



Appendix H6

Report of a consultation conference on the capacity to consent (*“Striking a balance between freedom and protection”*)

8-9 July 1999

Golden Valley Thistle Hotel, Cheltenham



Introduction

Betty Moxon welcomed all those attending what promised to be a full and interesting conference programme. This opened with the context of the review and an explanation of the strands of concern about the law on sex offences. Although there had been a lot of work in the area of evidential and procedural issues, the substantive law had rarely been addressed. The implementation of the Human Rights Act would give the UK courts the ability to make judgements about the Convention, and would provide an interesting new challenge for the legal system.

Please note that the report on the speeches as given below is not a verbatim transcript.

Lord Justice Henry Brooke – Keynote Speech

During the course of the next 24 hours we will be considering some of the most difficult questions a conference of this kind will ever be asked to consider. Any fortunate adult will know that a consensual sexual relationship is among the most precious experiences that a human being can enjoy. The word “consensual” is derived from a Latin verb which means “to feel together”. A consensual sexual relationship is what one does in a most intimate way with one’s partner, not to one’s partner. The word “contact” is also derived from a Latin origin, which means consensual touch. In contrast, an assault involves by definition a touch or attack to which no consent is given.

I mention these matters at the very beginning of this talk because they are so important. The English common law is man made, in the sense that in its origins it was made almost entirely by men. In very many respects it reflected an idea that a sexual relationship was what a man does to a woman, or what a man did to another man, or indeed to an animal. The common law has never involved itself much with what a woman might do to another woman, although statute creates offences if a woman commits an indecent assault on a man or an act of gross indecency with a man in prohibited circumstances.

While I was with the Law Commission, we issued two consultation papers on consent in the criminal law. The first was published in 1993 and the second in 1995. I have personally read every response to each paper. I think it is fair to say that nobody any longer supports the idea that a consensual sexual relationship, or sexual contact, is what somebody does to somebody else. It is what somebody does with somebody else, when each of them consents to what they are doing together. There were of course widely different views about the occasions when the law should ban and criminalise certain consensual sexual activities. There were also widely different views about the principles which should be applied when deciding when the law should stop people doing what they wanted to do together. But the old idea that consensual sex was something which someone did to somebody else seemed to have gone for good.

A second important feature of the English common law is that it was made by Christians, and until quite recently mainstream Christian teaching was based quite firmly on Old Testament teaching. For example, buggery is described in Leviticus as the abominable, or detestable, crime. For many centuries Parliament did not create sexual offences. They were common law crimes, developed by the judges. In the nineteenth century the parliamentary draftsman put all these common law crimes into a statute. Section 61 of the Offences Against the Person Act 1861 read:

“Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable at the discretion of the court to be kept in penal servitude for life or for any term not less than 10 years.”

As late as 1960 the law lords still had the idea that they could create a common law crime if someone did something so offensive to morality that they considered that it should be a crime. One of them said that the judges had a residual power to conserve the moral welfare of the State.

Traces of that thinking still linger in parts of our law today. They will not survive for five minutes once our courts start to apply Article 7 of the European Convention on Human Rights to some of the cobwebby corners of our criminal law. But these traces are mostly concerned with issues like prostitution, which are outside the scope of the present review.

You may ask: why should I be wasting your time talking about the past? The answer is that our criminal law relating to sexual offences is still stuck very firmly in the past. The old common law offences were codified in the nineteenth century, mostly in 1861. Parliament gave some time to law reform in 1885. It gave a little more time to it in 1922. It consolidated the law and removed some archaisms in 1956. And since then, it has occasionally tinkered at the edges. In 1959 it changed the words “imbecile or idiot” to “defective” to describe someone who lacked the mental capacity to give a valid consent. We still have to use the word “defective” today. In 1960 it filled a gap by creating an offence of committing gross indecency with a child under 14. In 1967 it legalised homosexual relations between consenting males over 21 in private. In 1976, following the House of Lords case of *Morgan* and the *Heilbron Report*, it codified some of the law relating to rape. It also made it clear, as the House of Lords had ruled in *Morgan*, that there was no longer any additional need to prove force, fear or fraud, as well as lack of consent. In 1994 it reduced the age of consent for homosexual males to 18 and abolished the corroboration rule. And that is about that. It was all piecemeal, ad hoc reform. Parliament altered the old common law rules at the edges, but it never attempted any comprehensive reform of the law. The judges have had to try and make it work.

I have copied for you three pages from a recent Law Commission paper [set out as Annex B to this report]. The first two pages show you what the law looks like today. The other reflects the recommendations of an official report 14 years ago, and shows how much more simply the law could be expressed.

This conference is about capacity to consent. As I have said, sexual intercourse, or sexual contact, between consenting adults who understand what they are doing is a perfectly natural human activity. I stress the words “adults who understand what they are doing”. These words exclude “children who are not adults”. They also exclude “adults who do not understand what they are doing”. In the two syndicate discussions we will be discussing each of these exclusions in turn. We will also be discussing some other topics to which I will turn briefly at the end of this talk.

Before I talk about children, there is something I need to say about our criminal justice process. In other countries, trials are conducted on an inquisitorial basis by three trained professional judges. They know the law, they know what questions to ask and what not to ask, and they give reasoned judgements. The English approach has always been quite different. Most decisions about guilt or innocence are made within an adversarial process by lay people: juries at the Crown Court and lay magistrates in the magistrates’ court. Until quite recently there were only a few professional magistrates, although their numbers are rising.

This state of affairs has two results. First, our law has got to be as simple as possible, so that lay people can understand it and apply it. The second is that decisions about guilt or innocence may not be arrived at for completely logical reasons, and no reasons have to be given. If juries do not like the law or the effects of the law, they simply acquit without giving reasons. We judges have seen this happen lots of times.

When this session is over, the first of our syndicate discussions will be concerned with the young. At present the law treats the young in different ways, depending on the offence which is being charged. If you are a girl under 13, sexual intercourse with you is an absolute offence. If you are under 14, you cannot consent to being a party to an act of gross indecency. If you are under 16, you cannot consent to heterosexual intercourse or to what is called an indecent assault. As the law now stands, if you are a male under 18, you cannot consent to an act of homosexual anal intercourse. Items 4, 5, 7 and 9 of my first paper show what the law looks like now.



Our civil law is quite different. It is administered by professional judges, and in the case of *Gillick* the House of Lords held that a girl can lawfully give her own consent to contraceptive advice and treatment if she has the intelligence and maturity to understand the nature and implications of the proposed treatment. This case has given rise to the lawyers' shorthand phrase *Gillick*-competent. The idea represents what I might call the real world, in which different adolescents mature at different speeds, and the majority of the House of Lords considered it ridiculous that contraceptive advice could not lawfully be given to intelligent, mature, 14- and 15-years old girls without their parents' consent.

Our Law Commission consent project was mainly concerned with the muddle the law has got itself into because consensual sexual activities which involve the infliction of pain have been categorised as acts of violence or assault instead of being categorised as a form of consensual sexual activity. We were dealing in this context with all sorts of different activities, from navel-piercing and nipple-piercing to mild, or not so mild, sado-masochistic beatings. We were anxious to see if the law relating to these activities could be brought in line with the law of sexual offences.

We therefore asked in our second consultation paper if it was feasible to introduce a concept like *Gillick*-competence into our criminal law. It is in fact already there in our common law. Parliament did not ban tattooing on young people under 18 until 1969. In a 1967 case, when very young boys had been tattooed, the High Court upheld a finding by magistrates that this was a crime. The judges relied on an old common law rule that a child or young person does not have the capacity to give a lawful consent to an activity if he or she does not have the age or maturity to judge the wisdom or unwisdom of giving consent.

I was totally convinced by those who responded to our second paper that we should not choose to continue with concepts like this in our criminal law. They told us that if we did so, the result would be that in effect it would be the complainant who was on trial. To ensure an acquittal, the defence would set out to show that the complainant was of the age or maturity to judge, or may have been of the age or maturity to judge, the wisdom or unwisdom of giving consent. To help them to show that, the defence would be anxious to delve into the past history of the complainant, to obtain disclosure of social services records about the complainant, and so on. It would all give rise to the same problems as we used to have in fatal accidents cases when a judge had to decide how likely it was that a widow would remarry and be maintained by another husband instead of the deceased – or the problems that arise because courts in rape cases have so little to go on when a jury is asked to be sure that a complainant is telling the truth that they are too ready to admit evidence of her previous sexual history. The CPS told us that they encountered great difficulties of a similar kind when they used to have to prove that a child under 14 was *doli capax*, if this was in issue.

My own personal view, for what it is worth, is that however rough and ready the result is, our criminal law cannot operate fairly and effectively if ideas of *Gillick*-competence are introduced by statute. For pragmatic reasons we have to stick to a choice of ages below which a complainant is deemed not to be able to give a lawful consent, however mature and intelligent he or she is. We have been told that one of the basic assumptions of the present review is that what is called the age of consent should not be lower than 16. I imagine that this refers to the age of consent, so far as sexual intercourse is concerned. It needs to be remembered that the law covers other sexual activity in which the young indulge, for which permitted ages are also needed.

This seems to leave only two topics worth discussing. First, is it sensible to have a law which makes it a crime for a boy to touch a 15-year old's breasts with her consent, or for a girl to touch a 15-year old boy's genitals with his consent? In this context, is there a mismatch between the permitted ages for consensual acts which lawyers identify as indecent assaults and those which they identify as acts of gross indecency?

The second topic is one which I discussed in one of my judgements in the High Court last year. This is concerned with the so-called “guilty mind” of the defendant. There was a huge Parliamentary row about this in 1922. This led to a compromise, so far as sexual intercourse was concerned. A new statutory defence was provided to a charge of unlawful sexual intercourse with a girl under 16 if the defendant fulfilled four criteria. He must have been under 24 at the relevant time. He must not have been charged previously with a similar offence. He must have believed that the girl was over the age of 16. And he must have had reasonable cause for his belief. It is called the “young man’s defence”.

This was a typical piece of Parliamentary compromise, but it is still the law today. A defendant charged with unlawful sexual intercourse with a girl of 15 can rely on this statutory defence. A defendant charged with the indecent assault of consensually touching her breasts has no defence. A defendant charged with committing an act of gross indecency, by exposing himself for instance, towards a girl who has the maturity and intelligence of a 17-year old, has no defence if she turns out to be in fact under 14. In other words, the law is upside down. If there is one thing I hope will emerge from the present review, it is that what we call the *mens rea*, or guilty mind, requirements for these different offences will have been thoroughly examined and overhauled in a logically consistent way. In principle, nobody should be found guilty of a crime, let alone a serious crime, in this country, if they honestly believe that what they are doing does not amount to the acts which constitute the crime, whose existence they are deemed to know. If they honestly believe that the complainant is over 16, or over 14, or whatever, then by ordinary principles of criminal law they should be acquitted. The minute you introduce middle-class concepts like “reasonable belief” into the criminal law, you are filling up the prisons with those who do not share the intelligence and logical thought-processes of the so-called reasonable man (or woman). People are no longer being judged for what they are, but what so-called right-thinking people think they ought to be. This is very dangerous, when the penalty on conviction means disgrace and degradation. I will return to the question of penalty in a minute.

There is a tension here between the protection of the young and vulnerable on the one hand, and the protection of the not so intelligent on the other hand, that this Review has got to resolve somehow. It has also got to spell out the requirements of the law when recklessness, as opposed to a deliberate act, is in issue.

The two questions we are being asked to answer in our first syndicate discussions are:

1. What are the problems in the present law?
2. Should the law recognise that children have any capacity to consent to sexual intercourse?

I have tried to indicate what I think some of the problems are, and I hope I have shown that questions about consent have got to range rather more widely than sexual intercourse.

The second main issue at this conference is concerned with the protection of those who are above the relevant age of consent but may not have the mental capacity to understand the nature of the different sexual acts in which they are encouraged to take part. The law at present is set out in Items 6, 9, and 10 of the first paper.

Here there seem to be two questions to be decided. The first is: if we need to do so, how do we define, for the purposes of the law, those who should be held to be incapable of consenting to any sexual acts? I suppose even here there might be a sub-question: should some people with limited mental capacity, and if so which, be permitted to give a valid consent to some sexual acts, like having their breasts or genitals exposed or touched, but not to others, such as intercourse?



As I have already said, in our criminal courts today Parliament still compels us to use the offensive word “defective” in cases involving complainants of very low intelligence. By a definition introduced in 1982, a “defective” is described as:

“a person suffering from a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning.”

Such a person cannot give a lawful consent, as the law stands today.

Stephen Silber will be coming here tomorrow to talk about the difficulties the Law Commission is experiencing in this area. In our second consultation paper we explored the possibility that the criminal law might adopt some of the tests we have just recommended for defining capacity in the civil law. These tests were quite sophisticated. They reflected the idea that people may have capacity to make decisions for themselves at some times, but not at others. Or that people with limited mental capacity should be permitted to take decisions for themselves about simple matters, like buying a tube of toothpaste, even if they do not have the capacity to understand the likely consequences of more serious decisions, like making a will or having themselves sterilised.

Again, the responses to consultation persuaded me that these concepts were too problematic to introduce into the criminal law. The trouble again was that they would tend to put the complainant on trial. The defence would have to be entitled to explore the complainant’s history and medical records to test the prosecution case that there was no capacity at the relevant time. Respondents also pointed out that decisions about sexual matters are much more simple and straightforward than decisions about financial or business matters, so that the criminal law does not have the same need to contemplate different levels of capacity as the civil law does.

The first question, then, is whether the law ought to retain a blanket rule which denies capacity to someone whose mind is very seriously impaired. If it should, it would obviously be a good thing that the same concepts are used as are used in current mental health legislation, although a more acceptable word than “defective” has got to be found. But what should those concepts be?

The next question is whether there is very much more than this that the criminal law can or should do to protect vulnerable people whose minds are impaired. So long as they have the capacity to understand what they are doing, they are entitled to all the rights that are recognised in the European Convention of Human Rights, and particularly the right to respect for private and family life. To deny adults the legal right to participate in sexual activity, if they wish to do so, is in an important sense to deny them their humanity.

The three questions we are being invited to consider tomorrow in our syndicates are:

1. How should the law treat those with no genuine capacity to consent?
2. How should this group of people be defined in a way that is not demeaning?
3. How should the law deal with those who may be able to give some degree of consent, but may not have a full understanding of the nature or consequences of sex?

The third question is likely to be far the most difficult to answer. We have got to remember that a criminal court is not a place for cosy theoretical discussions. It is a very public place where at the end of the trial a convicted defendant will be disgraced and degraded. He (or she) will be disgraced because of the stigma attached to sex offenders these days. Degraded because prison is usually very unpleasant indeed for convicted sex offenders. A criminal court is also a very public place where the complaining victim may be humiliated.

The last ten years have seen huge pressures to make the criminal courts cosier and more user-friendly for victims of crime. This is desirable, but it also causes problems. It is very difficult for a jury to be sure who is telling the truth when it is simply one person's word against another's. This is why the courts have allowed lines of inquiry in some cases which are regarded by pressure groups as unnecessary and insensitive. Sometimes they are indeed unnecessary and insensitive. Much more often they are necessary, in order to provide the jury with additional relevant evidence on which they can reach a safe, reliable decision on something as important as guilt or innocence of serious crime.

This is why any suggested law reform has got to be carefully tested for its practical effect in court. If you introduce this new issue into the law, what new lines of intrusive inquiry are you letting in at the same time? This is particularly important with a mentally impaired witness whose mental health may suffer from intrusive questioning in court.

Again, the “mens rea” element of the offences has got to be overhauled. You will see that Section 106(1) in my second paper puts it all very much more simply and sensibly than Items 6 and 9 in my first paper.

Finally, we will be asked two questions in our first syndicate session, and one in our second.

In the first we will be asked two very technical questions:

1. Should certain types of fraud negate consent and if so which ones?
2. Should deception or impersonation negate consent?

These are questions which will be asked whenever two or three academic criminal lawyers are gathered together with time on their hands. At present the relevant law is hidden away. The nearest you will get to it is in Section 89(2)(b) and Section 91 of my second paper.

The Law Commission threw all these questions, and many more, out for discussion four years ago, and it is sitting on an enormous pile of answers. My own feeling is that this Review will lose its way if it tries to embark on complicated technical questions like these, fun though they are to discuss, and that it should concentrate on clarifying and simplifying the present law first.

In our second syndicate discussion we are being asked to discuss this final question:

Are there any circumstances where the law should not permit any sexual intercourse between adults in relationships of influence or trust?

I have no particular insights to offer you on this one. It seems to me to raise questions much more appropriate for disciplinary processes than the criminal courts. Again, I hope the Review does not allow itself to be distracted from its main objectives.

That is all I have to say at the start of this conference. As you will see, my main pleas are that the law should be made clearer and more consistent; that it should reflect the sexual autonomy of all adults unless they need protection because of their incapacity to understand what is being proposed; that it should provide adequate protection for the young; and that any proposals for law reform should be tested by assessing the practical impact they will have, and the lines of questioning they will open up, at a criminal trial.

General discussion:

- There was some concern that there was an assumption that the law needed to be changed just because it was old. This was not so. In some cases there was nothing *seriously* wrong with the statute, but the underlying law was not always technically right. Law needed to be framed in a clear and coherent way so that it could be used.



- The implementation of ECHR in the Human Rights Act would change the basis of interpretation. The implication was that up until the present time the law had been freedom based rather than rights based, but now the law would have to be clear and accessible. In sexual offences, the right to a private life predominates.
- Although everybody knows what consent is, it is difficult to define in law. Some legislations have tried to define it, and the review must decide if there is any merit in it doing the same. The Olugboja case ruling drew a distinction between consent and submission, but it would be helpful if new statute could identify what needed to be taken into account. Working judges needed more help from the law.
- The prime objective of the review was to improve protection for children and vulnerable adults; and to remove unreasonable restrictions. The criminal law should only impinge to bring protection where necessary.
- There was some concern that the law at present was based on Judaeo-Christian teaching, and that it was difficult to determine the basis of ECHR. It was a convention similar to the US Bill of Rights which enshrined the fundamental rights of free expression, religious association, right to a private life, etc. These concepts brought together not only the principles of religious belief but a representative consensus of basic rights in a mature society. It was the balance between rights and allowance of the State to interfere in that right if necessary and proportionate.
- There was some discussion on abuse of trust. There were already some provisions in law around relationships of trust, such as the Mental Health Act, and it was hoped to introduce new legislation to protect 16 and 17 year olds within the next year. The review should consider whether the current scope of abuse of trust was too limiting, and whether it needs to be expanded.

First discussion session: Children and factors negating consent

Syndicate groups were asked to focus on the following questions:

1. What are the problems in the present law?
2. Should the law recognise that children have any capacity to consent to sexual intercourse?
3. Should certain types of fraud negate consent and if so which ones?
4. Should deception or impersonation negate consent?

Group A

1. The variable age limits for offences – 14 for gross indecency with a child, 16 for vaginal intercourse with a girl, 18 for anal intercourse with a boy or girl. This was much too confusing and there should be an equal age for all these offences – 16.

The offence should also be made gender neutral, to provide protection for boys as well as girls.

2. This posed more problem where the children were at the older end of the scale, where they could give actual consent. Was it right to have a law that was never used and would 'decriminalising' the offence encourage children who were sexually active to seek advice on contraception? It was recognised that this might send an unacceptable message – the age of consent

had to be retained at 16. However, there could remain an element of prosecutorial discretion as at present, for example, where both parties were similar in age and the relationship was truly consensual, and aggravating factors could include age, abuse by step-parents, etc. (Some of the group felt that the offence of incest should not be expanded to include step-parents.)

Most thought that it was right for the offence of rape to recognise the factual consent of children, but it was felt that there should be an absolute age limit where consent could never be recognised, even in rape, and which should constitute some form of absolute offence. Whether this should be 10 or another age was not determined. There were mixed views within the group about a defence such as the ‘young man’s defence’, or defences based on honest belief v reasonable belief (which could be open to all, but with the burden placed on the defendant to demonstrate how he could have reached that belief).

3. No consensus.

4. Husband and partner are already covered in law – this should be extended to wife and all partners. Also doctors and medical treatment.

Group B

1. The law was very untidy with the different age ranges for different penalties and it ought to be tidied up. Some of the defences relating to honest belief offered less protection to children. Such a defence should be honest and reasonable.

2. Not sure that children can give ‘proper’ consent: in many cases they may have been groomed. There should be some form of absolute offence for younger children below the age of 13. Sexual intercourse between children should either be decriminalised or made a lesser offence – might help teenage pregnancy figures by encouraging them to seek contraceptive advice. The offence could be based on age differentials and should be gender neutral to comply with ECHR.

3. Nature of the act.

4. Make identity of the partner gender neutral. Procuring by deception.

Group C

1. The Tyrrell ruling of 1893 has led to some inconsistency. With the differing consensual issues relating to rape, prostitution, indecent assault and rape it is difficult to determine if the law says children can consent or not. The law is full of gender exclusions. There has been no real debate on sex offences law in over 100 years.

2. There is a dysfunction between “age of consent” and capacity to consent in law. The law implicitly recognises children’s capacity to consent – should this be made explicit? It is difficult to see a way of doing so that would not make additional problems, and decrease protection for older young people. The State has a duty to protect children. Any age boundary will be arbitrary but can be justified in terms of protection from potential harm. The question should be what do we need to protect children from? There was no consensus on the question of statutory defences, except the view that older parties need to take more responsibility for their own behaviour. The shift in the treatment of child prostitution offences from the prosecution of young people to targeting clients could be used across a range of offences.

3. Fraud as to the nature of the act should negate consent.

4. The review might consider as a possibility a separate offence of procuring consent through deception. There was concern that this might blur the meaning of other offences.



Group D

1. The main problem is that young people who have experienced violence cannot get access to the law – they have a lack of confidence in the effectiveness of existing legislation.

2. There is a need to take account of ECHR ruling on Thompson and Venable case, relating to the trying of children for sex offences in court. Other legislations (notably Australia) do recognise children's capacity to consent. Concerns are what the level of consensual under-age sexual activity is – recognising a child's capacity could be seen as an abusers' charter. If capacity was recognised, it should be based on the growing and gradual maturity of the child. A child with a learning disability may never completely understand, and there has to be a flexibility in the law which looks at each individual and their capacity. The age of the perpetrator is also relevant – many other countries have an age differential of two years. However, although a flexible system might cater better for needs, in policy terms there is a clarity and better understanding with a clear age of consent.

Some commentators want a clear message to say that adults having sex with children is unacceptable. The difficulties lie in deciding what to do about children having sex with each other – and not watering down the age of consent. There would not always be prosecutions but the law was there to offer protection. Policy on whether to prosecute or not should be clear and transparent.

Some children and young people can be deterred from making a complaint by the possibility of custodial sentencing and the break-up of the family. Consideration should be given to using more therapeutic interventions.

3 and 4 No discussion.

General discussion:

- The general feeling was that the age of consent for men should be equalised at 16. There was a plea for childhood – it was said that although there were many myths about the sexual activity of children below the age of consent, research showed only about 20% of the total were actually involved. Children need to have boundaries set for them – sex was not necessarily consensual, but coercive and controlling. Although children sometimes appeared to be more worldly, it did not necessarily mean they had the maturity to apply information.
- It was important that the law reinforced the message that it was unacceptable for adults to have sex with children under the age of 16. There ought to be additional penalties for breaking relationships of trust.
- The review would be looking at aspects such as deliberate intoxication to obtain sexual intercourse, and other issues such as deception.

Stephen Silber QC: Capacity in sexual offences

1. The views set out in this paper are the provisional views of Stephen Silber QC, a Law Commissioner. They have not been considered by other Commissioners and therefore cannot be considered as the views of the Law Commission and are not for quotation or citation. The views expressed here may in any event be altered as a result of the discussion at this conference. We would welcome any written comments on the matters in this paper.¹

¹ It may be helpful for the Law Commission, either in discussion with others concerned or in any subsequent recommendations, to be able to refer to and attribute comments submitted in response to this paper. A request to treat all, or part, of a response in confidence will, of course, be respected, but if no such request is made the Law Commission will assume that the response is not intended to be confidential.

2. The Law Commission has produced two consultation papers on consent in the criminal law,² the first of which relates only to non-sexual offences against the person; the second is primarily concerned with offences against the person and sexual offences.

3. The responses to these consultation papers have been analysed and we are at present preparing a policy paper on what constitutes capacity to consent and what constitutes a valid consent, in relation to both offences against the person and sexual offences. In doing so we are working closely with the Home Office. After the following introductory paragraphs relating to the meaning and proof of consent, my views on capacity to consent to sexual acts are outlined.

Meaning of Consent:

4. Consent is a valid defence to most sexual offences committed against persons of full age and also to a limited number of offences against the person. The word “consent”, is used by Parliamentary draftsmen in many criminal statutes but is not defined – fact-finders are told that it bears its ordinary meaning. In *Olugboja*,³ drawing a distinction between consent and submission, the Court remarked that “the range of states of mind in the context of intercourse between a man and a woman” was sufficiently wide as to require a trial judge to supplement explanation that the term “consent” bears its ordinary meaning with “some further direction”, the content of which depends upon the particular circumstances of the case. Otherwise fact-finders are not now given any guidance on what is usually the major issue in sexual trials, on what “consent” means, or how it can be given. This would appear to be a serious defect in the present law. In the second consultation paper we propose a statutory explanation of the word “consent” in the context of offences causing injury and we are considering extending this to sexual offences.⁴

Proof of Consent:

5. Under the present law the defendant need only satisfy an evidential burden in respect of the defence of consent. The prosecution has to prove everything so fact-finders are certain. In other words the defendant needs merely to produce enough evidence to show that there is an issue to be considered. When this has been done the legal burden is on the prosecution to disprove the claim of the defendant, beyond a reasonable doubt. The majority of people who responded to our consultation paper agreed with this approach. Otherwise a defendant could be convicted of a serious criminal offence which attracts a substantial maximum sentence even when the fact-finders, having heard all the evidence, remain unsure whether or not the victim had consented. Any other view might well lead to a breach of the European Convention on Human Rights.

Capacity:

6. For the purpose of any offence to which consent is or may be a defence, a valid consent may only be given by a person who has the capacity to consent. In our second consultation paper we proposed a definition of persons without capacity, which comprised three categories of people:

² Consultation Paper No 134, *Consent and Offences against the Person* (1994) (the first consultation paper) and Consultation Paper No 139, *Consent in the Criminal Law*, (1995) (the second consultation paper).

³ [1982] 1 QB 320.

⁴ The second consultation paper, part XVI, para 8: *Meaning of consent*
 For the purposes of the above proposals – [relating to liability for causing injury]
 “consent” should mean a valid subsisting consent to an injury or to the risk of an injury of the type caused, and consent may be express or implied;
 a person should be regarded as consenting to an injury of the type caused if he or she consents to an act or omission which he or she knows or believes to be intended to cause injury to him or her of the type caused; and
 a person should be regarded as consenting to the risk of an injury of the type caused if he or she consents to an act or omission which he or she knows or believes to involve a risk of injury to him or her of the type caused.



- (1) those who are unable by reason of mental disability to make a decision for themselves on the matter in question;
- (2) those who are unable to communicate their decision on the matter;
- (3) those under the age of 18 who are unable by reason of age or immaturity to make a decision for themselves on the matter in question.⁵

Mental incapacity:

7. We have considered what factors the fact-finders should require to be present before it can be said that a person has the capacity to consent. The options open to us include combinations of the following:

- (1) the ability to understand relevant information;
- (2) the ability to retain relevant information;
- (3) the ability to use that information; and
- (4) the ability to communicate a decision.

We would be grateful for views as to any other factors that should be considered.

8. Drawing on the recommendations made in our report on Mental Incapacity in the civil law context (Law Com 231), in our second consultation paper we provisionally proposed the use of a flexible, functional, test for the determination of capacity.

- (1) First, a person should be regarded as being without capacity if when he or she gives what is alleged to be his or her consent, he or she “is unable by reason of mental disability to make a decision for himself or herself on the matter in question” (Proposal 13(2)).
- (2) Second, a person should be regarded as being at the material time “unable to make a decision by reason of mental disability” if the disability is such that at the time when the decision needs to be made –
 - (a) he or she is unable to understand or retain the information relevant to the decision, including information about the reasonably foreseeable consequences of deciding one way or another or of failing to make the decision, or
 - (b) he or she is unable to make a decision based on that information; and

in this context “mental disability” should mean a disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning (Proposal 17).

9. Responses on consultation have led us to revise the definition in Proposal 17, of “unable to make a decision” by omitting reference to the retention of relevant information. This is so that those with short term memory problems will not be wrongly categorised as unable to make a decision about sexual acts.

10. We are concerned that the adoption of a wholly flexible, functional test as proposed in our second consultation paper would not give sufficient protection from sexual abuse to those

⁵ Proposal 13. Note the order of these categories in Proposal 13 begins with minors.

with severe learning disabilities. We consider that, in light of *A v UK*,⁶ Articles 1 and 3 of the European Convention on Human Rights create a positive obligation upon contracting States to use the criminal law to provide an effective deterrent to protect those with severe learning disabilities from exploitative, abusive, sexual acts.

11. Current legislation proscribes all sexual activity with those with severe learning disabilities (who under the Sexual Offences Act 1956 are described as “defectives”).⁷ Whilst this may satisfy the obligations created by Articles 1 and 3 of the Convention, such absolute proscription of all sexual activity, may constitute a breach of Article 8, which guarantees a right to respect for private and family life.

12. We ask whether the current legislation extends further than is necessary in prohibiting those with severe learning disabilities from sexual activity altogether, irrespective of the relative mental states of the participants. Determination of this question requires first, the identification of the categories of harm from which the criminal law should protect those with learning disabilities and, second, the identification of those circumstances, if any, in which sexual activity by those with severe learning disabilities would not involve, or lead to, any of the identified types of harm.

13. People with severe learning disabilities need protection in relation to sexual activity because of:

- (1) their vulnerability to exploitation in particular by those without learning disabilities. Care environments may offer opportunities for abuse without detection. This must be coupled with the attitudes of society which create the risk that those with learning disabilities are seen as “child-like”;
- (2) the lack of victim resistance due to the “pervasive atmosphere of compliance” in which many with learning disabilities live, being “trained to obey”;⁸
- (3) the risk of pregnancy and its associated risks;
- (4) the risk of catching sexually transmitted diseases;
- (5) the risk of suffering from emotional distress which may develop independently of there being any exploitative element in the relationships.

14. The first of these identified harms may unquestionably be considered as one from which the criminal law should protect people with learning disabilities. We need to consider how non-exploitative relationships can be identified.

⁶ [1998] EHRR 82, in which the European Court of Human Rights held unanimously against the UK in relation to Articles 1 and 3 where a child aged 9 had, on more than one occasion, been beaten by his step-father, using a garden cane, with considerable force. At trial on a charge of assault occasioning actual bodily harm the defence of reasonable chastisement was accepted by a majority of the jury and the step-father was acquitted. Addressing the issue of whether the United Kingdom Government should be held responsible for the ill treatment, the European Court held that “Article 1 of the Convention, read with Article 3, demanded that contracting states adopt measures to ensure the protection of those within their jurisdiction and prevent them from suffering torture or inhuman or degrading treatment or punishment, with children and the vulnerable deserving particular protection in the form of effective deterrence. ... F’s acquittal notwithstanding that A’s treatment fell within Article 3 of the Convention, demonstrated that English law as it stood failed to provide adequate protection for children, and the Government’s failure in this respect constituted a violation of Article 3.”

⁷ Section 45 of the Sexual Offences Act 1945, as amended, defines “defective”, for the purposes of the Act, as “a person suffering from a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning”.

⁸ A report of the Scottish Society of the Mentally Handicapped of a workshop on Sexual Abuse and HIV/AIDS in the field of mental handicap identified the factors in sub-para 1 and 2 as reasons for increased vulnerability to sexual abuse.



15. As a means of achieving the appropriate balance required by Articles 1, 3 and 8 of the Convention, we are considering a proposal that would deem those with severe learning disabilities to be incapable of giving consent to sexual activity, except in limited circumstances. Our provisional view is that, in limited circumstances, such people should not be deemed to be incapable of giving consent to sexual activity, despite any inability to understand the reasonably foreseeable consequences of consent. It is the terms and scope of the limited circumstances in which such activity should be permitted which present a difficult question, requiring identification of those harms from which the criminal law should afford protection. Our aim is to identify the circumstances in which sexual activity could be permitted without causing harm that the criminal law should prohibit.

We would welcome views on this issue.

Inability to communicate:

16. A person may have the mental capacity to make a decision but be unable to communicate this fact. Our provisional view is that in order to provide the necessary protection of the law, such a person should be treated as if they lack the capacity to make a decision. (Proposal 13 (3)). This category of “persons without capacity” also covers the situation where it is not possible to say whether any decision has been made at all but it can be said that the person concerned cannot communicate any decision.

Minors:

17. The Sexual Offences Act 1956⁹ provides that it is unlawful for a man to have sexual intercourse with a girl who is under the age of 16 (irrespective of the fact that she may have consented to such intercourse) and that a girl under the age of 16 cannot in law give any consent which will prevent an act from being an indecent assault.¹⁰ So far as anal penetration is concerned, neither sex can consent until they have attained the age of 18.¹¹ As regards homosexual activities in general, no effective consent may be given until the parties have attained the age of 18.¹²

18. We are not concerned with specific ages but take the view that statutory age-limits should be retained in respect of activities, the effects of which are serious, long-lasting or irreversible, or which were perpetrated upon children by adults and are popularly regarded as criminal, irrespective of the consent of the child.

19. The majority of sexual acts with minors are dealt with by legislation that sets specific age-limits. Should it be necessary to determine whether a person under the age of 18 has the capacity to give a valid consent to activities which constitute a criminal offence in the absence of consent, where there is no material statutory age-limit,¹³ an assessment should be made of the level of that person’s understanding. In particular, a person under the age of 18 should be regarded

⁹ Section 6(1).

¹⁰ Section 14(2).

¹¹ Sexual Offences Act 1956, s 12(1), inserted by the Criminal Justice and Public Order Act 1994, s143.

¹² Sexual Offences Act 1956, s 1(1): the age of 18 was substituted by the Criminal Justice and Public Order Act 1994, ss 145(1), 146(1), 168(3), Sch 11.

¹³ For example the offence of rape. It is an offence of unlawful sexual intercourse for a man to have sexual intercourse with a girl under the age of 16, irrespective of the fact that she may have consented to such intercourse. There may be an issue in some cases as to whether in fact she did consent to the intercourse. If she did not, the actus reus of the offence of rape would have been committed. We propose that the girl’s capacity to consent in such a case should be determined as set out here.

as having the capacity to consent to such activity, if he or she is capable of understanding:

- (1) the nature and consequences of the act; and
- (2) the implications of the act and of its consequences for his or her present and future well-being.

Views:

20. We would welcome any written comments on the matters raised in this paper, and in particular in respect of the following two questions:

- (1) Are the criteria required by our provisional flexible text of the capacity to consent (set out in paragraph 8 above, as revised in paragraph 9) thought to provide a fair, workable and effective test?
- (2) In what circumstances is it considered that sexual activity with a person with severe learning disabilities should not constitute a criminal offence?

21. As stated earlier, it may be helpful for the Law Commission, either in discussion with others concerned or in any subsequent recommendations, to be able to refer to and attribute comments submitted. Any request to treat all, or part, of a response in confidence will, of course, be respected, but if no such request is made the Law Commission will assume that the response is not intended to be confidential.

General Discussion:

In discussion the following points were raised:

- Although the term learning disabilities has been used quite a lot in discussion, the policy should cover all adults lacking capacity to consent, including older people.
- To prove a sexual offence the jury has to be sure that there was no consent. The burden is on the prosecution to prove it and this is part of the hideous difficulty – if the complainant may have consented the jury has to acquit. More help on what is consent would be good.
- The definition of capacity to consent outlined in paragraph 7 of the paper was felt to be too limited through its focus on intellect. Learning deficit has to be considered in tandem with difficulties in social functioning. Often vulnerable people have no knowledge about what is ‘normal’ behaviour. There should be a change in the burden of an offence from proving the level of incapacity to proving the exploitative behaviour. This would require some form of definition – the feeling was that if this was left solely to juries (on the common meaning of the words) it would be difficult to satisfy the guilt. There could be an even broader category for vulnerable people – not just those who lacked capacity but including concepts of economic dependence.
- The policy concerns on relationships need to be reflected, not by a deeming provision but by a separate confined offence of abuse of trust. This would be a clearer, well-defined provision. To have something broader would lack legal clarity. The current law is not particularly effective. Consideration on definitions of consent might give a definition that kept the burden of proof with the prosecution, made it less of a test by making it a pro-active responsibility between two parties, and increased protection for vulnerable children.



- When looking at sexual activity the key factors to set out in policy terms are to separate out the criminal behaviour from the consensual. The premise is that adults with capacity should be free to enter into sexual relationships with other adults as long as they are consensual and not criminal. This raises questions of who can consent, and what their capacity to do so is – balanced against the right to a private life.
- In the case of vulnerable people apparent consent can be gained with small degrees of intimidation, gifts or promises. There must be a distinction between capacity and consent. Chapter 6 of the Law Commission's first report (consent in the criminal law) is compulsory reading for exploitative relationships, and helps to identify what valid consent should be. The text of that chapter is attached at Annex B to this report.
- There are many issues surrounding child and vulnerable people as witnesses in court. The Government has made huge efforts to improve the procedural hurdles which will be coming on-stream within the next year or two. In some ways adults with learning and other mental health disabilities pose more of a problem than children when it relates to the question of consent – it is less cut and dried.
- The current law uses offensive terminology and the blanket denial of rights is clearly wrong. One of the problems is that the law focuses on severe disability, and the majority have mild to moderate disabilities, but also need some form of protection (this includes elderly persons receiving care). However, some people are so profoundly disabled that they could never give informed consent, and it would be dangerous to withdraw protection from them. The review might consider the more able partner in a sexual relationship and whether they satisfy themselves that their partner does have the capacity to consent. This could be a means of shifting the burden away from having to prove the capacity of the victim.
- There were some views that where people were very suggestible there was an argument for reversing the burden of proof. This was not agreed, as it was felt that there was potential for breaching Article 6 (right to a fair trial) of ECHR. This states that the law must presume that a defendant is innocent until proven guilty.
- It might be possible to define relationships in terms of abuse of trust or power. Staff providing services (intimate care, etc.) should be subject to a strong offence, clearly defined. It was agreed that apart from those who are very severely disabled, the law should move its focus from the definition of a person's capacity to the quality of the consent – recognising that capacity impacts on that consent.
- Research seems to indicate that there are three categories of people who might exploit the more vulnerable:
 - people in a position of trust or power
 - the outsider who targets vulnerable people
 - fellow disabled person – in this instance there should be a means of dealing with the problem other than prosecution if possible.
- Any law must be expressed in the clearest possible terms which *must* enable it to be proved. There is no point in having criminal offences if cases fail, resulting in the victim being victimised twice. This would lead to the prosecuting authorities losing confidence.

Second Discussion Session: Lack of capacity to consent

All four groups were asked to identify the answers to the following 4 questions:

- (1) How should the law treat those with no genuine capacity to consent?
- (2) How should this group of people be defined in a way that is not demeaning?
- (3) How should the law deal with those who may be able to give some degree of consent, but may not have a full understanding of the nature or consequences of the act?
- (4) Are there any circumstances where the law should not permit any sexual intercourse between adults in relationships of influence or trust?

Group A

1. There was a discussion on genuine capacity. Any legal sexual relationship needed to be consensual, therefore consent itself had to be genuine, and free from coercion, deception and exploitation. Any reform of the law would have to be careful not to dismantle existing protection where it was needed.

2. “Defective” seems to mean that the focus of the law is on those who are severely disabled. The problem is that disability is relative. There was concern that there must be clarity in court which the jury can understand. Reliance on experts would become the norm. It was also agreed that more protection should be offered to those who were less disabled. They were often living in the community and were at greater risk in some ways. There was a suggestion that the ability to communicate did not have to be verbal, but could be through actions.

3. There was some agreement that the pointers outlined in Stephen Silber’s paper could be used as a starting point for ability to communicate. This raised a practical problem not just for those with mental health difficulties, but for other disabled people such as stroke victims, and whether they should be brought into the courtroom at all. There is a need to have guidance in the law, and the tiered approach, with a list of examples could be helpful. It was also suggested that there would need to be some sort of defence such as reasonable belief.

4. It was felt that those in a position of trust should cease to be in that position if relationships with vulnerable people developed. The group considered fraud and deception in this context, and the possible use of existing legislation. Concern was expressed that we are still not effective at dealing with the person who targets vulnerable people. This might not be achieved through the use of abuse of trust provisions. The offering of inducements to vulnerable people was raised – could this possibly be brought in as a narrow offence? There was no consensus to this.

Group B

1. Discussions focused on whether the law should draw a line below which people of very limited capacity should be legally unable to consent to sexual activity. It was agreed that there should be, but that it should be gender-neutral. The group recognised the difficulty of criminalising activity between severely disabled people, which might deny pleasure between equals. If below the legal line, they must be unable to understand sex in any context.

2. Should the law focus on the ability to consent rather than trying to categorise people? Society is changing its attitude towards those with learning disabilities and is encouraging them to lead a full life wherever possible, or is at least more tolerant of this. The law needs a relatively simple definition of mental capacity which is narrower than the existing definition of ‘defective’. Those falling above the test of capacity in law could be protected by an abuse of trust offence allied to a definition of consent along the lines of ‘free agreement’.



3. The law should offer greater protection. One of the criteria for those needed that protection might be where they require care services. The group was attracted to the idea that the onus of establishing consent should be on the defendant, with guidance for juries on factors to take into account (relative mental capacity, age of parties involved, understanding of the act) and with the use of free agreement in a definition of consent. The law must protect the vulnerable, but offences must be capable of proof to be workable. The vulnerable are often targeted by friends and family.

4. Yes! The ideas presented in paragraph 19 of Stephen Silber's paper were very interesting and could be developed further.

Group C

1. For people with no genuine capacity to consent, any act which would be regarded as a criminal offence in relation to children should also be an offence for this group, although for different reasons. There should be a narrowly defined core category of people who have absolute protection. There is a need to take account of the therapeutic methods of communication and requirements of intimate care for this group.

2. The group recognised the difficulty of trying to impose complex clinical and diagnostic concepts into legal definitions. There are huge variations even within the levels of disability. We also need to note the developments in care/services/progress and acceptable terminology. Absolute protection should be offered to people who lack any capacity to consent.

3. This was the most difficult question. The law needed to balance protection and the rights of both parties involved. The functional test of capacity needed further qualification. Other mechanisms for protection outside the criminal law need to be explored (e.g. child protection). The review also has to consider how best to target predatory offenders (and the serial nature of their offending).

4. The principle of 'abuse of trust' should be upheld, with a specific criminal offence of sexual relations by a person in a position of trust. This should define who and in which settings such relationships of trust could exist, and whether there was any period of time after that had ended that a sexual relationship was acceptable. The Consultancy Index and List 99 should be placed on a statutory footing, and broadened out to extend to vulnerable adults, as well as children. Any offence needs to have certainty so that defendants know their conduct is criminal. To comply with the ECHR it should be defined in terms of employment, and the practical application should be the responsibility of the employer.

Group D

1. There clearly seem to be those who can and cannot consent, but the law needs a tight definition that is fairly basic. It was agreed that there should still be a prohibition on sex in certain cases, e.g. those who are unable to communicate.

2. No consensus.

3. There is a role for public education in health and relationships. The law also needs to remember the mental capacity of the defendant, especially in relation to reasonable belief. To help protect those who can give some degree of consent, there could be an offence of exploitation of vulnerable people, involving elements like fraud, bribery, deception, inducement and violence. It is very difficult to balance the needs for protection and freedom. There is a need to clarify how much is covered in the existing law, and whether the mental health review will bring more elements to light. An exploitation offence would give a clear message that it is wrong.

4. There was discussion as to whether there should be a criminal offence of abuse of trust or just guidance. There is an offence in Australia and some parts of the US if it relates to a caregiver in a residential setting. There is some scope for extending this, including therapeutic counselling relationships. The offence would require a tightly drawn definition that encompasses ‘duty of care’. The offence should relate to delivery of a service, although there were concerns that where breaches occur in small communities, were there any other places for people to go to? The offence should also be extended to sexual activities other than sexual intercourse.

The difficulty of not having an offence and relying instead on professional codes of conduct is that many carers are not in professional bodies. There are many fragmented groups which could be defined. Some thought that it should also extend to volunteers and sub-contractors (e.g. taxi drivers). The criminal law was only one part of a much wider solution.

Closing session:

- There was a general recognition of a level below which consent could not be recognised. Any breach of trust offence would need the prosecution to prove:
 - the mental capacity of the victim;
 - the position of trust; and
 - that there was no reasonable belief.
- The law also had to offer protection to those who not severely disabled, but who were vulnerable. In certain relationships (e.g. foster care) there could never be a sexual relationship, even where the relationship of trust had stopped. Any offence would have to define elements of location (e.g. residential care) as well as the relationship of trust. Clearly there was a social evil which had to be dealt with by the criminal law. A blanket ban on sexual relationships (apart from those who were most severely disabled) was too proscriptive.
- The conference had been hugely useful and valuable for members of the review in making their considerations. One of the surprising issues had been the amount of abuse which seemed to be endemic within the system.
- The Chair thanked Mrs Linda Bateman of the Special Conferences Unit for her assistance in organising the conference.

Chair:

Betty Moxon

Discussion Groups:

- Group A: Chair – Su McLean-Tooke
Rapporteurs – Sara Swann, Nerys Rees
- Group B: Chair – David Congdon
Rapporteur – Sally Cole
- Group C: Chair – Martin Bowley
Rapporteur – Penny Letts
- Group D: Chair – Betty Moxon
Rapporteur – Claire Wilson-Thomas





Appendix H7

Report of a consultation seminar on abuse within the family

10 September 1999

**NSPCC Training Centre, Beaumont Leys,
Leicester**



Introduction

Betty Moxon welcomed all those attending. She set out the background to the Sex Offences Review: its terms of reference, scope, what it hoped to achieve and how all those attending could provide a positive input to the review. The purpose of the day was to discuss how the law should apply to sexual abuse that takes place within the family unit however loosely defined. Participants from a wide range of organisations were represented, including police, prosecutors, judiciary, social work, faith groups, voluntary organisations and colleagues from other government departments as part of the Review's open and inclusive approach.

It was a rare privilege to be given the opportunity to review an important area of the law, particularly one that is so closely underpinned by social attitudes and social policy. Indeed it is quite an awesome responsibility and one which members of the Review take very seriously. The implementation of the ECHR provided a new environment for the development of the criminal law. It provided a framework of principles to provide justice, fairness and respect for the private life of the individual.

There was also a widespread feeling that the law did not offer the protection it should, especially for children and other vulnerable people, and the review was charged with increasing the protection that the law could offer.

The law on incest and abuse forms part of a larger set of offences that protect children from sexual abuse, and everyone from unwanted, non-consensual sexual acts. It was against the law for anyone to have sex with a child under the age of 16, and the Review would be proposing new offences to strengthen those provisions. The concern for this meeting was what extra protection was needed to reflect the particular importance of the family. The questions for discussion set out the key issues about how the law should operate, and should be **considered** in the light of:

- increasing protection: the family environment was where a child should be safest, not at risk;
- gender neutrality: no assumptions should be made about the role of men and women, or differential impacts of abuse on boys and girls. The role of the Review was to make recommendations that would enable the law to deal effectively with perpetrators of sexual abuse and to give protection to victims.

Discussion Groups:

Most of the day was spent in 4 discussion groups considering the same set of questions on abuse within the family. Points arising from discussions are outlined below.

Discussion 1

1. If the law enables abusive or coerced sexual intercourse, and all sexual intercourse with children, to be prosecuted, is there still a need for an offence of incest?

Group A

- The abhorrence lay more in the abuse of trust involved than in the possibility of genetic abnormality. The current offence did not reflect the transient nature of family relationships and there was a major concern that the stigma attached to the offence tainted both the victim and the family. There was still a need for an offence, but it should be renamed, cover all sexual activity, and be extended to step-parents, etc. One of the attractions of the current offence was that there could be no consent in law.

Group B

- The family was the place where children should be safest and where that safety was compromised they most required protection. You could define that protection by location (within a household) or by a familial relationship. One way of approaching the definition of familial relationships was by cross referencing to the law of marriage – those who could not marry should not have sexual relationships. The Group felt that incest should be retained, although extended to include all penetrative sex between close family members.

Group C

- The Group felt that the offence of incest should be removed where the victim was a child under the age of 16 as long as the gaps left in doing so were covered by reviewing the existing offences – it was essentially rape (and this was charged more often). A new offence of sexual abuse of a child or sexual intercourse with a child below the age of consent (where consent would not be an issue) would be preferable. It was recognised that the greater the betrayal of trust the greater the impact on the victim.

Group D

- The Group felt that there was still a need for an offence of incest, on the grounds that it was needed to express society's disapproval of certain sexual relationships within a family. The more public health type goal of wishing to avoid the sort of birth defects that could be associated with the progeny of incestuous relationships was also a factor, but did not play a significant part in the discussions. The Group did not like the term 'incest' which was often felt to imply consenting behaviour. For the purposes of the discussion 'Biological Relationship Offence' (BRO) was used, although it was recognised that something rather snappier would be needed.
- The offence should cover relationships of (grand)son/mother; (grand)daughter/father and siblings. It should include other sexual activity as well as intercourse – in fact, any sexual contact which if carried out without consent would constitute an offence (e.g. indecent assaults).

2. Is there justification for retaining an offence of incest for consenting adults? If so, should both be liable?**Group A**

- This sparked considerable discussion. Such relationships tend to begin in childhood and sometimes represent power differentials within family dynamics. There ought to be legislation to capture such abusive relationships. The public interest in prosecuting a truly consensual relationship between adults was very difficult to determine if potential harm to progeny was not an issue.

Group B

- There was some discussion about society's attitude to sibling incest, and it was agreed that the most difficult area was those who had been brought up separately, met in adult life and developed a relationship as strangers. There was some debate about whether that should be criminal. It was felt however that many incestuous relationships had started in childhood and represented an abuse of power and should be criminal. The conclusion was that incest should be kept for consenting adults who were blood relatives, and who knew they were closely related.



Group C

- There was a wide-ranging discussion which concluded that the Group would want a remedy where there was a direct blood relationship between consenting adults – mainly relating to heterosexual activity, because of the potential consequences to any resulting offspring.

Group D

- The Group felt that BRO should still include adults (i.e. over the age of 18) consenting to sexual behaviour and that both adults should still be liable. Even though such activity rarely came to light, it would be politically unacceptable to repeal this aspect of the offence of incest.

3. Should any offence of incest include same sex activity?

Group A

- It was agreed that it was healthy for society to retain some taboos, and these should include all same sex activity which was not currently included in the offence of incest.

Group B

- Yes. The issue was not just one of eugenics, but of abuse within the close family relationships.

Group C

- See comments at '2' above. The group struggled with this, but concluded that because of the potential for abusive relationships the offence should include same sex activity.

Group D

- Amendment of the offence to include other forms of sexual activity would be necessary if it were to include same sex behaviour, which the Group thought it should.

4. Should the law be made gender neutral (e.g. for a person with his or her grandchild, child, sibling (including half-sibling), parent or grandparent?) – is there any intrinsic difference between the activities of a woman and a man in this context?

Group A

- The law should be made gender neutral. Although more men were prosecuted for the offence there was increasing awareness of women as abusers and the level of prosecutions of women was growing.

Group B

- The law should be made gender neutral.

Group C

- The law should be made gender neutral.

Group D

- The law should be made gender neutral.

5. Should any offence preserve the present arrangement whereby a woman can only become criminally culpable over the age of 16?

Group A

- Needs to be gender neutral.

Group B

- The Group thought this was a technical issue that would be resolved in the new construction of gender-neutral offences.

Group C

- Not discussed.

Group D

- No conclusions were drawn.

Discussion 2

1. Should the scope of the offence be expanded to include those within a family unit with no ties of blood?

Group A

- The Group felt that coverage of the offence should be extended, but that there was probably some scope for gradation, for example foster-parents who might be in contact with a child for a very short period of time. Care should be taken not to take away the discretion of the court and recognition given to the potential difficulties of prosecuting where there was no blood tie.

Group B

- The consensus was that the primary objective of the offence was to protect children with the family unit. Although the Group would like to extend the offence beyond blood ties, there were problems of definition. There was a desire to catch those who were seen by the child as a parental figure (whether step-parent, live-in partner or other person of influence. It was accepted that this was not a firm enough definition for the law. The conclusion was that close family ties and abuse of trust/abuse of a power relationship should be put into law as aggravating features to the core child protection offences.

Group C

- Taking a position for a new offence for sexual abuse of children or sexual intercourse with children, aggravating features could be built in. These could include:
 - where the perpetrator was a direct blood relative;
 - where the perpetrator was a significant individual in the child's life;
 - where the perpetrator had 'groomed' the child; or
 - the age of the victim (e.g. a more serious penalty where the victim was under 13).



Group D

- The Group did not feel that BRO should be extended to include family members without blood ties. The concern was that it would be too difficult, with attempts at prosecution foundering on definitions and proof of step-parenthood. However, it was recognised that not to include step-relationships in any way would be anomalous and undermine the protection offered to more vulnerable members of families. Rather than complicate matters with a further range of offences, the best way to deal with sexual relationships in step and foster situations (for victims under the age of 18) would be for it to be treated as an aggravating factor at sentencing – a ‘betrayal of trust’.

2. If so, which of the following categories should be included in the offence:

- **step-parents?**
- **foster parents?**
- **step-siblings?**
- **foster siblings?**

Group A

- The Group felt that the offence needed to include anyone in loco parentis or in a fiduciary relationship. The parenting type relationships were distinct (including grandparents), but there was uncertainty about siblings. The offence might be constructed to reflect the element of grooming where applicable and the abuse of power needed to be covered.

Group B

- The Group felt that there was a distinction between incest with a blood relative and ‘abuse of trust’ with a non-blood family member (particularly de facto parent) or someone close to the family. Incest should include adoptive parents, step-parents and adult siblings, perhaps an offence of ‘unlawful sexual intercourse with a child within the family’ could be used. The issue (concerning children) was not really whether it was incest or rape (as with children consent is rarely the issue) but whether sexual intercourse took place.

Group C

- See ‘1’ above.

Group D

- See comments at ‘1’ above.

Discussion 3

1. Would an offence of abuse of trust be a better way to catch looser family arrangements?

Group A

- The Group considered whether it could define a relationship of trust. Although some relationships of parental responsibility were clearly relationships of trust, it might not cover some ‘looser’ family relationships. There was a need to ‘catch’ as many as possible in a breach of trust offence, but the rest would fall to the general law.

Group B

- An abuse of trust offence would probably not catch all looser family arrangements, but the Group felt that the offence was needed. There needed to be a law that reflected the heinous nature of sex between a parent figure and a child, with no need to prove consent. It could be an aggravating feature with the betrayal of trust reflected not just in sentencing and would be clear and on the face of the law.

Group C

- The Group felt that it was not about ‘catching’ but that there should be an aggravating factor where there was a duty of care. The Group had a lot of difficulty with situations where both victim and perpetrator were under the age of 16 and were unclear as to a possible course of action.

Group D

- Betrayal of trust would apply to situations where the victim was under the age of 16 and the perpetrator over 16. It would not just apply to step/foster-parents, but anyone with ‘care, custody and control’ over the victim (i.e. it could include a family friend who was babysitting).

2. Should the law make any special provisions to recognise the transient nature of modern family relationships, e.g. boyfriends and girlfriends of parents? If so, how?

Group A

- Anyone having parental responsibility over a child under the age of 16. Boyfriends/girlfriends of parents need guidelines on what responsibility was, but if the relationship was with a child over the age of 16, there should be no criminal offence if there was no parental responsibility.

Group B

- This was very difficult and the Group drew no conclusions.

Group C

- There was some attraction to the New Zealand offence of abuse of someone ‘living with him as a member of the family and under his care and protection’. The domestic violence definitions in family law might also be useful.

Group D

- See comments above. Where the victim was aged between 16 and 18, to negate the problems of alleged consent where there was a ‘dependent familial relationship’ with the alleged perpetrator, that relationship would have the effect of vitiating consent – i.e. so that the sexual contact could be charged as indecent assault. These non-blood relationship measures would also be gender-neutral and same-sex applicable. Where both parties were over the age of 18 and there was no blood relationship, there would be no criminal offence.



Closing Session:

The final session was a general discussion following the report back from the syndicates. The Australian Model Criminal Code Committee had initially recommended the removal of the offence of incest for consenting adults but had concluded that there was still a level of social abhorrence which called for its retention, even though, as in the UK, the offence was not used very often. Relationships between siblings in particular would always be very difficult. Where such activity was not consensual it would fall within the provisions of the general law.

Children needed to be protected from sexual activity. There was already a fairly robust set of criminal offences, but the aim was to enhance protection without introducing more elements for a prosecutor to prove. There were more difficulties with young people of 16 or 17, although aggravating factors could be tailored specifically for families. The public perception was that sometimes incest was a 'technical offence' and this did not reflect the seriousness of the harm done.

There was some concern expressed about the practice of charging rape rather than incest. Although incest was regarded as a loaded and potentially damaging term, charging a man with rape could also have a damaging effect on families. However, most delegates believed that incest had a particular social stigma which made it hardly less awful than being charged with rape.

Most discussion groups had spent considerable time trying to extend the definition of incest and had almost come full circle. What was needed was a set of offences to reflect the gravity of the mischief. There was a strong case that extended offences were needed to reflect changed patterns in family life, and to mark that the protection of children within the family environment was paramount.

The Chair thanked Linda Bateman of the Special Conferences Unit for making all the arrangements for the seminar, and all those attending for contributing to a very interesting and informative day. The work done today would inform the thinking of the review. If any of those attending had any further thoughts following the seminar, these would be welcomed.

Chair:

Betty Moxon (Sex Offences Review, Home Office)

Facilitators:

- Group A: Ruth Vincent (Essex County Council Social Services)
Rapporteur – Dina Gold (Board of Deputies of British Jews)
- Group B: Betty Moxon (Head of Sex Offences Review Team, Home Office)
Rapporteur – David Congdon (Mencap)
- Group C: Su McLean-Tooke (Sex Offences Review Team, Home Office)
Rapporteur – Penny Dean (The Childrens' Society)
- Group D: Debby Grice (Sentencing & Offences Unit, Home Office)
Rapporteur – Robert Street (Research Development & Statistics, Home Office)



Appendix H8

Report of a consultation seminar about trafficking and sexual exploitation

15 October 1999

Home Office, Queen Anne's Gate



Introduction

Betty Moxon introduced the meeting by explaining the background to the Sex Offences Review: its terms of reference, scope, what it hoped to achieve and how all those attending could provide a positive input to the review. The purpose of the day was to discuss the problems posed by trafficking and sexual exploitation and to consider how these should be dealt with in the criminal law. Participants from a wide range of organisations were represented as part of the Review's open and inclusive approach.

It was a rare privilege to be given the opportunity to review an important area of the law, particularly one that is so closely entwined with important social policy issues. The review was aware of the responsibility on them, and they took this very seriously. We were working in a new environment for the development of the criminal law created by the incorporation of the European Convention of Human Rights (ECHR) into our law in the Human Rights Act. The review was working within the principles of the Convention in considering its proposals.

The seminar was fortunate enough to include some experts in the fields of trafficking and sexual exploitation, and this should increase knowledge and understanding. Trafficking introduced an international element into sex offences and there was no doubt that it was a subject of great concern around the world.

Inspector Paul Holmes (Metropolitan Police Clubs and Vice Squad):

This presentation discusses the phenomenon of trafficking of women and children for sexual exploitation from the police perspective. It is based on evidence and intelligence. Our criteria for what counts as trafficking is a woman being brought into the country for sexual exploitation by a pimp who may not be a resident of this country, so there is an international component and it is about sex and money. It is like other commercial crimes, in that there is a benefit to the criminal to the detriment of the victim. What is outside the norm in this instance is the scale of the profit and the human misery it causes. What makes investigating these crimes unique is the problem of the victim as witness. I will concentrate on this aspect and stick to the operational pragmatics and the ability to enforce the law. I will set it in the context of who we are looking at, the scale and our approach.

There are fourteen officers working throughout London with the investigation of sexual exploitation as their remit. Their first priority is the sexual exploitation of children, followed by trafficking for sexual exploitation. They remain the only dedicated unit in the UK. To give some idea of the number of victims we have identified:

- In 1998 13 investigations brought to light 51 victims (from SE Asia, the Balkans and Eastern Europe); and
- In 1999 9 investigations revealed 26 victims (from South America, the Balkans, SE Asia and Africa).

The lack of data bedevils effective investigation. The reason for the dip in 1999 was due to 2 major investigations in relation to the sexual exploitation of children and the United Kingdom's biggest ever brothel keeper. These took resources away that would otherwise have been dedicated to trafficking.

Our investigations have identified that criminals have benefited to the tune of £10 million, but it is very difficult to recover these funds – only about £75,000 has been seized so far. The money is often sent overseas. We do, however, have one case where £3.6 million is under seizure.

Investigation of brothels in the Soho area revealed 148 victims (this is compared to brothels in outer London where 35 victims were found):

- 125 Balkans (7)
- 14 Eastern Europe (6)
- 6 South America (5)
- 2 Africa (8)
- 1 SE Asian (9)

This data is compiled from a total of seven operations each involving an average of forty-five premises (eight visits to an average of twelve premises in Outer London). Victims are classified as females without language ability, documents and/or local knowledge. The level of foreign sex workers is as high as 75% in central London. These figures do not include sauna premises or escort agencies, and the data presented is considered to be only a small part of the real figure.

The monthly turnover of the 75 brothels in that area is estimated at £1 million per month, at is a conservative estimate. The victims are often forced to service up to 20 punters a day at up to £25 each. Most of those from the Balkans come from the former Yugoslavia. They often travel on forged or stolen Greek or Italian papers, and claim those nationalities without being able to speak any of the language. It has been said that if you were a young gangster just starting off in organised crime you would choose to traffick women rather than drugs.

90% of the victims are trafficked by deception. Most know that they are going to be involved in prostitution, but it is the anticipated life-style which is falsified. The reality they find is virtual imprisonment, psychological torture and slavery. Control over them is maintained by threat and fear of reprisal against loved ones at home. The levels of violence against the women does not seem to be high. The circumstances of their life in this country, with no language skills (they use a printed menu card for clients), often kept in isolation, with no papers means that although they are rarely physically locked in, they experience a form of psychological imprisonment. For women of Eastern European origin this is a particularly effective control as they are used to living in a society where to be without papers was to risk imprisonment or worse. They do not seek help because they are told that they will be arrested as illegal immigrants, and that the police in the UK are corrupt and have been paid-off by the pimps.

The options we have are to carry out proactive intelligence-led policing, often without reliance on the victim; disrupt the networks; or reactive investigation led by a victim. The law enforcement of the vice industry has been described in a report as being one where the victim rarely cooperates – but we can use some of the laws currently on the statute books. It is critical that we accept from the outset that victims are likely to be unavailable as witnesses, and that we are unlikely to get the key players. Both of these issues are alien to the normal police experience.

We find the following particularly useful in our investigation – ss30 and 31 of the Sexual Offences Act 1956, s25(1) of the Immigration Act 1971 (facilitation of illegal entry – although this can be complicated as it is often a technical breach), the common law offence of unlawful imprisonment, and related offences of sexual and physical violence. We can also charge a lot of peripheral players under the Aiders and Abettors Act. Since the victims can often leave the buildings, unlawful imprisonment often cannot be charged – even though they are in virtual imprisonment. There is sexual violence against the victims by those who control them; they are often sexually abused in the ‘safe houses’.



Without the cooperation of the victim we have to have an intelligence-led response – we have to adopt the clothes of the trafficker. In their world females are a commodity and they must market the product. This is our trigger, and although resource-intensive it does mean that we are not dependant on victims. On a humanitarian level, it is often not acceptable to ask for the victim's co-operation because police cannot ensure her safety or that of her loved ones in the country of origin. We use a combination of surveillance and documentary evidence with a multi-agency approach including non-government organisations. In parallel we run a financial assets investigation. It is costly but this can be balanced against the reduced likelihood for witness protection costs. The objective is the arrest and conviction of the offender without reliance upon the victim.

We use disruption techniques for networks where it is difficult for us to obtain the necessary intelligence – this is particularly relevant in dealing with Triad-led organisations. This consists of 'in your face' activity, and we use a combination of municipal regulations, licensing laws, fire regulations – anything to make their day-to-day existence difficult. This includes liaison or enforcement with landlords and advertisers, co-operation with local residents groups and overt police activity at the location.

Key issues for law enforcers responding in a reactive victim led investigation relate to issues of welfare for the victim, including medical and psychological welfare, as well as the normal witness issues of credibility, motivation, corroboration and witness protection. We have a key policy problem in that our witness can be immigration's deportee. We may currently circumvent some rules – should we offer residency status? There are complex issues of what we can do with victims and to deport the majority is heartless. We need to offer a range of support mechanisms. Often victims will say 'deport me now or they will assume that I am talking to you and take reprisals'. Yet we know that repatriation can be difficult – for a Muslim woman we might be sending her back into worse danger. We think that we have their best interests at heart, but may unintentionally make things worse for the victim. Other EU countries vary in their approach. Some offer temporary residency permits and non government organisations give support – but if they are deported post evidence, this seems to me to be disingenuous. Issues of credibility always pose a problem where the witness is a prostitute, and extra effort has to be put into corroborating the evidence. The motivation for making a false allegation might be to try and obtain residency status. The immigration authorities carry out their own investigations entirely independently of us, with separate documentation, to stop allegation of conspiracy.

Witness protection costs a great deal of money, and in its fullest form is rarely available. We supply a half-way house of secret addresses, panic alarms, etc., but how can we talk about witness protection in Albania or Thailand? Germany has set up a protection system in Munich, but they are finding that women jump out of the programme.

Any future legislative changes have to be necessary, enforceable, timely and take into account the international dimension. If creating an alternative or simpler offence may create something other than 'living on the earnings' – at what point would we intercede? There are risk management issues. If we jump in too early, we won't have the full spectrum of intelligence leading to sufficient evidence to convict. We also need to prepare our response. Can we enforce any new legislation? Will the offence be one of strict liability or require mens rea to be shown – which could only come from the evidence of a victim. Out of 31 investigations only 2 involved witness cooperation. What about the criminal justice process? We would not seek witness cooperation if they were to be deported. If the premise is sex and money, address the penalties (the sentencing guidelines following R v Ferrugio in 1971 for pimping offences does not address a multi-million pound business): the conviction for living off the earnings earns up to 7 years' imprisonment depending on the circumstances. Most others carry much smaller penalties. Should there be a strict liability test of a vulnerable person which should include children and trafficked victims. What about those who are 'trafficked' from Sheffield or Leeds?

The international dimension is developing. The current process is slow and cumbersome, but there are proposals for a 'European warrant'. The system at present is bureaucratic with the additional problem that some countries will not extradite their own nationals. We are exploring with the Lithuanian authorities, for example, the possibility of holding a trial at the embassy in London.

My final request is that if we address the issues of vulnerable people and Schedule 1 of the Sex Offenders Act 1997, where victims are under the age of 18 the offender needs to be listed under the Act. Predators are taking children from care homes – we know of some with nine counts against them, and they won't be listed on the Sex Offenders Register.

Dr Liz Kelly – Women and Child Abuse Studies Unit, University of North London:

My job is to put these issues in a wider context. The problem of trafficking in human beings is huge. Trafficking a woman for prostitution has to be a criminal activity, and it is not acceptable that this carries lesser penalties than trafficking in drugs. Trafficking has been on the international agenda in both the 19th and 20th Centuries. This problem is not new, but has been going on for a long, long, time. Currently there are a number of issues to consider:

- the sex industry is growing at a huge rate all over the world, including in the UK. The International Labour Organisation has suggested the sex sector is a significant component of many economies;
- globalisation has seen a growth in the movement of people, capital and business;
- there has been a transformation of nation states – particularly in Eastern Europe, and the division between rich and poor is growing. In Eastern Europe 80-90% of the new unemployed are women;
- the growing involvement of organised crime.

A lot of international literature tries to draw a neat boundary between forced prostitution and prostitution in general. But importers are trafficking women to an existing sex industry and often from countries with an existing sex industry. We need to think on their level because traffickers are adept at reading local change and adapting trafficking patterns accordingly – the big flow at the moment is from Kosovo.

We have been carrying out a small study on behalf of PRCU to establish the scale of trafficking into the UK. It is clear that this is not a simple task and we have used a variety of ways to explore the issues. We need to look at policy and practice in the UK and beyond, and look at successful investigations. We surveyed all police forces in the UK with a 75% response rate. We are now analysing this data as well as information from NGOs, Immigration and Nationality Division statistics, media reports and what we have found on the Internet.

It is difficult to tell how much of the migration around the EU involves trafficking. However, looking at the indicators the best guesstimate by the UN is that trafficking in women for sexual exploitation earns \$7 billion a year – that is equivalent to the global drug trafficking market. The Internal Office of Migration estimates that in 1995 half a million women were trafficked into the EU – so this is not a problem which is happening somewhere else.

There are huge issues about definition – we came across approximately 25 definitions for trafficking in human beings and there is a lot of overlap between these. The definition which we preferred was that of an organisation called Kalyaan, which contained the elements of transport, sale of women with or without their consent, enticement and inducement:



- transport or sale of women;
- with or without the consent of the victim;
- use of enticement, deception, force or intimidation;
- for the purposes of prostitution or other sexual abuse.

Choosing to be an economic migrant may be a choice but it is one made in very coercive circumstances. Bride trafficking and the marriage industry is also causing increasing concern at the Council of Europe. We are still looking at our results, but we found cases in 1998 not just in London, but in quite small provincial towns. Most police forces have tackled it through a reactive approach. We have tried to explore how large the issues might be – and we found newspaper reports of the problem in areas where the police said there was not any. Non-government organisations are also providing us with intelligence, including the fact that the UK has now become a transit point for the trafficking of Nigerian girls to Italy.

To give you a flavour, we accessed a website called 'Harmless Games' which contained a directory of massage parlours and escorts, with explicit advertising of the types of women available. The 'World Sex Guide' is a website where men write about their experiences in the sex industry. Their accounts make clear the involvement of foreign women in the UK sex industry.

On the Internet there are resource guides for brides which link into each other, with names like 'goodwife.com' and 'Dream Date from Russia'. They offer to arrange visas and travel. All these sites are addressed to men, who can search on any criteria. 50% talk about marriage in the text, but contain chilling instructions such as 'order now', 'add this woman to your order' and 'discounts for bulk purchases'. There is no-one in the UK monitoring what is happening to women brought in like this. Australian research indicates that Filipinas brought into Australia as brides are seven times more likely to be killed in domestic violence than their white Australia counterparts. There are also some men who are serial sponsors. Some have brought in up to seven different 'brides' – once the man tires of a particular woman she is discarded and he purchases another.

Whilst the majority of women who are trafficked into the UK are not abducted, we need to remember that some are. Most women brought into the country are victims of deception. They have visions of earning money, living in their own flat, citizenship of the target country and creating a different and better life for themselves. The reality is very different. There is a huge problem relating to recruitment in the source countries, as there appears to be very little happening to disrupt this.

We are very aware that proactive responses by law enforcement agencies (often the only way to find victims in any number) are unlikely to be welcomed by women in the sex industry and some organisations which support them. We need to engage in debate and dialogue about this. The policy of monitoring off-street prostitution is necessary, to find victims who are children or who have been trafficked or coerced. Off-street prostitution is sometimes presented as being almost benign, but everything that I have read about it indicates that this is an over-simplification. There has been a strong call internationally to legalise off-street prostitution. This would mean that the police would be able to direct their resources to exploitation of children and trafficking. We have considered the arguments but we do not think that they are particularly strong. The State of Victoria in Australia legalised off-street prostitution, and now there has been a growth in both legal and illegal activity. This has in turn exacerbated problems with respect to children and trafficked women which was not intended. Holland has had a history of tolerating prostitution, and has just legalised brothels – but very few have chosen to register. The implication is that a huge proportion of sex workers in the Dutch sex industry are foreign – and there illegally. Legalising activities relating to prostitution will not effectively deal with trafficking.

The UK, the Council of Europe and the EU need a legal framework to cope with sex tourism and sexual exploitation, including the use of new technology. It is depressing that they seem to have fixed on a response of temporary residency – this is a limited view. We need possibilities for prosecuting exploiters which do not require the involvement of victims. Aspects of trafficking which need to be addressed in law include:

- abduction;
- deception;
- supply and use of fraudulent documentation;
- being held in prostitution through threats and/or debt bondage;
- restriction of liberty;
- lack of control over work;
- confiscation of earnings;
- removal of passport.

A possible new crime of ‘sexual exploitation’ has been proposed where proving the offence would require showing that a sexual act took place and that someone else benefited from it in money or in kind. Australia proposed the Criminal Code Amendment (Slavery and Sexual Servitude) Bill. This lapsed with the recent election, but it will be reintroduced with a heavier maximum sentence of 25 years and an additional offence of deceptive recruitment. It creates an offence of sexual servitude where because of threats a victim is not free to stop providing sexual services.

The Coalition Against Trafficking in Women also produced some principles for law reform, which stated:

- prohibit enterprises or persons from promoting or profiting from, or engaging in any business involving matching women with foreign nationals for marriage;
- since women have a right to sexual integrity and autonomy they should have the right to sue their exploiters for harm; and
- no third parties should profit from the earnings of women in conditions of trafficking or prostitution.

First discussion session – Trafficking

Facilitator – Shami Chakrabarti

This commenced with an overview of the requirements for a criminal offence which was effective, fair and met with the provisions of the ECHR:

EFFECTIVE	Cover criminal conduct	Not cover Criminal conduct	FAIR
	Must be able to prosecute	Comply with the ECHR	



There was no point in having theoretically perfect criminal offences – the police must be able to use them to prosecute. The law also serves a purpose in defining culpable conduct and we would not wish innocent conduct to be inadvertently criminalised. It was important to take full account of ECHR requirements were also needed as these became part of our law in October 2000. All these issues were linked – if the law was not ECHR compliant, there could be no successful prosecution. Article 6 of the ECHR outlined the right to a fair trial, and this had to be a ‘Rolls-Royce’ fair trial in criminal matters. We were waiting for the judgement of the House of Lords in the case of ‘Kebilene’ as it had been suggested that offences with presumptions of guilt might breach Article 6. Other relevant ECHR Articles included Article 8 on the right to a private life and Article 14 on discrimination in the enjoyment of Convention rights, which included the treatment of people of different sexes and sexuality.

A summary of the two preceding presentations was given to help aid discussion. These were:

- penalties for trafficking women are lower than for trafficking narcotics;
- deception is not usually as to the prostitution;
- victims are not physically locked-in (not false imprisonment);
- the victim is enslaved
- there are problems with victim cooperation in regards to
 - language;
 - fear – of investigation, reprisals to loved ones, lack of documentation;
 - isolation;
- we can adequately deal with the traffickers using ss30 and 31 of the Sexual Offences Act 1956;
- aggravating factors should be living off the earnings of a child under the age of 18 or a ‘vulnerable person’ (e.g. illegal immigrant);
- we should change sentencing guidelines;
- and broaden the scope of Sex Offenders Act registration.
- there are different types of trafficking (e.g. for prostitution, marriage and domestic service);
- the nature of the trade is global, and the UK is being used as a gateway to the rest of the EU;
- advertising and facilities for transacting trade already exist on the Internet;
- trafficking should be an offence of sexual exploitation;
- proceeds of crime should be recovered.

Some delegates expressed concern that both presentations appeared to be moving away from the victim being central in a prosecution. Not all women working in the sex industry were happy with the intelligence-led policing which did not require the cooperation of a victim. Women would not come forward if they thought that they were likely to be deported. It was dangerous to go forward with strategies which bypassed victims: fear of reprisal was not the issue for most, it was the hostile treatment by the authorities and the likelihood of being deported before being given the chance to report what has happened to them – it disempowered them.

An alternative suggestion was to look at the means of transporting trafficked victims for the purposes of prostitution. If the payment trail could be traced to the trafficker, the offence would be proven without a victim having to testify.

One of the issues was that Immigration officers looked at how they could deport these women, and rarely looked at other aspects. The UK needed an offence which dealt with the real issues, gave the victim support and which needed increased sensitivity of handling from the immigration side. If a woman felt that she was being deported to a possible death it could already be a Convention case. The French authorities worked on a case by case basis, but this took a very long time – up to twelve months.

Delegates were pleased that the presentations had raised the international aspects so clearly. Current thinking in law enforcement agencies which had an international remit was that offences involving children and adolescents should attract much more serious penalties. Exploiter's financial assets should also be seized. Many of those behind the criminal organisations involved in trafficking were not based in the UK and could not be prosecuted, but the seizure of assets was an effective deterrent. Repatriation of victims was a general concern. The ideal solution was permanent residency but each individual would have to be considered. Sometimes they were providing a living for their families at home. The UK was already considered to be advanced in the quality of its legislation for sex offences, and more was likely to come out of the discussions.

The residency issue posed particular problems. It was felt that it was not reasonable to create a fast-track entry system for economic migrants via the sex industry. Children were the highest priority, wherever they originated from: the strategy to pursue was how to ensure through the criminal law the children were not involved in the sex industry. We needed to make it too expensive and risky a market to be in.

If the review was considering new legislation it should target the customers and also focus on the international pimps. The recent Swedish legislation targeted the client rather than the provider of sexual services, and this was suggested as a model. However, it was pointed out that the effect of the Swedish legislation had been to cause greater problems on the streets which had not been there previously: it was difficult to prove the offence. Criminalising the punter would only serve to drive the trade underground.

Some anecdotal evidence collected to analyse migration in sex work indicated that trafficking was really only an issue in London. In central London the estimate was that 50% of sex workers were non-UK nationals but less than 5% had been trafficked. It was important not to conflate migrancy with trafficking. Colleagues in Europe had reported that measures to exclude non-EU nationals were actually increasing the power of traffickers. Women were needing to turn to traffickers who were experienced at bringing them across borders.

Any offence relating to trafficking needed to have practical application: it had to be in the context of tried and tested prostitution law (around conspiracy or supply to exploit women) and the effects in the community. Probably a specific trafficking offence was necessary. It would be additional to existing law which had to be viable and practical – not merely declaratory. There were strong concerns about introducing 'Stepford' level legislation which was complete and utter window dressing.

The Irish Republic had introduced an offence of trafficking but only in relation to people under the age of 18. Unfortunately it has not been tested in the 15 months since it was brought in, so there was no evaluation of its effectiveness. There was an attraction in an offence relating to the transportation of people or in carefully remodelling offences in the Sexual Offences Act 1956 from s17 onwards to cover the international dimension.



Concerns were raised about the use of the 'pimping laws' which denied a woman prostitute the right to a private life. Some felt that the law in this area sent out a message that it was disgraceful for a man to live off the earnings of a prostitute. There was evidence that some police forces did not apply these offences to a person's partner, etc., unless they felt that coercion was involved. The law needed to differentiate between a person who lived alongside a prostitute as a loving partner and exploitative behaviour. There could be a separate offence or penalty for mental control of another related to forcing them into prostitution. The law did not say that a person living with a burglar was committing an offence.

Second discussion session: Procuring and pimping

Facilitator – Martin Bowley QC

Another specific offence relevant to pimping was s28 of the Sexual Offences Act 1956 (offence of causing prostitution of a girl under 16) but this could only apply to a person in charge and needed to be broadened in scope. Any new legislation would need to be gender neutral and to provide protection for vulnerable people, especially from predatory adults. There were no exact figures for the number of children in prostitution, but it was certainly in the hundreds, if not the thousands. Agencies were now working together to focus more on the needs and welfare of the children involved. Last year the police cautioned 260 prostitutes between the ages of 16 and 18, just over a score cautioned were under the age of 16 – and there were similar levels in the previous year.

The pilot project in Wolverhampton had led to a doubling in the numbers of people coming forward, although the true figures are probably much larger than that. There was some concern that the project had not been a uniformly good experience for all involved and that the increase in the numbers of children in prostitution seemed to mirror the withdrawal of benefits for people of that age.

There should be increased focus on the men who buy the services of children, such as the kerb-crawlers looking for children and vulnerable young people. A power of arrest for the police was essential, and the Government had already adopted this proposal as policy. However, there were times when child prostitutes were not in the power or control of a third party, but were free-lancing for themselves – there should be some provision to cover this situation. Some concern was expressed that the power of arrest against kerb-crawlers could compromise the safety of prostitutes – it was thought that the risk of arrest would mean that potential clients would give a prostitute less time to reach a decision whether or not to accept the client.

Many of the offences currently on the statute were little used. This was mainly because the penalties were too low (a maximum of 2 years' imprisonment) to be an effective deterrent. The review should consider improving the usability of the other offences by recommending an increase in the levels of penalty available. This would build on the armoury of the police to deal effectively with a range of criminal culpability. The remit of the review was to look at the criminally culpable behaviour and see what law needs to be put in place to counter it. S30 of the Sexual Offences Act 1956 covered the coercive side, and the offence of unlawful sexual intercourse existed to provide protection for girls under the age of 16. The law had to provide the ability to investigate and detect the coercer or abuser – it could be hard to procure the evidence. There were some real areas of uncertainty in the law with a proliferation of different ages which was not very helpful.

Internationally, there seemed to be a movement towards having an age limit of at least 18 before being allowed to work in the sex industry. Some delegates argued for the decriminalisation of children in prostitution. Those arguing against decriminalisation say it would encourage pimps and abusers to target these vulnerable people, but those termed 'persistent' prostitutes were probably the least able to make choices. Yet there should be provision in the law for the young man or boy involved in pimping young girls. Research published in the Children's Society's 'One

Way Street' indicated the importance of peer groups in inducing children into prostitution. This supported previous Home Office research. A multi-agency approach would always be best.

We needed to focus on the victim but also to recognise that the wider community was a victim. Delegates were reminded that prostitution itself was not illegal, it was the associated activities which were outside the law. Some felt that as prostitution was legal, there ought to be safe ways for a person to carry this out – the law created vulnerability, and the law should not be looked at separately from the social context. Prostitutes should have safety zones to access health services, etc., and there should be an accessible database of violent punters with the police being allowed to pass on the information they have for the use of sex workers. Data protection should be overridden by duty of care, particularly since the Osman judgement in 1998. There were strong counter-arguments against the provision of safe zones, and some expressed the view that there was no safe way of being a prostitute.

Research on kerb-crawlers showed that the majority of men who were stopped lived in the local community. It was suggested that the police should create more dedicated vice squads to help reduce the level of the problem associated with prostitution in the community.

A proportion of the evidence appeared to be anecdotal. It was possible that what was needed was not a set of completely new offences, but a degree of fine-tuning and adding too, particularly in the sentencing features. There was a variety of possibilities, from an age-defined defence to new sentencing guidelines from the Court of Appeal. These were not mutually exclusive, but we needed to determine which might be most effective. Whichever route chosen there were huge issues of enforcement and implementation. Police might not necessarily know their local sex industry – the implementation of performance indicators means that police forces focused their attention elsewhere. This was a policy issue for the government. Without encouragement and freeing up of resources nothing would happen on the ground. However, there was some evidence that proactive policing simply moved the problem on to somewhere else, say Southampton to King's Cross – where there was less opportunity for community policing.

The law needed just and fair enforcement. Law had to be practicable and the sentencing guidelines needed to be clearly defined. The 1956 Act was outdated and the combination of the 2 year sentence or the £10 fine for prostitutes was seen as tokenism and clearly not working. The law should be a clear deterrent to the exploitation of women. There were contradictions in the current law. Trafficking was not specifically mentioned – and there needed to be an offence. 90% of the Race Relations Act had not been tested but that did not mean that the law should not be there. The law defined the boundaries of what society deemed acceptable.

Closing Session:

The Chair thanked those attending for contributing so freely. There had been a lively discussion with a diverse range of opinion which would be reflected in the report of the day. It was clear from the long list of current offences circulated before the seminar that there was an obvious case for grouping and clarifying the drafting in modern terms.

The police supported those who had called for a power of arrest for kerb-crawling. There was a lot of money in commercial sexual exploitation, and it was hoped that developments in Europe (such as a Eurowarrant) would help to tackle organised crime by increasing the opportunities for cooperation across borders. The international aspects also came to the fore in the development of the National Plan against the commercial sexual exploitation of children in accordance with the 1996 Stockholm World Congress. Some delegates expressed disappointment that the UK had not ratified the 1949 UN Convention on Trafficking, but the UK was taking an active role in negotiations on the UN Convention on Transnational Organised Crime, which included various forms of trafficking. It was hoped that the protocol would be ready in the year 2000.



There was some confusion about the provisions of the Sex Offenders Act and the Rehabilitation of Offences Act. Convictions for prostitution would not lead to a requirement for registration under the Sex Offenders Act.

Although there were calls for offences relating to pimping to be repealed, there were counter arguments to the effect that this offered protection to victims who could not afford to come forward and testify.

The principle for any replacement legislation had to be that it made it easier to investigate the offence and offered a greater deterrent – certainly not become less of a deterrent or to make it harder to investigate and prosecute. The law had to be effective, fair and have legitimacy with the police and judiciary. Ordinary people also needed to know what the law was, and there was a request that any changes to the legislation should be heavily publicised.

The Chair thanked delegates for their final contributions. There was a growing recognition of the international aspects of sexual exploitation. The work done today would inform the thinking of the review. If any of those attending had any further comments to make following the seminar, these would be welcomed.

Chair:

Betty Moxon (Sex Offences Review, Home Office)

Facilitators:

Shami Chakrabarti (Legal Adviser's Branch, Home Office)

Martin Bowley QC



Appendix H9

List of delegates attending the Sex Offences Review Conferences and Seminars

This appendix lists the names of all those who attended one or more of the Sex Offences Review's consultation conferences and seminars during 1999.



Those attending the Sex Offences Review consultation conferences and seminars

Dr Adam Abedelnoor – St George's Hospital

Hement Acharya – Home Office

Nicki Adams – English Collective of Prostitutes

Mahmoud Al-Rashid – Muslim Council of Great Britain

Richard Allan MP

His Honour Judge Francis Allen

Alan Armbrister – Justices' Clerks' Society

Professor Andrew Ashworth QC – Vinerian Professor of Law, Oxford University

Vera Baird – Barrister

Christine Ballinger – Dudley Social Services

Simon Bass – Churches' Child Protection Advisory Service

Sarah Bateman – formerly Department of Health

Dr Richard Beckett – Oxford Forensic Psychology Service

Judith Bermingham – Chief Crown Prosecutor

Julie Bindel – Violence, Abuse & Gender Relations, Leeds Metropolitan University

His Honour Judge Martin Binning

His Honour Judge Henry Blacksell QC

Viscount Bledisloe QC

Sandra Boyles-West – South Essex Rape & Incest Crisis Centre

Ben Bradshaw MP

Dr Tim Brain – Deputy Chief Constable, Gloucestershire Constabulary

Allan Brand – Immigration & Nationality Directorate, Home Office

Roger Brice – Criminal Law Committee, The Law Society

Fiona Broadfoot – Co-ordinator, Street EXIT

Lord Justice Henry Brooke QC

Belinda Brooks-Gordon – Institute of Criminology, University of Cambridge

Catherine Byrne – Home Office

Martin Calder – Child Protection Co-Ordinator, Salford Social Services

Simon Calvert – Christian Institute

His Honour Judge Quentin Campbell

Jim Cassins – Amhurst Park Action Group

Ivor Catt – UK Men's Movement

Catherine Christie – Mother's Union

Sandra Clark JP

His Honour Judge Philip Clegg

Laura Cobbs – Barrister

John Coffey QC

Nicolette Collins – Senior Crown Prosecutor

His Honour Judge Colin Colston QC

Mandy Conway – Detective Constable, Greater Manchester Police

Kate Cook – Manchester Metropolitan University

Pamela Cooke – Ann Craft Trust

Robin Cooper – Her Majesty's Customs & Excise

William Coulson – UK Men's Movement

Dr Simon Court – Consultant Community Paediatrician, Newcastle General Hospital

Major Doreen Crockford – Research & Development, Salvation Army

Claire Curtis-Thomas MP

Lord Davies of Coity

Owen Davies QC

Ann Dawson – Staffordshire Probation Service

Hilton Dawson MP

Lord Dholakia OBE

Brian Donnelly JP – Director, VOCS

Lesley Donlan – St Mary's Sexual Assault Referral Centre, Manchester

Rabbi Johnathan Dove – Office of the Chief Rabbi

Isabel Drummond-Murray – Scottish Executive

Susan Edwards QC

Michelle Elliott – Director, KidScape

David Ellis – Social Services Inspectorate, Department of Health

Ben Emmerson QC – Barrister

Marcus Erooga – NSPCC

Anthony Evans – Chairman, Stipendiary Magistrates' Legal Committee

Dr Elizabeth Finlason – Law Commission

Shelagh Fleming – Home Office

Malcolm Fowler – Criminal Law Committee, The Law Society

John Fox – Detective Superintendent, Hampshire Police

Jackie Gibson – Association of British Travel Agents

Ann Goldsmith – Essex Social Services

Jacky Gordon – Norwood Ravenswood

Jenny Gray – Social Services Inspectorate, Department of Health

Stuart Greer – Policing & Organised Crime Unit, Home Office

Deborah Grice – Home Office



His Honour Judge David Griffiths

Professor Don Grubin – Dept of Forensic Psychiatry, University of Newcastle

Mark Haddan – Branch Crown Prosecutor

Lois Hainsworth – National Council of Women GB

Ruth Hall – Women Against Rape

John Harding – Kingsley Napley

Virginia Harington

Jessica Harris – Research Development & Statistics Directorate, Home Office

Andrea Henderson – Inspector, Northumbria Police

Dr Jeanne Herring – Principal Forensic Medical Examiner, Kent Constabulary

Stephen Hesford MP

Anne Hewlett – Detective Inspector, Greater Manchester Police

Dr Chris Hobbs – Consultant Paediatrician, St James' University Hospital, Leeds

Inspector Paul Holmes – Metropolitan Police Clubs & Vice Unit (CO14)

Valerie Howarth – Chief Executive, ChildLine

The Earl Howe

Sally Howes – Barrister

Bev Hughes MP

Christina Hughes – Law Commission

Dr Cathy Humphreys – Social Policy Department, University of Warwick

Ruth Ingram – Adult Protection Co-ordinator, Leeds Social Services

Irene Ivison – Coalition for the Removal of Pimping (CROP)

Martin Jausch – Superintendent, Metropolitan Police Clubs & Vice Unit (CO14)

David Johnston – Social Services Inspectorate, National Assembly for Wales

Gillian Jones – Criminal Bar Association

Helen Jones – Department of Health

Peter Jones – Stipendiary Magistrate

Julie Kay – Detective Sergeant, Greater Manchester Police

Caroline Keenan – Dept of Law, University of Bristol

Gill Keep – Childline

Judi Kemish – Bindman & Partners

Roger Kennington – National Organisation for the Treatment of Abusers

Alison Kerr – Chief Crown Prosecutor

Christopher Kinch QC

Hilary Kinnell – European Network for HIV/STD Prevention in Prostitution

Richard Kirker – Lesbian & Gay Christians

Alan Ladley – Detective Superintendent, Sussex Police
 Professor Sue Lees – University of North London
 Penny Letts – The Law Society
 Allan Levy QC
 Peter Lewis – Chief Crown Prosecutor
 Lisa Longstaff – Women Against Rape
 Professor Christina Lyon – School of Law, University of Liverpool

Dr Michelle McCarthy – Tizard Centre, University of Kent
 Miles McColl – Stipendiary Magistrate
 Hamish McCulloch – Interpol
 Mary MacDonald – Women’s Unit, Cabinet Office
 Caroline McGee – NSPCC
 Lesley McLean – Start Project, Leeds
 David Magson – Chief Crown Prosecutor
 Baroness Masham of Ilton
 Dr Leslie Moran – Dept of Law, Birkbeck College, University of London
 Annie Mullins – Senior Policy Officer, NCH Action for Children

Julia O’Connell Davidson – Department of Sociology, University of Leicester
 David Ould – Deputy Director, Anti-Slavery International

Jill Page – Leeds Inter-Agency Project
 Stephen Parkinson – Legal Secretariat to the Law Officers
 Simret Parmar – The Law Society
 Maggie Pearson – Home Office
 Edward Pegg – Home Office
 Martin Pendergast – Chair, Christians for Human Rights
 Robert Pinkus – Assistant Director, Norwood Ravenswood
 Joyce Plotnikoff – Researcher
 Cynthia Potanah – Home Office
 Dr Jean Price – British Assn for the Study & Prevention of Child Abuse & Neglect
 Conrad Prince – Human Rights Unit, Home Office

Robina Rand – Magistrates’ Association Legal Panel
 Linda Regan – Child & Women Abuse Studies Unit, University of North London
 Dave Roberts – The Children’s Society
 Dr Raine Roberts – St Mary’s Sexual Assault Referral Centre, Manchester
 His Honour Judge Daniel Rodwell QC
 The Lord Rowallan
 Kevin Ryan – Terrence Higgins Trust



Rev Dr Peter Sedgwick – Archbishop’s Council Board for Social Responsibility
Helen Self – Josephine Butler Society
Sue Shaw – Prevention of Professional Abuse Network
Michael Sheath – Lucy Faithful Foundation
His Honour Mr Justice Silber QC
Canon Adrian Slade – Churches Together in Gloucestershire
Jonathan Simpson – House of Commons Researcher
Dr Alaster Smith – PRCU, Home Office
Jacquie Smith – Cheshire Social Services Department
His Honour Judge Stanley Spence
Professor Betsy Stanko – Dept of Social & Political Science, Royal Holloway College
Christine Stewart – Home Office
Jenny Still – Lucy Faithfull Foundation
Gisela Stuart MP
Her Honour Judge Linda Sutcliffe

Dr David Thompson – Foundation for People with Learning Disabilities
Norman Trew – National Criminal Intelligence Service
Deborah Turnbull – Crown Prosecution Service
Robert Turnbull – Chief Crown Prosecutor

Judith Usiskin – Jewish Women’s Aid

Anne Van Meeuwen – Barnardo’s
Helen Veitch – ECPAT (UK)

John Wadham – Director, Liberty
Zurka Wahid – The Law Society
Pat Walton – Boys & Girls Welfare Society
Barbara Ward – SEIRRC
Clare Ward – Crown Prosecutor
Juliet Wheldon – Legal Adviser, Home Office
Robert Whiston – Chair, UK Men’s Movement
Catriona Williams – Director, Children in Wales (Plant Yng Nghymru)
David Wilson – Immigration & Nationality Directorate, Home Office
Gerald Wilson – Bar Lesbian & Gay Group
Dr Robert Wintemute – School of Law, King’s College, London
Heather Wood – Nursing Division, National Assembly for Wales
His Honour Judge Barry Woodward
Dr Jane Wynne – Consultant Community Paediatrician, Leeds General Infirmary



Appendix I

Talking to Children – a report of two visits to Rodborough School



Talking to Children – a report of two visits to Rodborough School

As the review was formulating its proposals we thought it would be valuable to have the opinions of children on some of our emerging proposals and the issues around them. Time was very limited and although we had hoped for a wider consultation, in the end we were able to talk to groups of Years 10 and 11 (aged between 14 and 16) in Rodborough School Milford, a 11-16 comprehensive. We are very grateful to John Latham the Headteacher for agreeing to the visit and Mrs Elizabeth Gibbs who facilitated discussions.

The discussions concentrated on issues of particular interest to teenagers, and was done as part of a wider PSHE (personal social and health education) course. The method used was to have a brief introduction to put the discussion in context and then to ask the children to discuss specific questions in small groups. Those groups would then report back to the whole class and often a full class discussion was underway by the end of the session. Not all groups covered all the ground – it depended on the extent of the discussion on particular issues.

The core issues discussed were

- (i) age of consent – should there be one and if so what should it be? Was the present age of 16 about right or not? Was there a younger age when any sex really should not take place at all?
- (ii) If young people under the age of consent engaged in mutually agreed sex who should be responsible – one partner (and if so which one), or both?
- (iii) How easy is it for you to mistake some-one's age when you are out on the town – or for other people to mistake yours?
- (iv) What do you think of as rape? Does no always mean no?
- (v) Should the criminal law have different arrangements for same-sex and heterosexual behaviour?

There were a variety of responses within groups, but quite a lot of agreement on general attitudes. The overall response was:

- (i) age of consent. There was general agreement that there should be an age of consent, with a few exceptions. Most thought 16 was about right but some thought a lower age would be better – the age of 15 that applied in France was mentioned by a couple of groups. Most groups thought that sex with children under 13 was clearly out of order, although both 12 and 14 were mentioned as alternatives by a few.
- (ii) Responsibility – where there was mutuality in sexual matters both partners should take responsibility for their actions. There was some discussion about where there was an imbalance of age or maturity, and a suggestion that a partner of more than 3 years older should be regarded as the responsible one.

- (iii) It was very easy to mistake age especially of girls when dressed up and out for the evening. Some boys too looked very mature and were readily taken as older. In general they thought it was the responsibility of the person seeking a relationship to find out the age of their potential partner.
- (iv) Consent was generally well understood and if that no should mean no. It was important for there to be agreement.
- (v) Same sex – in general there should not be a distinction but some groups thought that there was justification for a higher age of consent.

The other issue which came up in every class group was for more and better sex education, and for it to take place at a younger age. There was particular concern that boys needed to receive more sex education, as girls tended to get rather more help in coming to terms with the physical changes in puberty. They wanted it to deal with issues of relationships much more fully rather than to concentrate on the biology.





Appendix J

Number of offenders cautioned, defendants prosecuted at magistrates' courts and convicted at all courts for specific sexual offences, England and Wales, 1988, 1993 and 1998

These statistics were produced by the Crime and Criminal Justice Unit of the Research, Development and Statistics Directorate of the Home Office.

*They are a core summary of the pattern of usage of offences in recent years, and form a sample of the many statistical analyses produced for the review by CCJU, some of which are included in Volume 1 of *Setting the Boundaries*.*



Offence description	Cautions			Prosecutions			Convictions ⁽¹⁾		
	1988	1993	1998	1988	1993	1998	1988	1993	1998
Rape n/a	16	25	1277	1700	2176	499	458	673	
Procuring female for immoral purposes, or using drugs to obtain or facilitate sexual intercourse (SOA56 s2,3,4,22 & 23)	n/a	31	-	13	14	13	7	4	6
Unlawful sexual intercourse with a girl under 13 (SOA5 s5)	79	67	23	79	97	40	165	76	55
Unlawful sexual intercourse with a girl aged 13 to under 16 (SOA56 s6)	1215	553	286	1215	189	171	345	170	225
Man having sexual intercourse with a woman who is a defective (SOA56 s7)	n/a	-	2	1	-	2	-	-	-
Male member of staff of hospital or mental nursing home having sexual intercourse with woman patient (MHA59 s1a)	n/a	-	-	1	-	-	1	-	1
Man having unlawful sexual intercourse with mentally disordered female patient in his care (MHA59 s1b)	n/a	-	2	1	-	2	-	-	-
Male member of staff or hospital or mental nursing home committing buggery or act of gross indecency with male patient (MHA59 s1a as amended by SOA67 s1)	n/a	1	-	-	1	-	-	1	-
Incest with girl under 13 (SOA56 s10/11 pt)	n/a	19	5	105	52	17	104	51	19
Other incest (SOA56 s10/11 pt)	n/a	12	19	69	20	14	91	43	29

APPENDIX J - NUMBERS CAUTIONED OR CONVICTED FOR SPECIFIC SEXUAL OFFENCES

Offence description	Cautions			Prosecutions			Convictions ⁽¹⁾		
	1988	1993	1998	1988	1993	1998	1988	1993	1998
Inciting girl under 16 to have incestuous sexual intercourse (CLA77 s54) n/a	-	-	3	2	1	2	2	-	-
Buggery with male under 18 (SOA56 s12)	n/a	n/a	-	n/a	n/a	4	n/a	n/a	7
Man procuring act of buggery between two other men (SOA67 s4)	n/a	1	2	5	1	-	4	-	-
Indecency between males (SOA56 s13 as amended by CJ&POA94 s127)	163	473	193	1535	540	249	1333	389	189
Indecent assault on a female (SOA56 s14)	1450	1405	792	3414	3639	3772	2511	2066	2454
Indecent assault on a male (SOA56 s15)	190	259	125	697	621	625	546	408	440
Abduction of a woman (SOA s17)									
Abduction of unmarried girl under 16 (SOA56 s20)	n/a	3	1	20	13	8	8	6	4
Abduction of female defective (SOA56 s21)	n/a	-	-	-	-	-	-	-	-
Causing prostitution of a woman (SOA56 s22)									
Procuring, permitting or causing the prostitution, etc., of female defective (SOA56 s9,27 & 29)	n/a	1	-	-	-	1	-	1	-
Person responsible for girl under 16 causing or encouraging her prostitution, etc (SOA56 s28)	n/a	-	1	-	-	-	1	1	-



Offence description	Cautions			Prosecutions			Convictions ⁽¹⁾		
	1988	1993	1998	1988	1993	1998	1988	1993	1998
Man living on earnings of prostitution (SOA56 s30)	n/a	4	3	95	72	34	75	42	37
Woman exercising control over prostitute (SOA56 s31)	n/a	9	9	15	9	16	8	7	5
Man living wholly or in part on earnings of male prostitution (SOA67 s5)	n/a	-	2	3	-	-	6	-	-
Woman living wholly or in part on earnings of male prostitution (SOA67 s5)	n/a	-	-	1	1	1	1	1	1
Soliciting by a man (SOA56 s32)	154	205	128	696	208	61	545	124	42
Gross indecency with children (ICA60 s1)	88	101	50	226	257	325	246	203	214
Indecent exposure with intent to insult any female (VA24 s4)	295	416	255	1461	854	748	1163	598	488
Exposing person/indecent exposure (common law)	n/a	6	6	6	2				
Committing an act outraging public decency (common law)	n/a	60	38	73	38	21	6	6	2

SOA56 – Sexual Offences Act 1956
 MHA59 – Mental Health Act 1959
 CLA77 – Criminal Law Act 1977
 CJ&POA94 – Criminal Justice & Public Order Act 1994
 SOA 67 – Sexual Offences Act 1967
 ICA60 – Indecency with a Child Act 1960
 VA24 – Vagrancy Act 1824



Appendix K

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