other serious sexual behaviour, such as oral and anal sex or homosexual activity.<sup>76</sup> However these arguments were rejected by the CLRC, who did not accept that such a case had been made out.

#### **Liability for women over 16 who agree to sexual intercourse**

Under s11(1) Sexual Offences Act only complainants who are under 16 years of age are exempt from criminal prosecution for incest. The Criminal Law Revision Committee (1984) argued that this crime should remain, but that the prosecuting authorities should use their discretion taking into account which of the partners was exploiting the other.<sup>77</sup> However as we know that incest does not usually simply commence with the consent of both parties when a complainant is sixteen. Should recognition of this fact be left solely to the prosecuting authorities?

### **4.3 Justification and calls for abolition**

Three main justifications have been raised for the intervention of the law in this area: the genetic risk, the social and psychological consequences to the victim and the damage to family life.

#### **The genetic risk**

The Criminal Law Revision Committee accepted advice from the Policy Advisory Committee that the risk of abnormality in the offspring of an incestuous relationship is high, however they agreed that the precise degree of genetic risk is not a very important justification for an offence.<sup>78</sup> Society does not prohibit sexual intercourse in other circumstances in which there is a high genetic risk of abnormality in the offspring of a relationship.<sup>79</sup>

#### **The social and psychological consequences of incest**

The Criminal Law Revision Committee agree with the proposition that the primary aim of the law against incest is the protection of the young and vulnerable against sexual exploitation within the family. An incestuous relationship may impair a child's development and his or her capacity to form normal emotional and social relationships. An incestuous relationship can harm not only the participants but also other members of the family. The criminal law may strengthen the hand of the social agencies in their efforts to terminate the relationship. The committee rejected suggestion that it may be possible to sever a relationship between father and daughter by taking the daughter into care without the necessity of criminal sanctions on the basis that this would appear to punish the victim whilst leaving the offender untouched.

### **4.4 Damage to family life**

The weightiest reason, suggests Honore, which justifies the laws proscribing incest, is the family tension which incestuous relationships produce. However, he argues, if this is the case it justifies not a law directed against incest as such but one forbidding parents and other persons in authority in the home from having sexual relations with children under the age of majority.<sup>80</sup>

<sup>76</sup> Supported by Card (1975) p.370.

<sup>77</sup> Above para 8.36 and 8.37.

<sup>78</sup> Bailey, V. and Blackburn, A. 'The Punishment of Incest Act 1908: A Case Study of Law Creation' [1979] *Criminal Law Review* 709. The writers agree with the assertion that eugenic considerations were not the main justification for the enactment of the Incest Act 1908.

<sup>79</sup> *Ibid.* para 8.9 and 8.10.

<sup>80</sup> Honore, T. (1978) *Sex Law*, (London: Duckworth) p81.

Temkin suggests that the arguments advanced by various commentators as to why the law prohibiting incest should be abolished can be categorised into three sub-headings.<sup>81</sup>

### **The utilitarian argument**

Some commentators suggest that the criminal law should be used only to prevent harm to others, associated with this notion is that the criminal law should not be used to enforce morality.<sup>82</sup> Incest, it has been suggested, particularly between consenting adults, is a victimless crime.

### **Incest as social taboo**

Bailey and McCabe claim that “the social taboo associated with incest would remain as, arguably, a more effective way of discouraging the conduct than that provided by criminal proscription”.<sup>83</sup>

### **Eugenics**

The abolitionists argue that there is insufficient evidence clearly to establish that incest is dysgenic; pregnancy is not a necessary result of incest and given the paucity of incestuous births, the eugenic risks exists for individuals rather than for the population as a whole; other relationships between non-family members carry eugenic risks but the law does not prohibit them; and finally the Punishment of Incest Act 1908 was not passed for eugenic reasons.<sup>84</sup>

Against this Temkin argues:

- The abolitionists fail to recognise as problematic the notion of consent in the context of sexual relationships within the family. Many incestuous relationships involving women over the age of consent will have commenced at an earlier stage and many women may find it impossible to extricate themselves from such relationships.<sup>85</sup>
- The strength of the social taboo against incest is unknown. Studies have found evidence of an ambivalent attitude to incestuous relationships. She suggests that the law plays a crucial role in shaping the attitudes of society and the law against incest reaffirms the incest taboo. In a changing society the taboo against incest needs now more than ever the force of law behind it.<sup>86</sup>
- The offspring of an incestuous relationship are more prone to genetic problems than is the offspring of a non-incestuous relationship.<sup>87</sup>

<sup>81</sup> Temkin, J. (1991) ‘Do we need the Crime of Incest?’ *Current Legal Problems* 185.

<sup>82</sup> Bailey, V. and McCabe, S. [1979] state that “evidence submitted to the [CLRC] both by the National Council for Civil Liberties and the Sexual Law Reform Society have insisted that modern sex laws should be tested against the utilitarian justification of preventing social harm to victims. The aim of the criminal law should not be to express moral condemnation...”

<sup>83</sup> Bailey and McCabe at 749. The authors state that “evidence submitted to the [CLRC] both by the National Council for Civil Liberties and the Sexual Law Reform Society have insisted that modern sex laws should be tested against the utilitarian justification of preventing social harm to victims. The aim of the criminal law should not be to express moral condemnation...”

<sup>84</sup> Morton, J. (1988) ‘The Incest Act 1908 – Was it Ever Relevant?’ *New Law Journal*. p.59 concluded, “really by the 1800s no-one much cared about incest.”

<sup>85</sup> Temkin (1991) p.185–188.

<sup>86</sup> Temkin (1991) p.188–190.

<sup>87</sup> Temkin (1991). p.190–193.



## 4.5 Reform

### Abolition

The Sexual Law Reform Society<sup>88</sup> have proposed that incest should be decriminalised when committed between mutually consenting persons of 14 years of age and above, but that young persons aged under 18 who commit incest should when appropriate be dealt with as in need of care and control.<sup>89</sup>

### Revision

The Criminal Law Revision Committee (1984) proposed that the current position on in relation to mother and son relationships and grandfather and granddaughter relationships should continue. Liability should not cease to apply regardless of the ages of the participants. In addition having considered the argument that there is no identifiable age at which the father's dominance over his daughter can be accepted as having ceased the CLRC (1984) recommended the retention of the offence of incest between father and daughter of all ages. However they recommended that incest between a brother and sister both aged 21 or over should cease to be an offence.<sup>90</sup>

Temkin<sup>91</sup> has questioned the propriety of the CLRC recommendation that sibling incest should cease to be an offence once the parties have reached 21. She argues that in the vast majority of cases, sibling incest will commence before the parties reach 21. She also suggests these relationships are not infrequently coercive and exploitative and this coercion and exploitation cannot be relied upon conveniently to terminate once both parties have celebrated their 21st birthday nor can it be assumed that siblings will be able to protect themselves once they reach that age.<sup>92</sup> Temkin believes that sibling incest should remain an offence irrespective of the ages of the parties.

### A law prohibiting sexual abuse in the family?

Whilst there may be some genetic reasons justifying the prohibition of sexual intercourse between relatives, there appears to be significant force behind the argument for a specific law of which labels sexual abuse within the home separately, irrespective of biological ties. Ashworth has argued that to exploit a familial relationship for sexual advantage is not merely a sexual offence, but one of the deepest breaches of trust which can take in a family-based society. The home ought to be a safe haven and it is this fundamental feeling of safety that can be destroyed by child sexual abuse.

Bailey and McCabe<sup>93</sup> suggest that the law on incest should be replaced by a new statutory provision which prohibits 'sexual abuse of authority'. They propose that the offence of sexual abuse of authority should be restricted to parents, including step, foster and adoptive parents, in charge of young persons between 16 and 18. The offence they suggest would not apply to relationships outside the family.

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<sup>88</sup> Sexual Law Reform Society (1974) *Report of the Working Party on the Law in Relation to Sexual Behaviour* in Bailey and McCabe, *opus cit.*

<sup>89</sup> Bailey and McCabe (1979) p.761.

<sup>90</sup> This was also supported by Ashworth (1995) p.354.

<sup>91</sup> Temkin (1991) *above*.

<sup>92</sup> Temkin (1991) p.193.

<sup>93</sup> Bailey and McCabe (1979).

The CLRC (1984) recommended the expansion of a law on incest to include adopted children and step-children, and to be punishable under the same section as sexual intercourse between parent and natural child. However they decided not to recommend expansion of the law to include foster children or de facto adopted children. They argued that such relationships are too difficult to define with the degree of precision required for the criminal law, especially where the adults involved are cohabiting outside marriage. Temkin rejected this argument on the grounds that to determine whether a defendant was in fact the co-habitee of the child's parent is an issue of fact no different from many others which the criminal courts tackle every day. She suggests that an offence along these lines should be constructed to protect young women under 18 years of age.<sup>94</sup>

#### 4.6 Sentencing incest

The guideline sentencing case *A-G's Reference (No1 of 1989)*<sup>95</sup> set down the parameters to which sentencing judges should adhere. The case creates three categories of the crime of incest, for sentencing purposes:

(1). *Where the Girl is over 16* (Sentencing range 'a nominal penalty' to 3 years)

Judges should weigh 'whether force was used...and the degree of harm if any to the girl' against 'the desirability of keeping family disruption to a minimum'. They should also consider that the older the girl 'the greater the possibility that she may have been willing or even instigating party to the liaison'.

(2). *Where the girl is aged 13-16* (sentencing range between 3 to five years)

The same principles apply as above, 'though the likelihood of corruption increases in inverse proportion to the girl'.

(3). *Where the girl is under 13*

The widest range of sentence is likely to be found, 'if the girl is not far short of her thirteenth birthday and there are no particular adverse or favourable features on a not guilty plea, a term of about six years on the authorities would seem appropriate'.

The guidelines have been criticised because:

- They possess too lenient a view of the damage which incest can do to even to a sexually experienced, older child. Glaser and Frosh have suggested that older girls, with their greater degree of awareness of the meaning of an incestuous relationship, may suffer just as much emotional scarring as younger girls.<sup>96</sup>
- They could deter older girls from reporting incest and this is not a trend which should be encouraged.<sup>97</sup>

Furthermore the assumptions underlying the guidance in this case and others have been criticised:

- Firstly, for upholding a view of sexual abuse which perpetuates a view of incest as explainable in terms of family dysfunction, a view which is now unsupported by empirical studies. *A-G's Reference (No1 of 1989)* describes a typical incest case as

<sup>94</sup> Temkin (1991) p.193.

<sup>95</sup> (1989) 11 Cr. App. R.409.

<sup>96</sup> Glaser, D. and Frosh, S. (1988) *Child Sexual Abuse* (London: Macmillan).

<sup>97</sup> Yates, C. (1989) 'A Family Affair: Part 1 Sexual Offences, Sentencing and Treatment' 2 *Journal of Child Law* 70.



being one which is the product of family dysfunction: “If one can describe any kind of incest case as the “ordinary” type of case, it will be one where the sexual relationship between husband and wife has broken down: the father has probably resorted to excessive drinking and the eldest daughter is gradually...made the subject of the father’s frustrated inclinations”, per Lord Lane CJ. Such an approach effectively justifies incest and moves the fault from the male perpetrator to the family.<sup>98</sup> As Smart has written ‘each trial therefore confirms this truth about child abuse, namely that proximity causes abuse, abnormal stress causes abuse, and that this form of abuse is rare – men are rendered invisible in this model’.<sup>99</sup>

- Secondly they have been criticised for considering that the question of whether a child has been corrupted by being introduced to sex, is crucial when measuring the gravity of a crime of incest. These criticisms may be elucidated by an examination of the law as it stands. *A-G’s Reference (No1 of 1989)* suggested five possible mitigating factors in incest cases:
  - (i) a plea of guilty,
  - (ii) where there appears to have been genuine affection on the part of the defendant rather than the intention to use a child as the outlet for his sexual inclinations,
  - (iii) where the girl has previous sexual experience,
  - (iv) where the girl has made genuine attempts at seduction,
  - (v) where, as very occasionally is the case, a shorter term of imprisonment maybe of benefit to the victim and family.

As can be seen from these guidelines, a mitigating factor in this and subsequent cases has been that the child was already ‘corrupted’ before the incestuous sexual assault took place. Mitra has questioned this assumption asking: “*what is the principle upon which the court acts, that makes it any less just to punish a man for committing incest with a sexually experienced daughter than with one who is still a virgin? Why does lack of chastity negate culpability? Even in absence of force and coercion, trauma is likely to be caused by the inherent exploitative nature of the relationship and the knowledge of the betrayal of one’s mother; as well as society’s condemnation of incest. It is the adult’s responsibility to protect children from harm and the fact that she is not a virgin is neither here, nor there*”.<sup>100</sup>

<sup>98</sup> Collier, R. (1995) *Masculinities, Law and the Family* (London: Macmillan), Parton, C. (1989) ‘Women, Gender Oppression and Child Abuse’ in Parton, N. (ed) (1989) *Taking Child Abuse Seriously* (Houndmills: McMillan).

<sup>99</sup> Smart, C. (1989) ‘A Note on Child Sexual Abuse’ in *Feminism and the Power of Law* (London: Routledge).

<sup>100</sup> Mitra, C. L. (1987) ‘Judicial Discourse in Father–Daughter Incest Appeal Cases’ 15 (2) *International Journal of Sociology of Law* 121-148.

## SEXUAL INTERCOURSE WITH THE MENTALLY IMPAIRED

**Section 7 Sexual Offences Act 1956** – it is an offence, for a man to have unlawful sexual intercourse with a woman who is a defective.

**Section 1 Sexual Offences Act 1967** – a man, who is suffering from a severe mental handicap, may not in law consent to buggery or gross indecency.

Several aspects of s7 have been questioned:

- The use of the antiquated and offensive term ‘defective’.
- The application of the law solely when a complainant is female and a suspect male.
- Its inconsistency with the new law of rape.

**Furthermore it has been asked whether the existence of the new law is a denial of the right of the severely mentally handicapped to form sexual relationships.**

### 5.1 Prevalence

According to Mencap there are over a million people with learning disabilities in the UK, of whom about a fifth have severe learning disability. Furthermore according to the Psychiatric Morbidity Survey about one in five of the population living in private households reported suffering some psychiatric disorder. These included phobias and depressive episodes, and drug and alcohol dependence.<sup>101</sup> However offences contrary to s7 SOA 1956, the only offence which relates specifically to offences against ‘defectives’ have been rarely reported according to official Home Office statistics. In 1992 there were 8 cautions for a s7 offence, 6 were proceeded against, and 4 were convicted. In 1997 there were no cautions, 4 were proceeded against and 2 were convicted.

### 5.2 Criticism of the current law

Section 45 SOA defines a defective as one ‘suffering from a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning’. This may be compared to one of the four categories of mental disorder – ‘severe mental impairment’ – listed in s1(2) Mental Health Act 1983. The two categories of ‘severe mental impairment’ and ‘mental illness’ are characterised by the Mental Health Act as ‘major’ disorders, insofar as the presence of these disorders justifies admission to hospital without any need to demonstrate that treatment will alleviate or prevent further deterioration of the patient’s condition. Conversely, there is usually a requirement under the Act to demonstrate this in the case of the other two classes of disorder – ‘mental impairment’ and ‘psychopathic disorder’. Thus the present sexual offences law places a blanket prohibition on sexual intercourse with one category of those considered by the Mental Health Act to have a major mental disorder. Sexual intercourse for any other adult is only subject to the normal requirements of consent.<sup>102</sup>

<sup>101</sup> Home Office (1998) *Speaking up for Justice. Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the criminal Justice System* (London: Home Office) p.131.

<sup>102</sup> Rook & Ward (1997) para 7.04 -7.06.



### Use of the term “defective”

The term ‘defective’ may be primarily criticised on ideological grounds. As Paul Boateng in his Speech to the Sex Offences Steering Group commented “the law chillingly and I consider, offensively refers to “defectives”. In legal terms it may also be criticised on the grounds of its ambiguity and incompatibility with medical or scientific terms.

The criteria for determining whether a complainant falls within the terms of s45 may be questions on the grounds of lack of precision. As Bean has asked: ‘what does arrested or incomplete development of the mind mean? What does ‘associated with’ mean in this context?’.<sup>103</sup>

Furthermore, questions have been asked about the type of evidence that is used to determine the level of impairment of the complainant. Carson has stated that whilst it is common to cite intelligence test results as a measure of impairment, such tests actually tell little of a person’s capacity to consent. ‘A person may receive extensive education and training and be able to cope adequately with his or her social world whilst having limited intelligence. Equally a person without a learning difficulty may be open to exploitation and have a significant impairment of social functioning from the way he or she was brought up’.<sup>104</sup>

Most fundamentally, although the interpretation of this term has been left to psychiatrists and other mental health professionals in the context of the Mental Health Act, the interpretation of section 45 SOA 1956 has been left to the jury. Whilst the jury may be informed by expert evidence on the fact of the impairment, it is their duty to determine whether such impairment is of the requisite severity to fall within the terms of the act. *R v Hall* justified this responsibility on the grounds that the terms were ‘ordinary English words and not words of art’.<sup>105</sup> This viewpoint fails to acknowledge the fact that juries have to make a qualitative and arguably clinical judgement about the degree of severity of impairment which the complainant is suffering.

### Gender specificity and inconsistency with the new definition of rape

The defendant must be male and the victim female. Hogan describes this as an “oddity”<sup>106</sup> and the Howard League, unjustifiable.<sup>107</sup> Furthermore the Howard League have argued that there is no good reason why the law should distinguish between vaginal and anal intercourse in relation to s7 offences. However their criticisms are unjustifiable there is an offence under s1(1) Sexual Offences Act 1967 which a man over the age of 18 with a ‘severe mental handicap’, (a definition which accords exactly with the definition of defective) may not law consent to buggery.

## 5.3 Reform

When the Criminal Law Revision Committee (1980)<sup>108</sup> was considering reform of offences against the severely mentally handicapped, it noted two distinct strands of thought amongst those giving evidence. Those who opposed s7 of the Sexual Offences Act 1956 felt that it unduly restricted the freedom of severely impaired women to have sexual intercourse.<sup>109</sup> Whereas the British

<sup>103</sup> Bean, P. (1986) *Mental Disorder and Legal Control* (Cambridge: Cambridge University Press).

<sup>104</sup> Carson, D. (1989) ‘The Sexuality of People with Learning Difficulties’ *Journal of Social Welfare Law* 355–372.

<sup>105</sup> *R v Hall* (1988) 86 Cr. App. R.159.

<sup>106</sup> Hogan at p.431.

<sup>107</sup> Howard League (1985) *above*.

<sup>108</sup> Criminal Law Revision Committee’s Working Paper on Sexual Offences (1980).

<sup>109</sup> The Sexual Law Reform Society and the National Council for Civil Liberties in Rook & Ward (1997) para. 7.06.

Medical Association wished to extend the protection afforded by s7 to all those suffering from mental disorder.<sup>110</sup>

### **Arguments for the abolition of the offence in its entirety**

It denies the severely mentally handicapped the opportunity of forming tender and close sexual relationships.<sup>111</sup> The law should uphold the right of severely impaired people to express their sexuality not undermine it.<sup>112</sup>

The general law relating to sexual offences supplies sufficient protection.<sup>113</sup>

If section 7 were abolished the Policy Advisory Committee of the CLRC suggested that that protection for severely mentally handicapped woman should be provided by a new statutory power given to civil courts, to make non molestation orders against a man who had made, or was likely to make, harmful advances. This suggestion was rejected by the CLRC.<sup>114</sup>

Women Against Rape have proposed that a redrafted definition of consent which was universally applicable, should be introduced when s7 is abolished. They state that 'a universal test of consent – informed without deception and willing without coercion would take disability into account'.<sup>115</sup>

### **Arguments for the redrafting of the offence**

It has long been recognised that those who suffer from a severe degree of mental handicap require protection from sexual abuse and exploitation by others, over and above that provided by other sexual offences. A mentally handicapped woman may not be able to properly consent to sexual activity because she does not understand the nature of what is being done, nor may she be able to give coherent and comprehensible evidence that she did not consent.<sup>116</sup> However such handicap is not linked solely to severe mental disorder under the terms of the act.

Both the Howard league and the CLRC have argued that if section 7 is retained on the statute book then it should be amended so that it is no longer an offence for a severely mentally handicapped man to have sexual intercourse with a severely mentally handicapped woman.<sup>117</sup> Although this recommendation was made the Committee stated that it had reservations about this proposals as it may expose some severely mentally handicapped women to the possibility of bearing children who might suffer the same level of disability as their parents.<sup>118</sup>

### **Reform of defences**

At present a man is not guilty of an offence under s7 when he has unlawful sexual intercourse with a woman if he does not know and has no reason to suspect her to be a defective. However, this defence would exclude an accused who shuts his eyes to the obvious.<sup>119</sup>

<sup>110</sup> In Rook & Ward (1997) para. 7.06.

<sup>111</sup> CLRC (1984) para 9.1 Howard League para 8.16.

<sup>112</sup> Craft, A. and Craft, A. (1978) *Sex and the Mentally Handicapped* (London) Honore. T (1978) *Sex Law*. (London: Duckworth) pp.179–180. Williams, G. (1983) *Textbook of Criminal Law* (2nd Ed), (London: Stevens and Sons) p.572.

<sup>113</sup> Rook and Ward (1997) para 7.07.

<sup>114</sup> CLRC (1984) para 9.1–9.2

<sup>115</sup> Hall, R. and Longstaffe, L. (1997) 'Defining Consent' *New Law Journal* 840.

<sup>116</sup> Rook and Ward (1997) para 7.07.

<sup>117</sup> Howard League para 9.1.

<sup>118</sup> CLRC (1984) para 9.8.

<sup>119</sup> *R v Hudson* [1966] 1 Q.B. 448.



However given the technical nature of the definition of defective Williams<sup>120</sup> has suggested that the wording of the statutory defence under s7(2) “and has no reason to suspect” is an impractical limitation upon the defence. This is because the diagnosis of the degree of mental disability mentioned in the section requires an expert. In many cases, it is unlikely that a man who did not know the particular diagnosis would be able to tell the difference between a handicapped and a severely handicapped woman, even if he knew the statutory definition of the degree of mental impairment required to make intercourse an offence.

The Criminal Law Revision Committee (1984) recommended that a person should only be able to avail themselves of the statutory defence if he believed that the woman was not suffering from *any* degree of mental handicap. The presence or absence of reasonable grounds would be evidence of the genuineness of the belief.<sup>121</sup>

## 5.7 Sexual intercourse with patients

By s128 Mental Health Act 1959 and s1 Sexual Offences Act 1967 it is an offence for a member of staff of a hospital or mental nursing home to have unlawful sexual intercourse with woman or commit buggery or gross indecency with a man who is for the time being receiving treatment for mental disorder as an in -or out -patient.

s2 Sexual Offences (Amendment) Bill 1999 – creates an offence for a person aged 18 and over to engage in sexual activity with a person under the age of 18 if he is in a position of trust in relation to that person, including a hospital environment.

Rook and Ward provide a useful list of principal differences between an offence under s7 Sexual Offences Act 1956 and s128 Mental Health Act 1959.<sup>122</sup>

- The consent of the DPP is required for prosecutions under s128, but not under s7.
- Under s7 the victim must be severely mentally impaired, whereas under s128 any mentally disordered person may be the victim. Mental disorder is defined as “mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind.”<sup>123</sup>
- S128 applies to men as well as women, whilst under s7 the victim must be female.
- There must be a nexus of care between the defendant and his victim under s128, whereas this is not necessary under s7.

### Criticism of the current law

Temkin argues that the protection afforded to male patients from sexual exploitation is greater than it is for female patients.<sup>124</sup> It is no offence a member of staff or a manager of a hospital to engage in sexual acts other than unlawful sexual intercourse with a mentally disordered female patient, unless these are otherwise unlawful, but it is an offence for him to commit an act of buggery or gross indecency with a male patient who is mentally disordered. Rook & Ward suggest, however, that in the case of indecency with a woman the facts might well found a count of an attempt or for indecent assault.<sup>125</sup>

<sup>120</sup> Williams (1983) *above*.

<sup>121</sup> CLRC (1984) para 9.10–9.12.

<sup>122</sup> Rook & Ward (1997) para 7.67.

<sup>123</sup> s1(2) Mental Health Act 1983 and Sch. 5 para 2.

<sup>124</sup> Temkin (1987) at p.28.

<sup>125</sup> Rook & Ward (1997) para. 7.64.

## INDECENT ASSAULTS, ACTS OF GROSS INDECENCY WITH CHILDREN AND THE MENTALLY HANDICAPPED, AND BUGGERY

**Section 14 Sexual Offences Act 1956** – it is an offence to make an indecent assault on a woman.

**Section 15 Sexual Offences Act 1956** – it is an offence to make an indecent assault on a man.

**Section 1 Indecency with Children Act 1960** – it is an offence to commit an act of gross indecency with or towards a child under the age of fourteen, or incite a child under that age to such an act with him or another.

**Section 12 Sexual Offences Act 1956** – buggery of a person under the age of 18.

**Section 1 Sexual Offences Act 1967** – a man who is suffering from severe mental handicap cannot in law give any consent which would prevent a homosexual act from being an offence, unless the defendant proves that he did not know and had no reason to suspect that man to be suffering from severe mental handicap.

Several criticisms of the law on indecency may be made:

- A conviction for indecent assault gives no indication of the magnitude of the offence which the offender has committed.
- The offences are gender specific.
- There is no defence for young offenders.
- An offence of buggery may no longer be necessary.

### 6.1 Prevalence

According to Home Office statistics the number of indecent assaults reported to the police and recorded by them as an offence is steadily rising. In 1987 there were 2425 recorded offences of indecent assault on a male: this rose to 3119 in 1992 and 3503 in 1997. This pattern is replicated in the number of recorded indecent assaults on a female. In 1987 there were 13340, in 1992, 16235 and in 1997, 18674 offences were recorded. Conversely the small number of recorded offences of buggery have been decreasing in 1987 there were 929 offences recorded by the police, in 1992 there were 1255 and in 1997 there were 645.

The figures from the only age specific offence in this category, indecency with a child, show an increase in the number of crimes recorded: In 1987 there were 831 offences recorded by the police, in 1992 there were 1158 and in 1997 there were 1269.

### 6.2 Grading of indecent assault

The main problem with the offence of indecent assault as currently framed is that it is a 'catch-all' offence. An act is labelled as one of indecent assault irrespective of whether it involves a kiss on the lips or genital fondling. This all-inclusive offence has been justified on the grounds:

- that the creation of a number of graded offences would lead to plea-bargaining, and would allow offenders to escape with a more minor conviction than the offence deserved.
- it is actually impossible to grade indecent assaults in levels of seriousness.



However as Ashworth<sup>126</sup>, has argued, plea-bargaining is already a prominent feature of the operation of the existing law. Ashworth suggests that a more refined graduation of offences could hardly be worst in this respect and might improve the structure of sentencing for sexual offences.

Temkin<sup>127</sup> has suggested that the task of distinguishing sexual assaults in terms of gravity is perhaps less awesome than has been suggested. Penetration of the body by whatever means, she suggests, is generally more traumatic than other forms of sexual contact. Penetration involving the penis, vagina or anus is perceived differently and regarded more seriously than other forms of penetration. A satisfactory dividing line could have been drawn in these terms. Cunnilingus is a marginal case but since it involves genital contact and may involve a form of penetration, there is a case for placing it within the more serious category. So far as digital penetration with one finger is concerned, if this is less serious than other types of penetration, this could be reflected in sentencing. This division was also considered, but rejected, by the Criminal Law Revision Committee (1984).

Another welcome consequence of a fresh gradation of sexual offences might be that they would cease to be gender specific.<sup>128</sup>

### 6.3 Consent

The CLRC recommended the retention of 16 as the age at which a child could give a valid consent to sexual acts. They state that whilst they would not wish to see the criminal law used against adolescent petting they believe it is necessary to retain an offence in order to protect girls against older men, and even against older boys. They suggest that even if the age difference is slight situations could still arise where a boy is capable of putting pressure on a girl not much younger than himself to take part in sexual acts.

### 6.4 Young offenders

Williams<sup>129</sup> has considered it anomalous that the law of indecent assault makes no exemptions for young offenders. In *R v Laws*<sup>130</sup> Avory J commented on the lack of coherence of the laws as they relate to the 'young mans defence' within s6 Sexual Offences Act 1956 (unlawful sexual intercourse with girl under 16) and the provision contained with s14 Sexual Offences Act 1956 (indecent assault) which provides that if the victim is under 16 years of age, the consent of the child affords an offender no defence. In passing sentence he stated, "The law as it at present stands afforded you apparently a good defence to the charge of having had carnal knowledge of this girl, but if afforded you no defence to the charge of having indecently assaulted her. Some day, I hope, somebody will have the sense to remedy this state of things".<sup>131</sup>

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<sup>126</sup> Ashworth (1995) p.340.

<sup>127</sup> Temkin (1987) p.33, see also Clarkson, C. M. V. and Keating, H. M. (1998) *Criminal Law: Text and Materials* (London: Sweet & Maxwell) p.626.

<sup>128</sup> Ashworth (1995) p.356.

<sup>129</sup> Williams (1983) above.

<sup>130</sup> *R v Laws* (1928) 21 Cr. App. R.45, at 46.

<sup>131</sup> Samuels, A. (1966) 'Unlawful Intercourse and Indecent Assault' *New Law Journal*. p.1111.

Williams suggested another ‘status’ defence for indecent assaults against children. He argues that it should be a defence for a man charged with an indecency offence that he was not more than three years older than the girl. This, he suggests, would give partial recognition to prosecution practice.<sup>132</sup>

The CLRC (1984) have argued simply for a continuation in the selection of cases for prosecution. They state that it is very rare for a young man to be prosecuted for consensual indecent assault on a girl close to the age of consent. The committee hoped that this would remain the case, as they would not wish to see the criminal law used against adolescent ‘petting’, unless the special facts of the case require a prosecution to be brought.

The question remains therefore whether a young man’s defence should be created by the operation of discretion or should be regulated by being enshrined in legislation. We would argue that if a revised ‘young man’s defence’ was created in relation to sexual intercourse, it should be included in legislation on indecent assault.

## **6.5 Abolition of indecent assault and its replacement with a reformed offence of gross indecency with a child**

The Criminal Law Revision Committee have argued that the current offences should be reformulated: to deal in a more realistic way with acts to which a child under 16 has in fact consented, but to which the present law by a legal fiction presumed he or she has not.

The Criminal Law Revision Committee proposed that the offence of Gross Indecency with Children contrary to s1 Indecency with Children Act 1960 should be retained. They did, however, recommend that the offence should be expanded to include children under the age of 16 (it currently serves to protect children under the age of 14).<sup>133</sup> This, they suggested, would enable the legislature to repeal s14(2) and 15(2) Sexual Offences Act 1956 which provides that a child of under 16 cannot in law give a valid consent to an indecent assault.<sup>134</sup> The reformulated s1 Indecency with Children Act would prohibit the commission of an act of gross indecency with or towards a child under 16, and the incitement of a child under 16 to such an act with him or her, or another. Thus a purely passive offender would be caught by this provision.

A defence should be available to an offender who believed that the child was aged 16 or over and who believed he was validly married to him or her. Situations where there was in fact no consent to the indecent assault could continue to be dealt with by s14 and s15 Sexual Offences Act 1956.

The CLRC considered whether or not the term ‘gross indecency’ should be used to describe the conduct to be proscribed by the offences they were recommending. Different views were put forward. The committee however concluded that the term should be retained as it had been used without, any significant problems arising, as they understood it.<sup>135</sup>

<sup>132</sup> Williams (1983) above p.229.

<sup>133</sup> See also Ashworth (1995) p.352 who supports this provision.

<sup>134</sup> This was supported by Hogan, so as to enable the offence of indecent assault to be confined to indecent assault properly so called and ridding the law of the nonsense of the consensual indecent assault.

<sup>135</sup> CLRC (1984) para 7.14–7.22.



### **Criticism of the suggested reform**

Hogan<sup>136</sup> suggests that the restriction of indecent assault to assaults properly so called and the extension of the gross indecency offence to children under 16 means that a non consensual contact need only be indecent to attract a conviction, whereas in the case of consensual conduct the indecency would have to be 'gross'.

Hogan also questions how the distinction between indecent and grossly indecent offences is to be made. He asks what conduct with say, a girl or boy of 12 would be indecent but not grossly so. If the conduct in question passes the test of being simply indecent, why does the committee not wish to proscribe that conduct and but only to criminalise acts which meet a further, and indefinable qualification of being gross?<sup>137</sup>

## **6.6 Should the offence of buggery be abolished?**

With the government's commitment to equalising the homosexual and heterosexual age of consent, it may be argued that the offence of buggery stems from a bygone and homophobic age.

However, whilst s1 Sexual Offences Act 1956 has been expanded to include anal penetration within the definition of rape the offences of USI (s5 and s6 Sexual Offences Act 1956) and incest do not include anal intercourse, nor do these statutory provisions provide protection for boys who are abused. Situations may arise therefore where a young person has been subjected to anal penetration, but where it would be difficult to prove that the child did not consent and a prosecutor does not feel confident enough to justify a charge of rape. In this situation the existing offence of buggery is an option unless prosecutors are content to allow this act to be dealt with by the law prohibiting indecent assault.

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<sup>136</sup> Hogan (1985) above.

<sup>137</sup> Hogan (1985). at pp.428–429.

## ABDUCTION OFFENCES WHICH DEAL SPECIFICALLY WITH CHILDREN AND THE MENTALLY HANDICAPPED

**Section 19 Sexual Offences Act 1956** – it is an offence for a person to take an unmarried girl under the age of eighteen out of the possession of her parent or guardian against his will, if she is so taken with the intention that she shall have unlawful sexual intercourse with men or with a particular man.

**Section 20 Sexual Offences Act 1986** – it is an offence for a person acting without lawful authority or excuse to take an unmarried girl under the age of sixteen out of the possession of her parent or guardian against his will.

**Section 2 Child Abduction Act 1984** – a person, commits an offence, if without lawful authority or reasonable excuse, he removes a child under the age of sixteen from the lawful control of any person having lawful control of the child.

**Section 21 Sexual Offences Act 1956** – it is an offence for a person to take a woman who is a defective out of the possession of her parent or guardian against his will, with the intention that she shall have unlawful sexual intercourse with men or with a particular man.

Several aspects of the abduction offences as currently framed have been questioned:

- Whether the concepts underlying them still remain relevant.
- The inconsistency with the current age of consent.
- The gender specific nature of the offences.
- The limitation of the offence to acts of vaginal intercourse.

### 7.1 Prevalence

The number of offences of abduction reported to the police and recorded by them as offences has remained both relatively low and relatively static. In 1987, 268 offences were recorded. This figure rose in 1992 to 354 and but dropped again in 1997 to 277.

### 7.2 Criticisms of the existing law

#### Offences from a bygone age?

Rook and Ward have described the offences which deal with abduction as ‘antiquated’. Indeed the concept of criminalising the act of taking a child from the ‘possession of a parent or guardian’, when the parent or guardian does not consent to the taking, seems the product of a bygone paternalistic age where a father’s right was essentially one of ownership.<sup>138</sup> The spirit of the abduction offences go against the fundamental modern concept of parenthood enshrined in the Children Act 1989, that parents do not have an overriding right to exercise power over their children, but rather their rights stem from their duty to safeguard a child’s welfare.<sup>139</sup>

<sup>138</sup> Fox-Harding, L. (1991) *Perspectives in Child Care Policy* (London: Longman).

<sup>139</sup> Section 3(1) Children Act 1989.



### **The age of consent**

Section 19 Sexual Offences Act 1956 deals with the abduction of girls under the age of 18. However the age limit of 18 is inconsistent with the statutory age of consent for sexual intercourse of 16. If a girl of sixteen is deemed to be capable of consenting to sexual intercourse it would seem ludicrous to prohibit the taking of a girl under 18 'out of the possession of her parent or guardian against his will' if she is taken with the intention that she shall have unlawful sexual intercourse. Section 19 appears to deny young women the autonomy to make their own informed decisions.

### **Gender specific nature of offences.**

s19, s20 and s21 all require the victim to be female. As commentators have concluded, there are no reasons why offences designed to protect children and young people from sexual exploitation should only apply to girls. The same arguments in favour of an expansion of s5 and s6 Sexual Offences Act 1956 to provide protection for boys as well as girls can be adapted by analogy to the offences dealing with abduction which are gender specific.

### **Sexual intercourse**

Sections 19 and 21 of the Sexual Offences Act require an intention on the part of the offender to have sexual intercourse. The definition of sexual intercourse has not been widened to include anal intercourse, unlike the offence of rape.

## **7.3 Abolition of the existing laws and their replacement with new offences**

The Criminal Law Revision Committee (1984) proposed that the abduction offences contained within the Sexual Offences Act 1956 be replaced by two new offences:

The first covering the abduction of a child under the age of 16 – to include both boys and girls, with the intention that the child should have unlawful sexual intercourse or take part in an act of gross indecency, including buggery. A defence would be available to a defendant if he believed the child to be over 16.<sup>140</sup> This proposal has been effectively superseded by the enactment of the s2(1) Child Abduction Act 1984.<sup>141</sup>

A second proposed offence would cover the abduction of a severely mentally handicapped person with the intention that he or she should have unlawful sexual intercourse or take part in an act of gross indecency – including buggery with any person. It would be a defence if the defendant believed that the person abducted was not mentally handicapped. Both offences, suggested the CLRC, should be subject to a maximum penalty of two years imprisonment.

<sup>140</sup> CLRC (1984) para 13.8–13.13.

<sup>141</sup> Rook and Ward (1997) para 11.70–11.71.

## PROSTITUTION AND PROCURING OFFENCES WHICH DEAL SPECIFICALLY WITH CHILDREN AND THE MENTALLY HANDICAPPED

**Section 25 Sexual Offences Act 1956** – it is an offence to permit a girl under 13 to use premises for intercourse.

**Section 26 Sexual Offences Act 1956** – it is an offence to permit a girl under 16 to use premises for intercourse.

**Section 23 Sexual Offences Act 1956** – it is an offence to procure a girl under the age of 21 to have unlawful sexual intercourse with a third person.

**Section 27 Sexual Offences Act 1956** – it is an offence to permit a female defective to use premises for Intercourse.

**Section 28(1) Sexual Offences Act 1956** – it is an offence to cause or encourage the prostitution of, the commission of unlawful sexual intercourse, or indecent assault of a girl under the age of 16 for whom a person is responsible.

**Section 29 Sexual Offences Act 1956** – it is an offence to cause or encourage prostitution of a female defective.

**Sexual Offences (Conspiracy and Incitement) Act 1996** – this Act makes it an offence to conspire to commit certain sexual acts abroad against children, or to incite a person to commit such acts.

Numerous other offences exist which seek to control those involved in prostitution. The Children's Society, in their book 'Child Prostitution in Britain', provide a useful summary of the laws dealing with prostitution. Essentially, the Sexual Offences Act 1956 deals with offences concerned with the control and coercion of prostitution while the Street Offences Act 1959 deals with soliciting for prostitution in the street or public place. The Sexual Offences Act 1967 deals with male prostitution and the Street Offences Act 1985 deals with kerb crawling.<sup>142</sup>

### 8.1 Prevalence

The number of offences of procurement reported to the police, and recorded by them, has remained at a consistently low level. In 1987, 175 offences were recorded, in 1992, 130 and in 1997, 131. In 1996 there were 288 cautions and 1777 convictions of girls and 6 cautions of boys aged under 18 for soliciting.<sup>143</sup>

### 8.2 Criticisms of the existing law

The gender-specific nature of these offences can be criticised. The majority of offences against child prostitutes are sex specific (s23, 25,26,27, 28 and 29) are all limited by the requirement that the victim must be female.

<sup>142</sup> Barrett, D, (1997) *Child Prostitution in Britain: Dilemmas and Practical Responses*. (London: The Children's Society) at p.21.

<sup>143</sup> Home Office (1999) *The Draft Guidance on Children Involved in Prostitution* (London: Home Office).



### 8.3 Abolition of the Existing Law

It has been questioned whether child prostitutes should be criminalised at all, rather than seen as victims of abuse. It is not within our remit to describe these arguments in full.

The Draft Guidance on Children Involved in Prostitution<sup>144</sup> has argued against the abolition of the offence of soliciting by children. The guidance states that Government considers that the criminal law plays an important role in establishing society's view that street prostitution is not welcome nor is it acceptable for children to be involved in it. Decriminalising prostitution for children would risk creating a perverse incentive to encourage children into prostitution, and could encourage coercers and abusers to concentrate on drawing children in. The guidance suggests that the primary law enforcement effort must be against abusers and coercers who break the law.

### 8.4 Reform of the Existing Law

Barnardos have suggested that laws which deal with sexual offences should be widened in an effort to deter men from seeking to use the services of children who are engaged in prostitution.<sup>145</sup> They suggest that:

- The maximum penalty for unlawful sexual intercourse contrary to s6 of the Sexual Offences Act 1956 should be reviewed. Currently an offence under s6 is subject to a maximum penalty of two years. Barnardos also suggest that any change to existing legislation should be accompanied by the issue of sentencing guidelines. These should list a number of aggravating factors including a significant age gap between the parties and or evidence of an abusive or exploitative relationship.
- The Indecency with Children Act 1960 should be extended to cover 14 and 15 year olds.
- Section 28 Sexual Offences Act 1956 should be extended to cover all adults, not just those with parental responsibility.
- The Street Offences Act 1959 should be extended to exclude young women under 16 from its provisions.

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<sup>144</sup> Home Office (1999) above.

<sup>145</sup> Barnardos. Press Release. 29th December 1998.

## INDECENT PHOTOGRAPHS OF CHILDREN

**Section 1 Protection of Children Act 1978** – it is an offence to take, show and possess indecent photographs of children.

**Section 160 Criminal Justice Act 1988** – it is an offence to have any indecent photograph or pseudo-photograph of a child in one's possession.

Criticisms of the current law have focused around problems of enforcement.

### 9.1 Prevalence

The number of people convicted of offences under s1 PCA and s160 CJA has been steadily rising, although the numbers themselves remain small. 103 people were convicted under s1 PCA in 1997 as opposed to 44 in 1992 and 81 people were convicted under s160 as opposed to 30 in 1992. This may reflect a small rise in the number of people proceeded against under these acts. Figures available from the magistrates court indicate a rise from 46 people to 111 proceeded against under s1 PCA and a rise from 43 people to 124 under s160 CJA.

### 9.2 Problems of enforcement

Rook & Ward<sup>146</sup> state that there is a problem for the prosecution in proving the age of the child to establish that an offence has taken place under s1(1)(b)-(d). For the purposes of s1(1) a of the 1978 Act the prosecution may rely on section 99(2) Children and Young Persons Act 1933 which enables the court to draw from the victim's present appearance a rebuttable presumption as to his or her age at the date of the alleged offence. However s99(2) is not available for a charge under s1(1)(b)-(d) and the prosecution must therefore rely on other means of proving age. However a particular difficulty with many prosecutions both under the 1978 Act, which also applies to the 1988 Act is that the identity of the subject of the photograph cannot always be discovered, and therefore that his or her age cannot be proved any of the normal methods. In such cases s2(3) of the 1978 Act states:

“In proceedings under this Act relating to indecent photographs of children a person is to be taken as having been a child at any material time if he appears from the evidence as a whole that he was then under the age of 16”.

Rook & Ward suggest that problems of a different sort arise under section 1(1)d of the 1978 Act in that if an advertiser offers indecent photographs of 'young girls' or 'Lolita photographs', then the prosecution must satisfy the jury that the advertisement is likely to be understood as referring to photographs of children, as opposed to young-looking adults.

<sup>146</sup> Rook & Ward (1997) above.



## THE LAW AND THE EUROPEAN CONVENTION OF HUMAN RIGHTS (ECHR)

A child and or vulnerable adult could potentially challenge the current legislation on the grounds of its failure to fulfil its obligations under Article 8 of the European Convention of Human Rights (ECHR) to ensure that person's right to respect for his private life.

Article 8 states:

- (1) Everyone has the right to respect for his private...life;
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary...in the interests of public health and morals',

The concept of 'private life' covers a person's sexual life, as well as their physical and moral integrity.

Article 8 can and has been interpreted in two ways in the context under discussion:

- First it imposes a duty on the state not to interfere in a person's sexual life, if such interference is not necessary for the protection of health and morals.
- Secondly, and most interestingly in this context, article 8 has been interpreted to impose positive duties on the state, particularly in relation to protection from abuse. In *X and Y v Netherlands* the European Court of Human Rights (ECtHR) concluded that 'although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in the effective respect for private and family life'.<sup>147</sup>

We consider that the most likely challenges would come on the basis of Article 8 when allied with Article 14.

Article 14 states that: "enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political, or other opinion...birth or other status".

Although there may not be an application solely on the grounds of Article 14 and it must be allied to another right, an application may be successful in cases where there would be no violation of that other article alone.<sup>148</sup>

This Article concerns less favourable treatment towards a particular group than another group who is in a similar situation. Different treatment is acceptable under the ECHR. However such a difference must be substantively and objectively justified. Thus in *McMichael v UK* a challenge based on the difference in treatment of an unmarried father under the Children Act 1989 was unsuccessful, as it was said to have an objective and reasonable justification in the protection of the rights of the child and the mother.<sup>149</sup> Justification for a difference in treatment may be

<sup>147</sup> (1986) 8 EHRR 235 para 23, see also *Airey v Ireland* (1979) 2 EHRR 305 para 32.

<sup>148</sup> Jacobs and White (1996) *The European Convention on Human Rights* (Oxford: Clarendon Press).

<sup>149</sup> [1995] 2 FCR 718.

determined by looking at the aim and effect of the measure, and whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.<sup>150</sup> Furthermore, whilst the contracting states enjoy “a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify similar treatment”<sup>151</sup>, when this difference in treatment “impinges upon a most intimate aspect of affected individuals private lives,” it has been the view of the Commission that “the margin of appreciation must be relatively narrow”.<sup>152</sup>

### 10.1 Challenges against undue interference in a person’s sexual life

As Fortin has observed, the ECHR is very adult orientated.<sup>153</sup> It is not expected that children have a right to sexual life. The only challenge which might be made by a ‘child’ could be under s19 Sexual Offences Act 1956. This makes it an offence for a person to take a child out of the possession of her parent or guardian against his will, if she is so taken with the intention that she shall have unlawful sexual intercourse with men or with a particular man. Section 19 appears to deny to heterosexual girls over 16 the freedom to order their sexual lives, against the wishes of their parents, a freedom that heterosexual males and lesbian females already enjoy and homosexual males soon will.

A challenge could be made by a vulnerable adult to both s7 of the SOA, which criminalises sexual intercourse between a woman ‘defective’ and a man, and against s1(3) Sexual Offences Act 1967, which criminalises homosexual acts with a man suffering from a severe mental handicap, on the grounds that that man is unable to consent. Can such an interference in the sexual life of a particular group of people be justifiable under the ECHR? We suspect not. Our primary reason for reaching such a conclusion is the lack of ‘objective and reasonable justification’ for the distinction that the law currently makes. Valid justification could potentially arise from medical or other evidence to the effect that this particular group of people requires special protection through the criminal law, as a result of their inability to consent. However the definition of this group has been primarily driven by law rather than science. There do not appear to be any medical or other research findings which define this group as being particularly unable to consent to sexual acts, as opposed to other people with mental handicap. In the absence of any supporting evidence, it seems likely that these offences could be found to be discriminatory.

### 10.2 Challenges on the grounds of a state’s positive duty to protect citizens from abuse

The ECtHR in *A v UK* stated that ‘children and other vulnerable individuals, in particular are entitled to state protection, in the form of effective deterrence against such serious breaches of personal integrity’.<sup>154</sup> This view was reiterated, by the Commission in *Stubbings v UK* when it

<sup>150</sup> *Belgium Linguistics Case (No 2)* (1979-1980) 1 EHRR 252 at para 9.

<sup>151</sup> *Gaygusuz v Austria* (1997) 23 EHRR 364 para 42.

<sup>152</sup> *Sutherland v United Kingdom* 24 EHRR CD 22.

<sup>153</sup> Fortin, J. (1998) p.52.

<sup>154</sup> (1998) 27 EHRR 611 para 22.



stated that “sexual abuse is unquestionably an abhorrent type of wrong doing, with debilitating effects on its victims. Children and vulnerable adults are entitled to state protection in the form of effective deterrents from such grave types of interference with essential aspects of their private lives”.<sup>155</sup> Not only does a state have a duty to provide deterrence in law, the deterrence is expected to be found in the criminal rather than civil law. In *X and Y v Netherlands*, which concerned the sexual assault of a mentally handicapped child, the Court concluded that “effective deterrence...in this area...can only be achieved by criminal-law provisions”.<sup>156</sup>

How might our legislation be considered to fail to provide an effective deterrent?

- If the domestic criminal law fails to provide ‘practical and effective protection’ for a child, as no remedy through the criminal law is available for a particular person, or group for an assault. In *X and Y v Netherlands*, for example, an application alleging a violation of article 8 succeeded, on the grounds that no criminal remedy was available for a mentally handicapped child who had been forced to have sex and indecently touched, by the adult son of the owner of the care home in which she lived, because she was unable to make a formal complaint herself. As no provision of the criminal law provided her with protection in these circumstances, it was held that she was a victim of a violation of the ECHR.
- If a defence is in operation which effectively removes the protection afforded to a child by the existence of a particular offence. In *A v UK* it was therefore held that the protection afforded to children was significantly reduced by the defence of reasonable chastisement, which meant that the law failed to deter those who might assault children.<sup>157</sup>

We feel that our legislation would be open to challenge on the grounds of the disparity in the sexual offences which may be committed against girls and boys. Primarily, certain offences – USI with girls under 13 and under 16, incest, abduction offences under sections 20 and 21 and the prostitution offences of procuring and providing premises for prostitution – only relate to acts against girls. These may be subdivided into offences for which no equivalent offence with a male victim exists (notably offences of procuring and providing premises for prostitution), and the others where there is some similar offence against a male victim, albeit not an equivalent one.

A challenge has been successful in the past on the grounds that no offence exists which may protect a child. We conclude therefore that the category of ‘prostitution’ offences would certainly be open to challenge. However we also consider that the differences in the legislation relating to boys and girls, could in all likelihood not be justified as ‘objective and reasonable’ under the terms of the ECHR.

We would argue that, with the exception of USI with a girl under 16, even instances where an offence may be charged when the complainant is male (albeit not the same offence that may be charged when the complainant is female) could be open to challenge. The basis of such a potential challenge would be that the offences do not reflect an essential element of the harm which the complainant has suffered: harm which an offence would recognise were the complainant female. For example, a woman who has sexual intercourse with a boy under the age of 16 against his will may be charged with indecent assault as an alternative to rape or USI. However this would fail to reflect that the child had been forced into sexual intercourse.

<sup>155</sup> (1996) 23 EHRR 213 para 64.

<sup>156</sup> (1986) 8 EHRR 235 para 27.

<sup>157</sup> (1998) 27 EHRR 611 (Commission Opinion) para 48.

Similarly, in cases of incestuous relationships, indecent assault or buggery could be charged when the complainant was male, whereas incest would be charged if the complainant was female. However, as the Criminal Law Revision Committee argued, the primary aim of the law against incest is the protection of the young and vulnerable against sexual exploitation within the family. Thus abuse of trust is an essential element of incest offences. It might then be argued that the absence of an offence against male victims which specifically highlights the abuse of trust within a family relationship is discriminatory, because it fails to afford a boy the same level of protection as a girl.



## CONCLUSION

### Capacity

The current law has taken two approaches in dealing with the difficult question of consent of children and vulnerable adults to sexual acts. The first has been to consider that a specified group cannot in law consent to sexual acts – the ‘status’ approach. This model has been used for most current sexual offences involving children, with the exception of rape. It has also been used in an offence prohibiting sexual intercourse with specified group of vulnerable female adults (defined in law as ‘defectives’), subject to the defences outlined in section 4 of this review. The second model does not rely on a victim’s inclusion within a defined grouping, but upon her capacity to consent – the ‘capacity’ approach. It concentrates upon guidance specifying how that capacity may be judged. This model has been used in the offence of rape, for both children and adults and all other sexual offences committed against adults.

Both models in practice have their weaknesses. The first model may be criticised on the grounds that the selection of those who will be placed in the category has been arbitrary. The legal categorisation of people as being unable to consent is not founded in medical and psychological knowledge. It may also be argued that when the legislation does not adequately reflect a complainant’s capacity to consent, enforcement practice will impose it.

Conversely the second model is open to the challenge that insufficient understanding or the capacity of some children and vulnerable adults may mean that they will be deemed to have freely consented when in fact, because of their age or disability, they were not able to do so.

In reforming the law of consent in relation to children and vulnerable adults, a choice between the two approaches must be made. Whilst the status approach seems both unjustifiable and practically impossible when dealing with vulnerable adults, whose lack of capacity may not be linked to particular mental conditions or disorders, it may be more persuasive in terms of children. It makes a forceful statement that a child may never have the requisite understanding of the effects of sexual intercourse to be able to consent, however precociously she may behave. We feel that this may provide protection for children in certain circumstances, by giving weight to their refusal. It also may provide an important message to juries, that a child complainant cannot be considered responsible for the acts perpetrated against her.

### Consent

At present the legal definition of consent is vague. While the fact that mere submission does not equal consent may help some vulnerable people, who may more readily submit to sexual intercourse without force or pressure, it can be very difficult for juries to determine whether a complainant did consent without some clearer form of guidance. We would argue that sexual behaviour is an area in which people, particularly children and vulnerable adults who have been abused before, may behave counter-intuitively (i.e. submit to sexual intercourse without apparent protest in situations where one might expect them not to). Without some guidance, jurors may consider such behaviour to denote freely-given consent. The existence of a non-exhaustive list of factors detailing situations where consent might not be freely given could help a jury to weigh up all the relevant factors in reaching their conclusion.

## The wide range of offences which may currently be charged

The enormous range of offences currently on the statute book arguably produces less justice rather than more. Many of the offences are little understood and never used. Police and prosecutors charge within a narrow band of offences, which may not reflect the nature of the complainant's assault. We would argue that this practice originates from the fact that many of the offences stand alone and are geared to a very specific set of circumstances. They are not joined by any coherent ideology. Thus charging becomes a memory game with some offences being overlooked, or ignored because they are incomprehensible.

## Discrimination

The justice which some parts of the current law dispense is arbitrary. The law's application depends on the victim possessing certain characteristics, selected when an understanding of the nature of sexual assault was very limited compared with today. Some sexual offences – for example, incest – are discriminatory and probably would not withstand challenge under the ECHR.

Most fundamentally the law currently sends out a message that some assaults are less serious, and in some cases not even criminal, simply because of the gender of the complainant, or the defendant. For example, the legislation largely ignores the possibility that a woman may commit a sexual assault. It also overlooks the fact that boys may be persuaded into sexual relationships by an abuse of trust within their home.

## Does the law currently protect children and vulnerable groups?

The current law, in failing to reflect the nature of sexual offences as currently reported, is outdated and ineffective in protecting children and vulnerable people from assault.

As well as its discriminatory nature, the law inadequately criminalises some type of sexual assault, and fails to criminalise others at all. In doing so it fails victims and potential victims in two ways. Firstly, the law may demean the effects of the assault on the victim. Secondly, not truly representing the nature of the assault perpetrated can now have fundamental implications for the level of protection which the Sex Offenders Register can offer. For example, the majority of those who offend sexually against children and vulnerable adults will be charged with indecent assault. On paper many offenders may then look the same, but in reality they will pose widely different levels of risk.

Great advances have been made to protect the vulnerable in the court room<sup>158</sup>, however fundamental reform of the offences with which sexual assailants may be charged can offer protections which stretch far beyond this area.

<sup>158</sup> Youth Justice & Criminal Evidence Act 1999.



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