



Appendix E

Sex offences law in Australia and New Zealand: the impact of change

A summary of the findings of a visit made to Australia and New Zealand by the Sex Offence Review Team (Betty Moxon and Su McLean-Tooke), from 26 August to 8 September 1999. This formed a working paper of the Sex Offences Review.



Sex offences law in Australia and New Zealand: the impact of change

Many of the contributions which the sex offences review received on the subject of rape called for adoption of laws similar to those of the State of Victoria, Australia. Given that there had been many recent changes in this and other sex offence law in Victoria and other states, a major policy review by the Australian Model Criminal Code Officers' Committee and substantial changes to sex offence law in New Zealand where there was about to be a full review of that legislation, we wanted to assess the effectiveness of these changes, where possible.

During the period 26 August – 8 September 1999, the review team travelled to Australia and New Zealand, meeting those involved in criminal law policy and the criminal justice system, investigators, academics, legal practitioners (both defenders and prosecutors) and voluntary groups providing support for victims / survivors. We were fortunate enough to be able to talk to people in Victoria, Tasmania, the Australian Capital Territory and New Zealand. All gave unstintingly of their time and expertise.

In terms of the criminal law, the States and Territories of Australia have almost full autonomy. Four follow a codified law system whilst the other four retain a common law system inherited from English criminal statute. Federal jurisdiction applies to areas such as drugs, trafficking related to importation, and fraud against the Federal Government. New Zealand has a common law system.

The Australian Model Criminal Code Officers' Committee (MCCOC):

MCCOC was composed of criminal law advisers who were drawing up a model Criminal Code to provide a template for consistent law reform in all States. They had produced a report on sex offences in 1999 following a long consultation process.

Rape and sexual assault:

Like us, both the Australians and New Zealanders have seen a rise in the incidence of acquaintance rape whilst the number of serious sex assaults by strangers has remained at a fairly steady level.

Victoria: Rape with mitigating circumstances was introduced in the 1980s: rape with aggravating circumstances included gang rape, to reflect the gratuitous violence and level of degradation involved.

Even before the latest amendments to the legislation in the Crimes (Rape) Act 1991 and the Crimes (Sexual Offences) Act 1991, major changes were made in 1981 which expanded the definition of rape to penetration of the anus, mouth and female genitalia by a penis or object without consent. In the experience of the judiciary making the offence of rape gender neutral had not caused a problem.

The 1991 amendments again expanded the definition of rape to include penetration by any other part of the body. They also introduced changes to clarify the concept of consent by categorising it as free agreement and reaffirmed the fundamental right of a person not to engage in sexual activity. The new definitions of consent were not regarded as particularly controversial. In order to help juries to understand issues of consent several mandatory directions for judges were introduced. These came into operation on 1 January 1992. Since that time one further direction for judges has been introduced; the 'Longman' warning, based on a High Court decision. Following its introduction in 1997, judges must now inform the jury where appropriate that there may be good reasons for delay or hesitation in reporting an assault. Senior members of the judiciary felt that putting the directions into statute had been beneficial: it simply codified directions which were already being given in court and if it had not been put into statute some thought that there might have been a risk of missing some of these elements. Juries were able to hear propensity evidence and asset seizure could be taken into account when sentencing.



The 1996 Evaluation Report of the Crimes (Rape) Act 1991 (studies for which commenced in May 1992), considered the impact of the changes, particularly on the way that police deal with victims / survivors of sexual assault and victims' / survivors' experiences of reporting sexual assault and the court process. As part of the evaluation, the Office of Public Prosecutions carried out a small study on prosecutions that did not result in trial proceedings.

There seems to have been no overall evaluation on the impact of these legislative changes on the attrition rate in rape and the overall level of conviction. However, it is interesting to note that Victoria still holds full-scale committal hearings at which all the evidence is presented to a magistrate. The role of these is to ensure that there is a case to answer. There is a weeding out process prior to committal to consider the issues. This reduces trial times by having few unresolved pleas: this system is much more likely to flush out a guilty verdict. Costs are often awarded to the defendant if the prosecution is unsuccessful.

Following a decision by police to refer the case to the DPP and where the accused was not brought to trial, the prosecution could be resolved in one of six ways:

the DPP withdraws the charges;

the charges are dismissed by the magistrate at the committal;

the accused is committed on non-sexual offences only;

the DPP discontinues the prosecution after the accused was committed to stand trial in the County Court (equivalent to Crown Court) aka *nolle prosequi*;

the accused pleads guilty to an offence other than rape;

the accused pleads guilty to one or more rape offences.

Investigation of rape is split between the Community Police Squads (CPS) who take all 'standard' rape cases, and the specialist Rape Squad of the Victoria Police Force, which deals with instances of serial rape or crimes against children. All indictable offences come to the Office of Public Prosecutions (OPP) for prosecution, while the CPS prosecute summary offences. On rule of thumb, the CPS will take forward a prosecution for an acquaintance rape where there is corroboration. The OPP will take a case where there is a reasonable prospect of conviction or where it is in the public interest to do so. Obviously, with acquaintance rape they feel that the credibility of the complainant is important, and prosecutors now have a policy of talking to complainants as well as using the Witness Assistance Service which is staffed by social workers on attachment. This is not to coach the witness but to prepare them for the court process.

The OPP has its own Crown prosecutors, some of who specialise in sex offences, and they also use some regular members of the Bar who have experience in prosecuting sex offences. The OPP also imposes a restraining order on the suspect if the victim/survivor wishes to sue for compensation.

Both the criminal law policy team at the Department of Justice and members of the OPP felt that the changes to the law had had a beneficial impact on successful prosecutions. Their estimate for the overall conviction rate was that of every 100 cases reported, 40 are charged, 30 are prosecuted and up to 90% of those prosecuted result in a conviction (an overall percentage of 27%). The OPP suggested that the conviction figure in rape was more likely to fall between 80% and 85% (an overall percentage of 24-25%) and that conviction rates have been similar since 1982. Where the issue is contested, the conviction rate was about 51%, but one of the impacts in changes to legislation seems to have been that there has been an increase in the number of accused pleading guilty to rape. The police had also sponsored some research of false allegations in rape, and estimated that 49% of claims of stranger rape were untrue. There were no figures given for acquaintance rape. (We were unable to discover any overall statistical analysis of rape cases.)

Officers of Legal Aid (essentially the public defenders for the State of Victoria) were in the main happy with the new legislation. They identified one or two problems from their point of view, including third party disclosure, which involved having to give the structure of their questioning prior to the trial, and having to seek leave from the judge to depart from that structure. Recklessness (a slightly higher level) is seen by defenders as an extra element on the burden of proof. With serious sexual offenders or serious violent offenders, there was a ‘three strikes’ presumption of accumulation when concurrency of sentencing was displaced. It was felt this could lead to disproportionate levels of sentencing.

Tasmania: Prior to 1924, when it was codified, the law of the State of Tasmania was based on English common law. In general the test of intent remained subjective, but it was thought easier to prosecute using the codified law. Like Victoria, Tasmania has a committal system. In a contested committal witnesses appeared to put forward the prima facie case – these were very rare. In an uncontested committal, the defendant had the right to call prosecution witnesses to test their case. That was seen as a problem, but the Justices Act said that all victims of sexual assault and victims under the age of 16 for other offences may not be called. Tasmania is about to abolish contested committals.

Tasmania has a single maximum penalty for all crimes of 21 years. A ‘dangerous offender’ would have to stay in prison until the whole of the sentence for the offence was completed – the Supreme Court could order no parole. This applied where there were convictions for three violent offences or offences with violent elements. Offenders could apply for the label to be removed, but they had to satisfy the court that they were no longer dangerous. If they failed in this, they could reapply after a gap of two years.

MCCOC: After considering the issues of consent MCCOC largely followed the Victorian model. They did not include fraud, although the expectation was that it would be proven in some circumstances. They felt that there was a need to think carefully about the state of mind of both the victim / survivor and the perpetrator. The proof had to be that the perpetrator knew that the victim was not consenting, or that there was no honest belief that consent had been given. An innocent idiot could not be criminally culpable. A person would be reckless if they foresaw or contemplated the possibility that there was no consent, or if they made an assumption as to consent. Sex without turning the mind to the state of mind of others was not consensual sex.

New Zealand: The most recent reforms to the rape law (in the Crimes Act 1961) took place in 1986 when the offence of sexual violation was introduced. This included the elements of rape and unlawful sexual connection. The initial maximum penalty of 14 years had been raised to 20 years. Rape was a gender specific offence of forced sexual intercourse with a woman. In sentencing the Court of Appeal had set 8 years as the starting point for rape. There were no sentencing guidelines as to the starting point for unlawful sexual connection, although the average sentence was approximately 2 years. Based on the figures provided by the Department of Justice, the level of conviction for rape was high. In the period 1990-1998 the overall conviction rate varied between 35% and 75% (in the final three years it was consistently above 50%).

Members of the judiciary thought that there had been a huge reaction to the changes in the sex offences especially in relation to the bar on cross-examination on previous sexual history and an honest but reasonable belief in consent. Acceptance of the changes had not shifted the presumption of innocence, but altered the focus to the defendant. Some issues were difficult for juries, but judges directions on reasonable grounds had helped. They felt that it was difficult to formulate law on honest belief for twelve people who do not normally have any contact with the law, but there were no great difficulties, and very few cases depended entirely on the issue of honest belief. Judges also felt that the sentencing guideline for rape was too high, and wished to see instead a reduction and the greater use of aggravating features such as home invasion, use of drugs, etc.



The prosecution function was split between the Crown Law Office and the police. In jury trials, there is a system of Crown solicitors in private firms who are commissioned by Crown Counsel to prosecute, but police prosecuted all summary offences and preliminary hearings. Police always make the decision whether or not to prosecute, but may consult Crown Counsel if they think that the prima facie case is questionable before laying charges. There was a stand-alone prosecutions group within the police. Prosecutors specialise in various aspects of the criminal law.

Support for witnesses

One of the outstanding features in both Australia and New Zealand was the level of support given to victims of sexual assault. In Victoria the CPS provide a continuity of contact with victims who can also be supported by organisations such as CASA. The Witness Assistance Service works with the OPP to help prepare victims for court and the Victim Referral and Assistance Service (VRAS) is part of the Department of Justice set up when it was decided to abolish financial compensation for pain and distress. Through VRAS all victims (whether or not they have reported their assault to the police) have an entitlement to receive professional counselling to a value of Au\$ 1,000. They also provide support services. For example, if a victim is attacked and injured, members of the service will ensure that the victim receives the relevant health treatment without charge. They have instigated an longitudinal study based on 50 people to evaluate the effectiveness of proper intervention and counselling: interim reports indicate that victims who have received help are clearly doing better.

Child sexual abuse was dealt with separately by the Child Protection Service. They were currently carrying out research on children in domestic violence and child victims of sexual assault

The Sexual Assault Support Service (SASS) of Tasmania provides services for men and women (although rarely men), but does not provide any help for children under the age of 13. They have been lobbying to provide a service for children. It is partially funded by government under domestic violence initiatives. The police or hospital contacted SASS who provided a support worker to help victims / survivors make decisions (e.g. whether to go forward with a complaint, etc.). They were keen to develop this multi-agency approach, with either specialist police or those who have received some training to make them more effective in dealing with victims of sexual assault. There was a waiting list of people waiting for counselling. Some states limited the amount of counselling sessions before diverting victims into an alternative scheme such as group therapy. In Tasmania there was no such limit – the average time of counselling was six months, but where required, some victims / survivors had been receiving counselling for years.

In New Zealand victims / survivors were supported through court by Rape Crisis, and they were also in the process of setting up a witness assistance court system similar to the Victoria model. As a general rule, police refer victims / survivors to a specialist agency such as Rape Crisis or Victim Support, and in 1997 Rape Crisis were acknowledged as the primary agency in dealing with sexual assault cases. The police have set up a system of monitoring these referrals, with monthly meetings between a police manager and the agency concerned. No Victim Support officer would work with sexual abuse cases unless trained to do so and training was being developed in a collective way between the police, Rape Crisis and Victim Support. Counselling was given both to victims / survivors and their families. Compensation of up to NZ\$ 10,000 was also available and this had a restitutionary element, including funding for a limited number of counselling sessions capped at NZ\$55 a session. Victims/survivors did not have to report the offence to the police to become eligible for this service.

Prosecutors did have contact with witnesses, especially children. It was felt that it was important to talk to people before the trial, to talk about the evidence and to build up confidence, although definitely no coaching.

Sex offences against children:

There had been an increased level of reporting, particularly on historic sex offences against children in all areas of Australia and New Zealand, an experience similar to the UK model.

Victoria: Operation Paradox (a free phonenumber from 1989 to 1994) allowed people to call in about sexual assaults experienced in childhood. The Victoria Parliament review of 1994 considered the increase in crime statistics for offences against children, recommending changes particularly in the area of child evidence.

Sexual penetration of a child did not distinguish on the basis of gender and covered fear, force and fraud. There were no alternative charges. Propensity evidence could be used if an offender had been convicted of a sexual offence against a child and was later charged with another: the prosecution could call on the original as proof of propensity. Consent as a defence was available for sex offences against children. There were some other provisions for the protection of children including offences of loitering near schools (to prevent sex offenders from working with or contacting children) and persistent abuse of a child.

Where the complaint related to peer activity, police considered whether it was sexual experimentation or abuse, although they did try for consensual unlawful sexual intercourse when parents had laid a complaint or where the case involved a vulnerable child.

Tasmania: The 1924 legislation introduced differential ages for consensual underage sexual activity. For children aged between 12 and 14, the older partner could be no more than 3 years older, and for children aged 15 and 16, only 5 years older. These differentials also applied to male same sex activity (but not anal sex): the aim was to try and prevent exploitation by older men. Police aimed not to prosecute children whenever possible, taking into account the child's power to make decisions. There was a defence of mistake of fact in age, but this could not be used if there was self-induced intoxication, recklessness or wilful disregard.

New Zealand: There was an absolute offence under the age of 12. There were some defences for children between the ages of 13 and 16 if the boy was younger than the girl, including consensual intercourse providing there is no coercion. Any gap in age of more than three years was taken to indicate some degree of coercion. Where it was truly consensual activity, and there had no been no undue influence by either party, it was thought better not to prosecute, although child protection issues might still be raised. The police had some discretion as to whether or not a prosecution was the best way forward. There was also a mistake of fact defence which included reasonable grounds.

There was a multi-agency approach to children, with child abuse teams working under the terms of the Children and Young Persons Act. If the abuser was under the age of 10 (the age of criminal responsibility in New Zealand) the police would still investigate the circumstances – for instance, if a child of 8 had been abusing another of 3, this was regarded as learned behaviour which required counselling and therapy. In extreme cases there were care and protection provisions controlled by the Children and Young Persons Agency. There was no real policy about consensual sex between children. Contraceptive advice is available on a similar basis to Gillick competency, and there is sex education as well as protective age-appropriate education along the lines of 'Keeping Ourselves Safe'.

There was a policy of training police uniformed counter staff to deal with child victims, and the training for the Criminal Investigation Bureau lasted for two and a half years with most going on to a child abuse team. Most of these work from remote police stations.



With many thanks to:

Criminal Law Policy Team – Department of Justice, Victoria

Victim Referral and Assistance Service (VRAS) – Victoria

Victoria Police Force

Victoria Court of Appeal

Office of Public Prosecutions – Victoria

Magistrates' Courts

Victoria Legal Aid

Legislation and Policy Team – Ministry of Justice, Tasmania

University of Hobart

Tasmanian Police Service

Sexual Assault Support Service (SASS) – Tasmania

Attorney General's Office – Australian Capital Territory Canberra

Criminal Justice Policy Team – Department of Justice, New Zealand

Rape Crisis (Whanau Ahuru Mowai)

Victim Support

New Zealand Police (Nga Pirihimana O Aotearoa)

Crown Law Office – New Zealand

Department of Corrections – New Zealand

Children, Young Persons and Their Families Agency – New Zealand

District Court – Wellington, New Zealand

High Court – Wellington, New Zealand

Court of Appeal – Wellington, New Zealand

Ministry of Health (Manatu Hauora) – New Zealand



Appendix F

Summary of the South African Law Commission Discussion Paper on the Substantive Law of Sex Offences (August 1999)

This paper is a short summary of a very substantial consultation document issued by the South African Law Commission. It formed a working paper of the Sex Offences Review.



Summary of the South African Law Commission Discussion Paper on the Substantive Law of Sex Offences (August 1999)

1. This paper has been drafted to give an idea of the background, discussion and proposals of the South African Law Commission relating to the substantive law of sex offences in the Republic of South Africa. Whilst they are recommending substantive changes in some areas, in others they are leaving it to the courts as the most appropriate authority.

Background:

2. The South African Law Commission was requested to investigate sexual offences by and against children and to make recommendations to the Minister of Justice for the reform of this particular branch of the law. A Project Committee was appointed and an issue paper on sexual offences against children was published for general information and comment in May 1997. It became clear during the course of the investigation that any proposed changes will have a far-reaching effect on the position not only of children but of adults as well. As a result and because of various requests the Commission decided to expand the scope of the investigation to include sexual offences against adults.

3. The areas of law included are:

- The Sexual Offences Act 1957 (implemented to consolidate and amend the law relating to brothels and unlawful carnal intercourse and other acts in relation thereto – but including age of consent legislation) which was previously contained in the Immorality Act.
- The Domestic Violence Act 1998 (includes provisions for rape within marriage).
- The Child Care Act 1983 (extended for commercial sexual exploitation of children).
- Common law offences of rape, indecent assault, incest, unnatural sexual acts, sodomy

4. 'The criminal law is ... not a device whereby all social wrongs in society should, or even can, be corrected. Nor is it, according to the prevailing view, a device through which standards of morality can or should be endorsed. also significant, especially in the sexual offences context, is the symbolic or educative function of the criminal law. The criminal law performs a vital role in the community by making significant moral denunciations of unacceptable conduct. In declaring certain types of sexual behaviour to be criminal, the law plays a crucial part in the development, maintenance, and perhaps even establishment, of community attitudes and expectations. This symbolic function may be particularly relevant in the sexual context because the law can and does influence community attitudes about relationships, particularly between women and men and adults and children.'

Rape:

5. January – June 1998 level of convictions to cases reported 10.84%.

6. The current common law definition of rape was that of a man having unlawful intentional sexual intercourse with a woman without her consent. A husband can be convicted of raping his wife. There is an irrebuttable presumption that a girl under 12 years old is incapable of consenting to sexual intercourse. The offence is gender specific for both perpetrator and victim. The essential elements of the offence are:



- intention
- unlawfulness
- sexual intercourse
- with a woman
- without her consent.

Intention:

7. The man must intend to have sexual intercourse with the woman, knowing, or foreseeing the possibility, that she has not consented to sexual intercourse. If the accused genuinely believes that the woman consents, even though he believe is unreasonable, he lacks the necessary intention.

Unlawfulness:

8. Sexual intercourse without consent was not unlawful where it took place between husband and wife, but this common law rule was repealed in 1993 by the Prevention of Family Violence Act.

Sexual intercourse:

9. The slightest penetration of the vagina by the penis is sufficient. Sexual intercourse is a continuing act which only ends with withdrawal. Where the woman withdraws her consent after penetration it is rape for the male to continue the act of intercourse.

With a woman:

10. A man cannot be raped, and a woman cannot commit rape. However, a woman who acts as an accomplice of a man who commits rape can be convicted of that offence. Respondents were almost unanimously of the view that rape should be a gender neutral offence.

Without consent:

11. Physical resistance on the part of the woman very obviously indicates an absence of consent on her part, but the essence of the offence is that sexual intercourse should have occurred without consent, and that lack of consent could be due to 'fear, force or fraud' or incapacity to consent. Because an absence of consent is included as one of the elements of the offence of rape, the state firstly bears the notoriously difficult burden of proving a negative proposition, that is, that the complainant had not consented to sexual intercourse. The effect of this is to shift the enquiry from the behaviour of the accused to that of the victim. Her non-consent, not his compulsion is in issue. There is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent –

R v Swiggelaar:

12. The requirement for the prosecution to prove lack of consent has been criticised on the grounds that it leads to an excessive focus on the complainant's behaviour rather than the alleged conduct of the accused. Generally unlawfulness of an act or omission is one of the elements of an offence, implying that a person had no lawful reason to act in the way they did. The accused may raise as a defence that he or she had an excuse in law for their actions, which may be that the accused had acted with the consent of the victim, which might justify their action. The accused may also rely on a legal excuse as a justification for what appears to be rape – e.g. being threatened at gunpoint to rape the victim. If a defendant alleges such a legal excuse he carries the onus to prove that excuse.

13. If a man so intimidates a woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape. All the circumstances must be taken into account to determine whether passivity is proof of implied consent or whether it is merely an abandonment of outward resistance which the woman, while persisting in her objection to intercourse, is afraid to display or realises is useless.

14. Matters which might vitiate consent include lack of mental capacity (e.g. mental defect – where she has to be proved to be either an idiot or an imbecile), intoxication where a woman is reduced to a state of insensibility or when it renders her incapable of understanding what she is doing, and where a girl is under the age of 12. The discussion point was that although this latter was a legal fiction, in that a girl under that age might understand the nature of the act and its implications, the rule is justified on grounds of public policy. It was felt that this presumption should be extended to boys under the same age. There is also the lack of opportunity to consent, e.g. sleep, insensibility (e.g. through intoxication, drugs, hypnosis or general anaesthetic) as well as the absence of physical capacity through duress (both physical force and inducement through threats – including threats to harm the woman's child) and fraud. There are only two species of fraud which for the purposes of rape destroy consent: where the fraud induces error as regards the person or where the woman fails to appreciate that what she is consenting to is sexual intercourse and thinks that it is an act of a different nature, such as an operation.

15. The Commission had considered various arguments for reasonable belief in consent, but drawn no conclusions.

16. The Commission believes that it is essential to redefine the offence of rape to be reliant on 'coercive circumstances' rather than absence of consent in order to establish prima facie unlawfulness. A shift from 'absence of consent' to 'coercion' represents a shift of focus of the utmost importance from the subjective state of mind of the victim to the imbalance of power between the parties on the occasion in question. This perspective also allows one to understand that coercion constitutes more than physical force or threat thereof; but may also include various other forms of exercise of power over another person: emotional, psychological, social or organisational power. One may also add here the exercise of power resulting from age difference between the perpetrator and the victim.

Proposals:

17. While enacting a single offence to cover all types of sexual assault would simplify the present law, a single, all-embracing offence would reduce legislative guidance for presiding officers in relation to sentencing. It would also be wrong in principle for the legislature not to distinguish one type of sexual interference from another. The law should continue to distinguish between penetrative and non-penetrative sexual offences. The term 'rape' should be used to describe any proposed statutory defence.

18. The general consensus is that the definition of what constitutes unlawful sexual intercourse should be widened to include the introduction of the penis into another person's vagina, anus or mouth.

19. The Commission proposes the repeal of the common law offence of rape and its replacement with a new gender-neutral statutory offence. The essence of the Commission's proposal on rape centres around 'unlawful sexual penetration' (unlawful means it occurs under coercive circumstances including the application of force, threats, the abuse of power or authority, the use of drugs, etc.). Sexual penetration is defined very broadly by the Commission to include the penetration 'to any extent whatsoever' by a penis, any object or part of the body of one person, or any part of the body of an animal into the vagina, anus, or mouth of another person. Simulated sexual intercourse is also included under the Commission's definition of 'sexual penetration'.



20. In terms of the Commission's recommendations oral, anal or vaginal penetration or even simulated sexual intercourse under coercive circumstances can constitute rape. This means that both men and women can be rape victims and perpetrators.

1. **Any person who intentionally and unlawfully commits an act of sexual penetration with another person, or who intentionally and unlawfully causes another person to commit such an act, is guilty of an offence.**
2. **For the purposes of this Act, an act of sexual penetration is prima facie unlawful if it takes place in any coercive circumstances.**
3. **No marriage or other relationship shall be a defence against a charge under this section.**
4. **No person shall be charged with or convicted of the common law offence of rape in respect of an act of sexual penetration committed after the commencement of this Act.**
5. **Subject to the provisions of this Act, any reference to 'rape' in any law shall be construed as a reference to the offence of rape under this section, unless it is a reference to rape committed before the commencement of this Act which shall be construed to be a reference to the common law offence of rape.**

"sexual penetration" means any act which causes penetration to any extent whatsoever –

(a) by the penis of one person –

- (i) into the anus, ear, mouth, nose or vagina of another person, or**
- (ii) into any body orifice of an animal;**

(b) by any object or part of the body of one person –

- (i) into the anus or vagina of another person, or**
- (ii) into any body orifice of another person in a manner which simulates sexual intercourse, or**

(c) by any part of the body of an animal –

- (i) into the anus or vagina of a person, or**
- (ii) into any body orifice of a person in a manner which simulates sexual intercourse.**

21. To provide better protection for children, the Commission proposes that the sexual penetration of any child below the age of 12 years should constitute rape.

22. In terms of the current definition of rape, the State must prove beyond a reasonable doubt the fact that the woman did not consent to sexual intercourse. In the public perception, this creates the impression that the victims of rape are put on trial to prove the absence of consent to sexual intercourse on their part. In terms of the Commission's recommendations, absence of consent to sexual intercourse will no longer be an element of the offence. The accused can obviously still raise consent to sexual intercourse as justification for his or her unlawful conduct, but will carry the burden of proof in this regard.

23. The definition of coercive circumstances includes:

circumstances where –

- **there is any application of force, whether explicit or implicit, direct or indirect, physical or psychological against any person or animal;**
- **there is any threat, whether verbal or through conduct, direct or indirect, to cause any form of harm to any person or animal;**
- **the complainant is under the age of twelve years;**
- **there is an abuse of power or authority, whether explicit or implicit, direct or indirect, to the extent that one person is inhibited from communicating his or her resistance to an act of sexual penetration, or his or her unwillingness to participate in such an act;**
- **a person's mental capacity is affected by –**
 - **sleep;**
 - **any drug, intoxicating liquor or other substance;**
 - **mental or physical disability, whether temporary or permanent; or**
 - **any other condition, whether temporary or permanent, to the extent that he or she is unable to appreciate the nature of an act of sexual penetration, or is unable to indicate his or her unwillingness to participate in such an act;**
- **a person is unlawfully detained;**
- **a person believes that he or she is committing an act of sexual penetration with another person; or**
- **a person mistakes an act of sexual penetration which is being committed with him or her for something other than an act of sexual penetration.**

24. A provision is included that no marriage or other relationship shall be a defence against a charge of rape.

Indecent assault:

25. This is defined as an unlawful and intentional assault which is or is intended to be indecent or the unlawful and intentional assault of another with the intent to commit an indecent act. It is a generic term describing most forms of unlawful sexual encounters other than rape. The purpose of the offence is primarily to protect the sexual autonomy and bodily integrity of a person, whether male or female. The crime is gender neutral. Depending on the circumstances, such perpetrators may be prosecuted for rape, incest, offences under the Sexual Offences Act, indecent exposure or indecent assault. This overlap results in the crime of indecent assault being used as a catch-all where it is not possible to bring a prosecution under one of the other offences. In contrast to the other common-law crimes, this crime may take the form of the inspiring, by threats or conduct, of apprehension that force is immediately to be applied. The intention of the accused must be taken into account when deciding whether an assault is indecent or not.



26. One question posed was when did an assault become indecent. One view was that it is impossible to classify all kinds of acts that might be indecent – the interpretation given to what indecent assault is that it is an assault which significantly invades the person or privacy of the individual. As general principle the consent of the parties engaged in such activity is likely to render it not unlawful. The consent of a girl under the age of 12 years is not a defence. There is no certainty as to whether there is an age of consent for males.

Administering drugs, etc. for the purposes of committing a sexual act:

27. Section 18 of the Sexual Offences Act can offer protection against exploitation in circumstances where the actions of the perpetrator would not amount to rape or attempted rape. This indicates a need for a provision of this nature. It is suggested that such a provision should provide equal protection to both sexes.

Compelled sexual acts:

28. No specific provisions exist to cover the situation where a person forces another to engage in sexual acts with a third person or to commit sexual acts upon themselves. A person who compels another to commit an indecent assault cannot be convicted on the basis of ‘common purpose’ as the compelled person lacks the intention to commit the offence.

Proposals:

29. The Commission believes that the common law offence of indecent assault is a flexible and dynamic concept adequately suited to the changing needs of society. It covers a wide variety of acts, is a competent verdict on a number of offences and is gender neutral, providing that the offence may be committed by persons of the same or different sex. Although the proposed definition of rape provides for the insertion of objects other than the penis, numerous non-penetrative acts may still constitute indecent assault. The recommendation is that the offence is not codified. Suggested offences include:

Administering substance for the purposes of committing a sexual act

5. **Any person who administers or applies to, or causes to be taken by another person any substance with the intent –**
 - (a) **to overpower that other person in order to commit a sexual act with that person, or**
 - (b) **to induce that other person to allow him or her to commit a sexual act with that person, is guilty of an offence.**

Compelled sexual acts

5. (1) **Any person who intentionally compels another person – (a) to engage in a sexual act with that person; or (b) to engage in a sexual act with a third person; or (c) to engage in a sexual act with himself or herself, is guilty of an offence.**
- (2) **Any person who intentionally causes another person to engage in a sexual act with an animal is guilty of an offence.**

Sexual offences against and by children:

30. The current section 14 of the Sexual Offences Act reads:

Sexual offences with youths

- (1) Any male person who –

- (a) has or attempts to have unlawful carnal intercourse with a girl under the age of 16 years; or
 - (b) commits or attempts to commit with such a girl or with a boy under the age of 19 years an immoral or indecent act; or
 - (c) solicits or entices such a girl or boy to the commission of an immoral or indecent act, shall be guilty of an offence.
- (2) It shall be a sufficient defence to any charge under subsection (1) if it shall be made to appear to the court –
- (a) that at the time of the commission of the offence was a prostitute, that the person so charged was at the said time under the age of 21 years and that it is the first occasion on which he is so charged; or
 - (c) that the girl or person in whose charge she was, deceived the person so charged into believing that she was over the age of 16 years at the said time.
- (3) Any female who –
- (a) has or attempts to have unlawful carnal intercourse with a boy under the age of sixteen years; or
 - (b) commits or attempts to commit with such a boy or with a girl under the age of 19 years an immoral or indecent act; or
 - (c) solicits or entices such a boy or girl to the commission of an immoral or indecent act, shall be guilty of an offence.
- (4) It shall be a sufficient defence to any charge under subsection (3) if its shall be made to appear to the court –
- (a) that the boy at the time of the commission of the offence was a prostitute, that the person so charged was at the said time under the age of 21 years and that it is the first occasion on which she is so charged; or
 - (b) that the boy or person in whose charge he was, deceived the person so charged into believing that he was over the age of 16 years at the said time.

31. The issue paper underpinning the report asked what the age of consent should be. In response to this question the opinion was held that 18 is an appropriate age of consent. Sexual intercourse is essentially an adult activity and an informed mature decision must be made by an individual in respect thereof. There was no justification in requiring a different age of consent (19 years) when it comes to immoral or indecent acts as opposed to sexual intercourse (16 years). It was felt that the age of consent for all acts should be the same and be in the region of 18 years for both boys and girls.

32. Discussion of defences concluded that the defence of marriage should not be retained as it was still possible in some cultures for a very young girl to be forced to marry. The fact that the accused was deceived as to the victim's age poses many problems. It can be used as an easy defence in certain cases. There may well be allegations of unconstitutionality should the accused have to bear the onus of proving his belief was justified, as clearly the Constitution gives everybody the right to be presumed innocent. The fact that the victim was a prostitute should not be a defence. The need to protect children from exploitation is overwhelming. The fact that the accused was under 21 should not be a defence. Statistics of child abuse cases show a significant percentage of acts are committed by youthful offenders who harm and exploit children, in some cases both



brutally and ruthlessly. Youth may, however, be a very important mitigating factor when it comes to sentencing. The fact that it was the first occasion on which the accused has been charged is also no defence. Anyone who wants to interfere with children sexually should know that it is wrong and if children are to be adequately protected this defence cannot possibly be retained.

33. It is suggested that the reason for the existence of an offence concerning sexual behaviour with young persons should be to punish sexual abuse and exploitation of children. By criminalising sexual behaviour with young persons in separately defined offences prominence can be given to the seriousness of such offences and the particular protection which should be afforded to young persons at risk of sexual exploitation. By incorporating such behaviour with a general sexual offence such as rape where a wide spectrum of victims can be identified, these issues may be lost.

Persistent sexual abuse of a child:

34. One of the most serious problems facing law enforcement officers, etc., is the legal requirement that every charge must be specified with sufficient particularity. This is to enable an accused to know what he or she is charged with. The difficulties encountered by the prosecution when the offences involve the persistent sexual abuse of children are: the young age of the complainant, competency to give evidence, highly technical rules of evidence that may exclude relevant evidence being led, the abuse may occur over a long period of time, no clear distinction can be easily made between the separate attacks and frequently no complaint or report was made for some time. Some of these problems can be attributed to the fact that the majority of sexual offences against children are perpetrated by persons known to and trusted by the victim. South African prosecuting authorities typically rely on section 94 of the Criminal Procedure Act of 1977 which says that where it is alleged that an accused on various occasions during any period committed an offence in respect to a particular person, the accused may be charged in one charge with the commission of that offence on diverse occasions during a stated period. However, if the defence requests further particulars, the court may dismiss the case against the accused.

35. As a result, this often translates into a child having to give details as to date, time, surrounding circumstances, sequence of events, etc. Children do not remember in this way and the younger the child the more unrealistic the expectation that they can behave in what is essentially an adult manner. All these factors are compounded by the trauma a sexually abused child suffers as a result of the abuse.

Children in commercial sexual exploitation:

36. The Commission shares the sentiments of those who have made submissions in this regard and categorically state that a complete ban should be placed on child prostitution and that anyone involved in sexually exploiting a child whether as a pimp or customer should be severely punished for doing so. In order to portray uniformity with international instruments it is suggested that a child with regards to commercial sexual exploitation should be seen to be anyone under the age of 18 years.

37. The Commission is of the opinion that commercial sexual exploitation implies sexual abuse of children based upon remuneration in cash or kind. In kind remuneration should be interpreted broadly to cover a variety of situations where there is some value, profit, benefit or consideration interlinking or exchanging between the child and the adult or between the adult and another adult in regard to the child.

Proposals:

38. Sexual relations with young persons should constitute a separate offence where the existence or absence of consent is not an element of the offence and therefore not an issue to be placed in dispute.

39. The current section 14 definitions to be replaced with a new statutory offence:

Child molestation

7. (1) **Any person who intentionally commits a sexual act with a child, at least two years younger than him or her, shall be guilty of an offence.**
- (2) **Any person who commits any act with the intent to invite or persuade a child, at least two years younger than him or her, to allow any person to commit a sexual act with that child shall be guilty of an offence.**
- (c) **Consent by a child to any sexual act shall not be a defence to a charge under this section.**

40. The Commission is mindful of the possible difficulties that may face an accused of an offence that is not specific in relation to when the offence is alleged to have taken place. Furthermore, it is recognised that the accused person has constitutionally protected rights that guarantee procedural fairness. On a balance it is of greater importance to protect children from persistent sexual abuse and it is recommended that an offence be created.

Persistent sexual abuse of a child

8. (1) **Any person who persistently sexually abuses a child is guilty of an offence.**
- (2) **For the purposes of this section, a person shall be taken to have persistently sexually abused a child if that person has engaged in a sexual act with the child on two or more occasions during a specified 12 month period.**

41. The Commission recommends a complete prohibition on the commercial sexual exploitation of children in the new sexual offences act. Commercial sexual exploitation includes child prostitution, child pornography and trafficking in children. The Commission is convinced that the commercially sexually exploited child is a victim in need of care and protection and not a criminal. As a consequence, the Commission specifically proposes that any person who commits a sexual act with a child for financial or other reward, favour or compensation be guilty of an offence; that any person who invites, persuades or induces a child to allow any person to commit a sexual act with a child for financial or other reward, favour or compensation be guilty of an offence; and that any person who participates in, or is involved in, the commercial sexual exploitation of a child be guilty of an offence.

42. In order to combat child sex tourism and the other forms of commercial sexual exploitation, the Commission believes that it is necessary to provide for effective national legislation which has extra-territorial application. The Commission therefore proposes to give extra-territorial jurisdiction to the new sexual offences act on the basis that the wrongdoer is a citizen or permanent resident of the Republic. Legal entities incorporated or doing business in South Africa are also included in the scope of persons who can be prosecuted under the act. The Commission also proposes certain auxiliary measures to ensure the eradication of the commercial exploitation of children. Amongst these are the withdrawal of operating licenses of any travel agent or bureau found to have organised or planned organised sex tours within the borders of South Africa or abroad, the deportation after serving sentence of all foreign nationals for committing a sexual offence in South Africa, and the withdrawal of the passport of any South African citizen convicted of a sexual offence while abroad. The Commission endorses the following recommendations regarding extra-territorial operation of legislation:

- That the South African Government exercise jurisdiction because the wrongdoer is one of its citizens or permanently resident in South Africa.



- That legal entities incorporated or doing business in South Africa be included in the scope of persons who can be prosecuted under this type of provision.
- That the principle be accepted whereby sexual offences are prosecuted because these offences are crimes for which the international community has undertaken responsibility to punish wrongdoers in terms of inter alia the Convention on the Rights of the Child.
- That to enable South Africa to exercise jurisdiction of this nature provision for extra-territorial application be made in specific legislation dealing with sexual offences.
- That in keeping with the German example, that extra-territorial provisions should be expressed to be independent of the law of the country where the criminal act was committed, meaning that a South African national or permanent resident committing an act which is criminal in South Africa, in another country, even if it is not a crime in the other country, may be prosecuted for the crime in South Africa.
- That any foreign national convicted of a sexual offence within South Africa be deported after serving his or her sentence and be prohibited from entering the country again.
- Cancelling and retracting the passport of any South African citizen convicted of a sexual offence abroad.
- Making provision for the retraction of operating licences of any travel agent or bureau found to have organised or planned to organise sex tours within the borders of South Africa or abroad.
- That 18 be used as the age of protection of children from sexual exploitation, irrespective of the issue of the child's consent and the need to prove that the sexual misdeed is a crime in both the country of origin and the destination country of the sex exploiter (the double criminality principle) be discarded.

43. To give effect to these recommendations:

Child prostitution

- 10. (1) Any person who intentionally commits a sexual act with a child for financial or other reward, favour or compensation to the child or to any other person, is guilty of an offence.**
- (2) Any person who intentionally invites, persuades or induces a child to allow him or her or any other person to commit a sexual act with that child for financial or other reward, favour or compensation to the child or to any other person, is guilty of an offence.**
- (3) Any person who intentionally participates in, or is involved in, the commercial sexual exploitation of a child, is guilty of an offence.**

Keeping a brothel for child prostitution

- 11. (1) Any person who intentionally keeps a brothel is guilty of an offence.**
- (2) For the purposes of this section keeping a brothel includes owning, leasing, renting, managing, occupying or having control of a brothel.**

Offering, engaging a child for commercial sexual exploitation

- 12. Any person who intentionally offers or engages a child for purposes of the commercial sexual exploitation of that child is guilty of an offence.**

Facilitating or allowing commercial sexual exploitation

- 13. (1) Any person who intentionally facilitates, in any way, the commercial sexual exploitation of a child is guilty of an offence.**
- (2) Any parent, guardian or caregiver of a child who intentionally allows the commercial sexual exploitation of such child is guilty of an offence.**

Receiving consideration from commercial sexual exploitation

- 14. (1) Any person who intentionally receives any financial or other reward, favour or compensation from the commercial sexual exploitation of a child, is guilty of an offence.**
- (2) Any person who intentionally lives wholly or in part on rewards, favours or compensation from the commercial sexual exploitation of a child is guilty of an offence.**

For the purpose of the above the following terms are defined:

“commercial sexual exploitation” in respect of a child means engaging the services of a child, or offering such services to any person, to perform a sexual act for financial or other reward, favour or compensation to the child or to any other person.

“child” means any person under the age of 18.

Sexual offences against mentally impaired persons:

44. The general offences of rape, indecent assault and incest apply to all persons including victims with impaired mental functioning. The question arises whether there is anything about their personal circumstances that requires further legislative enactments to ensure that they are adequately protected. What is of concern is their particular vulnerability due to the fact that they often do not understand what has happened to them, are unable to communicate their experiences and do not have access to persons outside their home or residential facility where the abuse takes place.

45. Section 15 of the Sexual Offences Act 1957 places an absolute prohibition on any sexual relations with persons who suffer from a certain degree of mental disability:

Sexual offences with idiots or imbeciles

Any person who –

- (a) has or attempts to have unlawful carnal intercourse with any male or female idiot or imbecile in circumstances which do not amount to rape; or
- (b) commits or attempts to commit with such a male or female any immoral or indecent act; or
- (c) solicits or entices such a male or female to the commission of any immoral or indecent act, shall, if it be proved that such a person knew that such male or female was an idiot or an imbecile, be guilty of an offence.



46. In *S v N* the court acknowledges that the layman would not have the ability nor the facilities to establish whether a person falls into the category of either an idiot or an imbecile, but comes to the conclusion that persons who can be categorised in this way are so plainly incapable that even a layperson will realise that they do not have the ability to make decisions concerning their sex life. It is acknowledged that this interferes with a mentally impaired person's ability to conduct his or her private life, but the justification put is the fact that the majority of mentally impaired adults have normal sexual desires but lack the mental control to express these desires with responsibility.

47. It is suggested that persons who are mentally impaired should be afforded protection from sexual exploitation. This protection should place the ability of a mentally impaired person to make decisions concerning expression of his or her sexual desire on par with his or her ability to conduct the rest of his or her private life. The question in this regard is how the reference to a mentally impaired person should be defined in statute. The terminology currently used has specific technical meanings. The margins between the various categories into which mentally impaired persons may be classified are not clearly defined and even among experts there may be a difference of opinion on the classification of a person's level of mental impairment. This will hamper the State's case to prove that the victim falls below a specific level of mental impairment and to prove that the accused was aware of this fact, and not merely that the victim was suffering from some sort of mental deficiency.

Proposals:

48. The Commission proposes the enactment of a separate statutory offence covering exploitative relationships with mentally impaired persons and situations where the mental impairment of the complainant excludes free and informed consent to acts of sexual penetration. There are cogent policy reasons for regulating sexual activity within these particular relationships: a person who is mentally impaired may not want a sexual relationship, but may find it difficult to refuse; other concerns include the psychological harm which may result from such a relationship as well as the breach of trust by a care giver.

49. The view is held that the continued use of the words 'idiot' and 'imbecile' are derogatory and it is proposed that the term mentally impaired be used in their place. Another reason for this change is that use of the existing technical terms make it extremely difficult for the prosecution to prove that the victim falls into one of the categories and that the accused knew that the victim did so.

50. That it is important for the law not to overregulate and to recognise that mentally impaired persons have sexual rights to make decisions concerning reproduction and to security and control over their bodies. A general blanket prohibition does not recognise the sexual rights of mentally impaired persons.

51. It is suggested that the scope of the offence is:

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

Sexual offences with mentally impaired persons

- (1) Any person who intentionally commits a sexual act with, or in the presence of, a mentally impaired person shall be guilty of an offence.**

- (2) Any person who commits any act with the intent to invite or persuade a mentally disabled person to allow any person to commit a sexual offence with that mentally disabled person shall be guilty of an offence.

Definition of ‘mentally impaired person’

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

Incest:

52. The common law offence of incest consists of unlawful and intentional vaginal sexual intercourse between two persons who on account of consanguinity (blood relationship), affinity (relationship by marriage) or an adoptive relationship may not marry one another. Consent is not an element of the crime. Prohibitions include:

consanguinity: ascendants and descendants in the direct line ad infinitum, for example father and daughter; grandfather and granddaughter; collaterals, if either of them is related to their common ancestor in the first degree of descent, for example brother and sister.

affinity: the only prohibition on intermarriage between relations by marriage applies to those in the ascending and descending line ad infinitum. This indicates a fairly substantial statutory relaxation of the common-law position.

adoptive relationship: there is an absolute prohibition against marriage or sexual intercourse between adoptive parents and adopted children.

53. The statutory presumption in incest is that it will be sufficient at criminal proceedings at which the accused is charged with incest, to prove that the woman or girl on whom and by whom the offence is alleged to have been committed is reputed to be the linear ascendant or descendant or the sister, stepmother or stepdaughter of the other party to the incest. A girl under the age of 12 cannot be convicted of incest as an accomplice.

54. With regard to the moral abhorrence of sexual relations between close relatives, the question arises as to whether a criminal sanction should be used to enforce public morality, as the degrees of relationship that fall within the prohibition are subject to the mores of the day. The point is readily taken that what adults and adult family members do in the privacy of their bedrooms is their business and the criminal law has no role to play there. The criminalising of incest is often justified on the ground that it prevents a particular and abhorrent form of sexual abuse against children. As incest is only committed by the performance of vaginal sexual intercourse, the crime cannot be used to penalise homosexual abuse of children or indecent assaults upon children, nor does it punish a female relative abusing a female child.

55. The most commonly used reason for the prohibition is that it prevents persons who share the same genetic makeup from procreating and thereby avoiding possible genetic, mental or physical defects. This reason cannot apply where persons are related by affinity or adoption, and there is no similar provision seeking to prevent procreation between unrelated partners with inherent genetic problems. On the other hand studies have shown that there is a direct impact on infant mortality and congenital malformation. Where the sexual intercourse is consensual and voluntary, it could be argued that there are no elements of exploitation or corruption which could justify the imposition of criminal sanctions. The assumption may be made that the crime exists only as a reflection of a moralistic disapproval of the choice of a sexual partner. The criminal law should only be used to prevent harm and, as incest is not necessarily harmful and often



occurs by mutual consent, it is a victimless crime and therefore should not be criminalised. **Temkin** has found, through comparative research, that incest in all its forms is frequently harmful or extremely harmful to victims and that the notion of consent is problematic. The Scottish Law Commission has found that not only is incest harmful to the victim but to other members of the family as well.

56. It is clearly vital to the actual security and the sense of security of all members of the family unit that certain boundaries are set and preserved within the family. Of these boundaries the sexual one is the most fundamental. Some research indicates three factors which determine the degree of seriousness or impact of 'sexual molestation' on a child. One of these factors is the relationship with the child. A child who is related to an offender often endures the situation for much longer and in addition the abuse is usually repetitive and extensive. Of immense concern is that despite the fact that incest usually is repetitive and extensive, the perpetrator is usually given the benefit of being sentenced as a first time offender. The emotional bond which exists between family members leaves conflicting feeling within the child, who may feel guilty about the possible disintegration of the family unit. Children abused by their families often leave home, and because such children often wind up on the street, they are likely to be further abused and sexually exploited.

57. Where a significant power imbalance (i.e. age and physical difference) exists between siblings, and the younger or weaker children are sexually abused by the older sibling, this amounts to rape. We do not see a role for the criminal law to regulate what is quaintly called 'sexual experimentation' by siblings. Prosecutorial discretion will therefore continue to play a critical role.

58. The response to the questions posed in the issue paper was that parenting figures other than the biological parents or blood relatives, (e.g. custodians, care givers, child minders, guardians, foster parents and adoptive parents) should also be included in the category of persons for whom incest is possible. This seems to some to be sensible as the frequency and variation of extra-marital relationships is increasing, and to determine the offence of incest by reference to marriage or blood ties is inadequate and does not prevent the mischief, namely the practice of sexual relations within a family unit.

59. Three schools of proponents advocating the abolition of the common law crime of incest have emerged. The first group proposes relying on the existing sexual offences such as rape and those offences which proscribe sexual relations with persons under age. The second group proposes decriminalisation of sibling incest, even where the girl (or boy) is under the age of consent in some or all circumstances. The third group wishes to see the introduction of a new offence of sexual abuse of authority.

Relying upon the existing offences:

60. This option has its flaws in that it does not account for the fact that the breach of trust, the destruction of boundaries, the deprivation of childhood which incest victims describe, the repetitiveness of the offence as well as the genetic risks will generally have little application to non-incestuous cases of under-age sex.

Decriminalisation of sibling incest:

61. The reasoning underpinning this proposal is that much or most sibling incest is simply children experimenting with sex in a manner that is relatively harmless. A flaw in this argument is that an older sibling may fulfil an authoritarian position in the family and may use a younger sibling as a sexual guinea pig. Studies have shown that even where siblings are fairly close in age, force and coercion may be involved. If this option were implemented, a brother, irrespective of his age, would for instance be free to exploit his sister with impunity unless a rape charge could be brought. In addition to this the genetic argument is also valid here.

A new offence of sexual abuse of authority:

62. This would be committed where a parent, adoptive parent, step-parent, foster parent or long-term cohabitee of a parent has sexual relations with a child. This could be extended even further by including teachers, probation or childcare officers, games coaches and indeed anyone in control of children. An objection to this proposal is that very different relationships will be treated the same. The psychological relationship between parent and child is unique and the fracture of the sexual taboo between them is particularly damaging. Abuse by others is generally not in the same league. An alternative would be to introduce a new offence in addition to and not as a substitute for the offence of incest.

Proposals:

63. The crime of incest in principle should be left in the common law, however, in order to make the crime gender neutral and to expand the ambit of the common law offence, it is recommended that the proposed statutory definition of ‘sexual penetration’ be made applicable to the common law offence of incest.

Unnatural offences:**Sodomy:**

64. The reasons usually advanced for criminalising sexual intercourse between two men is that it denies the basic purpose of the sexual relationship, viz. procreation, it subverts the institution of the family and is a corrupting influence on young people. It has been rightly shown that none of these contentions is rationally persuasive: celibacy and contraception also prevent procreation, but they are not criminalised; subversion of the institution of the family makes sense only if it assumes that all humans will enter into exclusively homosexual relationships, which is patently not the case (and following the argument to its rational conclusion means that adultery ought also to be criminalised), and there is no evidence that homosexuals as a group are more inclined to corrupt young persons than anyone else.

65. The traditional crime of sodomy discriminates against gay males. There is no equivalent common law crime regarding females or heterosexual intercourse between consenting adults, and violates the rights to human dignity and privacy.

Bestiality:

66. Bestiality consists of unlawful and intentional sexual intercourse by a person with an animal. The offence is gender neutral and the person and the animal may be male or female. Because of the penetration requirement, bestiality does not cover the situation where a person performs oral sex on an animal or vice versa. Two major issues need to be addressed. The first relates to the need to create a statutory offence to cover forced or manipulated sexual activity between children and animals, while the second issue relates to the penetration requirement for the existing common law crime of bestiality.

67. The majority of respondents are in favour of the enactment of legislation to cover forced or manipulated sexual activity between children and animals in response to a question posed in the Issue Paper. Where such sexual acts are being engineered by an adult, this should amount to a statutory offence by the adult, and penetration should not be a requirement for such an offence.

68. The Commission has seen that the criminal law does not serve to protect every societal interest, and is reluctant to express an opinion on whether the common law offence of bestiality should be repealed. It is best to leave that question to the courts who are in the best position to judge societal interests. This flexible approach also makes it unnecessary to consider whether



penetration should remain. However, the Committee is adamant that there needs to be a new statutory provision to cover forced or manipulated sexual activity between persons (children and adults alike) and animals.

Other unnatural sexual offences:

69. This consists of the unlawful and intentional commission of an unnatural sexual act by one person with another person or animal. Lack of consent is not an element. There is doubt as to whether this category of offence still exists and doubt as to whether the Constitutional Court would give recognition to such an unduly vaguely defined crime. Some legal commentators say this crime will always be covered by indecent assault.

Proposals:

70. In the **National Coalition for Gay and Lesbian Equality** case the Constitutional Court declared the common law offence of sodomy unconstitutional. No proposals are made in respect of repeal or otherwise. The Commission believes it best not to express any opinion on whether the common law crime of 'unnatural' sexual offence still exists and what sexual conduct it prohibits. Our courts are in the best position to make these decisions and may well in future find it necessary to express society's condemnation (or approval) of sexual acts considered unnatural.

71. The Commission does not recommend the repeal of the common law offence of bestiality, but does propose the inclusion of a statutory provision in a new sexual offences act to cover forced or manipulated sexual activity between persons (children and adults alike) and animals.



Appendix G

Information from other countries:

A paper for the Sex Offences Review

*This paper was prepared for the Sex Offences Review
by the Research, Development and Statistics
Directorate of the Home Office as an initial overview
of information from other countries.*



Sex offences review: information from other countries

1. This paper provides a summary of information on sex offences legislation in Australia, New Zealand, Canada and the Republic of Ireland. A letter was sent to the governments of these countries. Information has also been obtained from academics with expertise in this area.

2. Australia

Background information

2.1 Australia has a federal system of government with powers distributed between the federal government (the Commonwealth) and the eight states and territories. Northern Territory, Queensland, Tasmania and Western Australia have a criminal code, while New South Wales, Victoria, South Australia and the ACT (Australian Capital Territory) are common law jurisdictions.

2.2 Responsibility for sex offences legislation lies with the states and territories, which operate under eight different sets of laws. Although there are some common features, mainly as a result of reforms over the last twenty or thirty years, there are also considerable differences, for example in terminology and definitions.

The Model Criminal Code and other reviews

2.3 The Australian Federal Government is encouraging the development of improved and more consistent laws through the Model Criminal Code project. A discussion paper “Sexual Offences against the Person” was produced in 1996. There was considerable controversy when the discussion paper was released. The final report was published in May 1999. It is hoped that state and territory governments will move to standardise laws, but to date implementation of the Model Criminal Code has been conducted in a piecemeal way. The Federal government expects it to take some time before reforms are implemented.

2.4 Some jurisdictions are carrying out their own reviews, additional to, or to complement the work on the Model Criminal Code. The Tasmanian Justice Department has just completed a review but it has not yet been made public. They will send a copy to us in due course. Tasmania has also commissioned an academic at the University of Tasmania to carry out work on the operation of the Tasmanian Criminal Code provisions relating to consent. Again, this should be available to us in the next couple of months.

‘Positive’ consent

2.5 Substantial changes were made to rape law in the state of Victoria by the Crimes (Rape) Act 1991 (Vic). The Act aimed to clarify the concept of consent, to reaffirm the fundamental right of a person not to engage in sexual activity and to give greater protection to complainants in court proceedings.

2.6 For the purposes of rape and other sexual offences, a statutory definition of consent was introduced, with consent defined as ‘free agreement’. The Act contains a non-exhaustive list of circumstances where the person does not freely agree to an act. These include, for example, where the person submits because of force or the fear of force to that person or someone else, where the person submits because she or he is unlawfully detained, where the person mistakenly believes that the act is for medical or hygienic purposes and where the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing. The importance of the free agreement standard of consent is underlined by mandatory jury directions on the meaning



of consent and free agreement. Judges are required to direct juries (in relevant cases where consent is an issue) that the fact that a person did not say or do anything to indicate free agreement is normally enough to show that the act took place without that person's free agreement. In addition, a person cannot be regarded as frilly agreeing just because she was not physically injured and/or did not protest or physically resist, or because on an earlier occasion she freely agreed to engage in another sexual act with that person, or a sexual act with another person. The existing *mens rea* regarding belief in consent is retained but judges are required to instruct juries to take into account whether belief in consent was reasonable in all the relevant circumstances.

2.7 A review of the Act was undertaken in 1996 by the Department of Justice with the aim of assessing the operation and impact of the Act on the processing of rape cases. Much of the evaluation dealt with the provisions in the Act relating to alternative arrangements for giving evidence and the trial experience. The evaluation of the implementation and operation of the new definitions and directions took a fairly qualitative approach which involved examination of transcripts of judges' directions to juries and interviews with solicitors, magistrates, barristers and judges. It aimed to determine whether judges were directing juries in accordance with the mandatory provisions introduced by the Act.

2.8 The evaluation found that the new definition of consent had received broad acceptance from legal personnel, and, in general, had been incorporated into judges' instructions. It seemed to have influenced decisions about whether to prosecute some cases which would otherwise not have been proceeded with because of perceived difficulties in proving lack of consent. The only perceived problem was that some judges did not consider which of the conditions under which a person had not freely agreed were relevant to a particular case and instead listed all conditions. For example, the jury might be told that a person could not consent if asleep, drunk or drugged at the time of the assault, where this was not an issue in the trial. Further training in this area was recommended.

2.9 Legal practitioners had a mixed response to the introduction of consent directions. Most judges gave each of the directions to the jury but some made it clear that they did not agree with them. In a small number of cases the judge did not give all the relevant directions or gave some which were not relevant, which could be confusing for a jury. The review recommended that judges take a more rigorous approach to the directions and make sure that each direction is relevant to the case in question. It also recommended further legislation which would make clear that judges' discretion to comment on the evidence should not include personal views about a case.

2.10 Among commentators outside government, there is some debate about whether positive consent formulations have changed the practice of consent directions and some are now less enthusiastic about the change than they were initially.

2.11 The 'free agreement' definition of consent is also used in the Northern Territory and a list of circumstances in which a person does not freely agree is given in the Criminal Code. The circumstances where a person does not freely agree are similar to those in use in Victoria but include some additional ones (where a person is mistaken about the sexual nature of the act or the identity of the person or where a person submits because of a false representation as to the nature of the act).

Age of consent

2.12 All jurisdictions have different ages of consent which may vary if the activity is heterosexual or homosexual. In the ACT, the age of consent for both heterosexual and homosexual sex is 16. In South Australia and Tasmania the age of consent for both is 17 (although homosexual sex was illegal in Tasmania until fairly recently). Victoria has a series of general offences which

apply where the child is between 10 and 16 and have recently moved to implement an offence of persistent sexual abuse of children. In New South Wales and the Northern Territory, the age of consent is 16 for heterosexual sex and 18 for homosexual sex. In Queensland, it is an offence to have vaginal intercourse with a girl under 16 or anal intercourse with a person under 18. In Western Australia, it is an offence to sexually penetrate a child under 16, while the age of consent for homosexual sex is 21.

2.13 In some states there is a different age of consent where the accused has a position of trust in relation to the victim. In South Australia the age of consent is 18 in cases of sexual relations between a child and a guardian or schoolteacher. In Victoria sexual penetration of a 16 or 17 year old is prohibited if the child is under the ‘care, supervision or authority’ of the accused. In the ACT, the age of consent of 16 is negated where there is abuse by a person of his or her position of authority over the victim.

2.14 The age at which a child cannot consent to sexual activity at all also varies from 10 in New South Wales, Victoria and the ACT to 16 for females and 18 for males in the Northern Territory and Queensland.

2.15 The Model Criminal Code recommends that the age of consent for males and females be 16, that the age at which a child cannot consent is 10 and that the ages of restricted consent be set at 10 to 16 years.

Children and other vulnerable groups

2.16 Non-consensual sexual offences apply to both children and adults. In all jurisdictions there is a separate category of offences which deals specifically with children. The main feature of these is that consent is irrelevant (subject to certain defences).

2.17 The general offences of rape/sexual assault and indecent assault apply to victims with impaired mental functioning (senility, intellectual disability, mental illness, brain damage and severe personality disorder). All jurisdictions also have specific offences relating to this group. Most prohibit sexual/indecent acts with a person with impaired mental functioning but various defences can be given, for example where the accused did not know this was the case or where an offence was not sexual exploitation. New South Wales, Victoria and the Northern Territory have specific offences prohibiting sexual/indecent acts between caregivers and people with impaired mental functioning.

Male rape

2.18 On the whole, no distinction is made between rape of a male or female. New South Wales has specific provisions dealing with homosexual rape.

Homosexual offences

2.19 There are now no specific offences relating to homosexual activity between consenting adults in private although the law decriminalising homosexuality in Tasmania is fairly recent. Commonwealth legislation has been introduced to protect consenting persons over 18 who are acting in private from intervention with their private sexual life. There are differences in some states in the age of consent, as outlined above. In New South Wales, Victoria, South Australia and the ACT, homosexual activity in public places can be dealt with under offensive behaviour provisions that also apply to heterosexual activity in public. Other jurisdictions have offences of gross indecency between males in public places. The Model Criminal Code recommends that there should not be specific offences relating to homosexual conduct, whether in private or public.



3. Canada

Background information

3.1 Sexual offences are included in the Criminal Code which operates at the federal rather than province level. The Code contains all the offences of general application, but preserves common law defences.

Reviews of sexual offences

3.2 The last major review of the legislation was by the federally-appointed Committee on Sexual Offences Against Children and Youths (the Badgely Committee) which reported in 1984. New protections for children were subsequently introduced.

3.3 A detailed background paper on Child Victims and the Criminal Justice System is being completed which considers whether other changes are needed to help protect children from exploitation by adults. The areas being examined are the minimum age of consent, creating child-specific offences against children (e.g. child homicide), sentencing to prevent reoffending against children and children's testimony.

'Positive' consent

3.4 The Criminal Code was amended in 1992 and the substantive law procedures governing rape were reformed. Bill C-49 enacted a statutory definition of consent as 'voluntary agreement of the complainant to engage in the sexual activity in question'. The Bill also listed the circumstances where a person is taken not to consent. Specific situations where there is no consent in law include where the agreement is expressed by the words or conduct of a person other than the complainant, where the complainant is incapable of consenting to the activity and where the complainant expresses, by words or conduct, a lack of agreement to engage in the activity. In addition, the scope of the defence of honest belief in consent was limited. The defence is not available where the accused's belief arose from the accused's self-induced intoxication, or where the accused's belief arose from the accused's recklessness or wilful blindness or where the accused failed to take reasonable steps to ascertain whether the complainant was consenting.

Age of consent

3.5 The general minimum age is 14, with a close-in-age exception. The minimum age for anal sex is 18, with an exception for married couples in private (this offence is under review because of court decisions indicating that the age should be consistent with the general minimum age).

Children and other vulnerable groups

3.6 The offence of sexual exploitation protects young people who are 14 or more but under 18. A new provision on sexual exploitation of a person with a disability was proclaimed in force in June 1998.

Male rape

3.7 There are no homosexual offences as such. The offence of anal intercourse applies to males and females.

4. Republic of Ireland

Background information

4.1 Ireland is a common law jurisdiction. There was little change in the law on sexual offences from the foundation of the Irish State until 1981. In the 1990s a number of pieces of legislation were produced dealing with sexual offence are which had aspects that are relevant to sexual offences.

Reviews

4.2 A Discussion Paper on Law on Sexual Offences was published in May 1998. The purpose of this was to take stock of changes in legislation and to give the public the opportunity to respond to these changes. Responses are still being analysed and any reaction to the Discussion Paper, in terms of legislation, has not yet been decided.

Age of consent

4.3 The age of consent for both males and females is 17 (the same as in Northern Ireland).

Children and other vulnerable groups

4.4 The main sexual offences such as rape, where lack of consent rather than age is the main element, apply equally to all age groups. There is also specific legislation protecting children and mentally impaired people, such as that dealing with incest, unlawful carnal knowledge and child pornography.

Male rape

4.5 This is an offence under section 4 of the Criminal Law (Rape) (Amendment) Act 1990.

Homosexual offences

4.6 Homosexual acts between consenting males were decriminalised by the Criminal Law (Sexual Offences) Act 1993.

5. New Zealand

Background information

5.1 The sexual crimes in the Crimes Act 1961 provide a statutory code for sexual offences. Case law is important in relation to interpretation, setting judicial sentencing principles and maintaining relativity in sentences.

Reviews

5.2 The Ministry of Justice is currently reviewing the sexual crimes provisions of the Crimes Act 1961. The review revisits some of the proposals that were introduced in a Crimes Bill 1989 (which lapsed in 1993) and incorporates further developments in public and judicial thinking since that time. Various amendments are likely. Recommendations are likely to include ensuring that all appropriate sexual offences apply gender neutrally and to rationalise such offences. Offences relating to subnormal persons are likely to be updated. Two aspects of age classifications are also being reviewed: the age of persons against whom offences are committed where a specific age classification is an element of the offence or affects the penalty; and the age of persons who commit certain offences, where the offender's age is an element of the offence or is a defence.



5.3 The Ministry of Justice intends to report on the review in the near future and a report on it may be available later this year.

Age of consent

5.4 The age of consent is 16 for both males and females. It is unlikely that the current review will recommend a change to this.

Children and other vulnerable groups

5.5 There are specific male-principal offences in relation to girls and boys under 12, girls and boys under 16 and girls under 20 who are under the male's care and protection. Sexual intercourse with a severely subnormal person is prohibited. A specific female-principal offence applies to any indecent act between a woman and a girl under 16.

5.6 A general provision provides for an offence, by a New Zealand resident or a person ordinarily resident in New Zealand, in relation to any act outside New Zealand and in relation to a child under 16, where the act would constitute an offence if conducted within New Zealand.

Male rape

5.7 The Crimes Act 1961 does not specifically deal with male rape but such conduct is an offence of unlawful sexual connection, subject to the same maximum penalty as rape (20 years imprisonment). This is unlikely to be changed by the review.

Homosexual offences

5.8 Separate homosexual offences were inserted in the Act under the Homosexual Law Reform Act 1986, specifically dealing with homosexual issues. However, such provisions are being reviewed in light of gender-neutral considerations. There are arguments as to whether the only specific male-on-male offence of unlawful male anal intercourse with a male under 16 or with a severely subnormal person, need be separately retained.

Sheila White
Home Office Research, Development and Statistics
26 April 1999



Appendix H1

Report of a consultation seminar for Legal Practitioners

Thursday, 29 April 1999

Middle Temple Hall, London



Introduction

Betty Moxon opened the seminar by welcoming all those attending. The introductory session which she presented gave information about the Sex Offences Review and in particular, its terms of reference, scope, what members of the review hoped to achieve and how the legal practitioners present could add to the consultation process by sharing their own practical experience of how the current law on sex offences worked – and where it did not.

Justice:

Shami Chakrabarti began the debate by inviting a discussion on the design and structure of the present criminal law, especially how it worked in practice for both prosecution and defence purposes. This had to be set in the context of the ECHR and the implementation of the Human Rights Act in domestic law. Article 6, giving the right to a fair trial, involved concepts of the presumption of innocence and legislators would need to be wary of using reverse burden of proof. Article 7, the right to no punishment without law, precluded the use of retrospective criminal penalties.

Some issues arising from the Sexual Offences Act 1956 which were offered for consideration included:

- the concept of ‘honest belief’ in rape;
- the fact that honest belief did not apply in unlawful sexual intercourse (usi) where the girl was aged less than 13 years;
- how honest belief applied in usi where the girl was aged between 13 and 16 – the ‘young man’s’ defence and its dependency on there being no previous charge;
- ‘defectives’ in relation to capacity to consent;
- concepts of indecency;
- solicitation by men – discrimination and clarity issues;
- living off immoral earnings – an example of reverse burden of proof in the current law.

The following points were made in discussion:

- It was suggested that the first consideration of what should underpin any underlying policy consideration was where *abuse of power* applied in sexual relationships. There might not need to be a wide range of sex offences if this rationale was applied. Sexual activity without consent or the ability to consent were the key issues.
- Views were expressed that the language of the current law (e.g. gross indecency) contained a certain amount of ‘baggage’ which in some circumstances was in itself rather judgmental.
- There was a discussion about the phrase ‘sexual activity’ which had been drafted in the abuse of trust provisions. Suggestions were to use assault rather than sexual activity, although this might not really cover inappropriate behaviour such as incitement to an act. The consensus was that we should allow jurors to set standards for us, rather than trying to define this in statute – there needed, however, to be a health warning about ECHR provisions and the need for clarity, and such flexibility would require monitoring.



- 'Consent' may not be explicit enough. There was some unease that the use of consent implied confrontation between one active party and one passive party. It was thought that perhaps the wording 'free and full agreement' which implied a negotiation between both parties to sexual activity would be better. Others put forward the view that consent was acceptable. In practice it might be categorised as free and full consent (lawful), reluctant consent (lawful) and mere submission (unlawful).
- The issue of sexual activity between those under the age of consent was discussed. It was clearly difficult to prosecute for indecent assault where parties of roughly the same age were involved and the act had been 'consensual'. On the whole, prosecutions would be justifiable when there was either a want of consent or where children (or others) needed a greater degree of protection. The latter would apply particularly where a very young child was involved or where there was a considerable disparity in age. In some ways indecent assault was a helpful label which was understood by the majority of the general public – what might be needed was a descriptive phrase which was equally useful, e.g. intimate assault.

Fairness:

Sally Cole opened this session by asking what the law should be aiming at. From the perspective of the CPS, consideration would have to be given to the impact of legislative reform on current prosecution policy, procedures and subsequent training.

A sensible question to pose at the outset had to be whether society had progressed to a stage where the law on sex offences seemed to be out of date and out of touch with public perceptions of what was seen to be just, fair and tolerant. Should the whole of the law on sex offences be reformed, or was it more sensible and cost effective to target those areas that were seen to be a problem, leaving well alone those parts that were seen to work well and were acceptable to the public? The separation of these various strands would be an onerous task; at the heart of the review were the overarching Home Office aims of a safe, just and tolerant society.

In discussion, the following points were made:

- The term 'defective' in the 1956 Act was out of date and badly in need of redrafting. Sexual activity with defectives was currently prohibited. Whilst the perpetrator of such activity might claim in defence that it was not clear that the other party was a defective, it was often the case that both parties could be described as defective. In those instances, both often enjoyed the sexual activity (mostly in the context of a loving relationship) which made a nonsense of the fact that their actions were criminal. It was suggested that it should only be an offence if either party was incapable of understanding the nature, quality and potential consequences of the act.
- Such capacity for understanding could be ephemeral. The current definition of a defective was very unhelpful and often caused difficulties for mental health professionals involved in the reporting of such offences; one London hospital was currently trying to develop sensible guidelines for its staff. It would assist enormously to have a better definition; e.g. a physically adult person with the mental capacity of a child.
- Discussion of immoral earnings centred on the issue of reverse burden of proof. It was felt that represented some philosophical and moral fudging on the part of legislators. There should be evidence of undue influence, coercion, etc. Although

not part of the review, there was still concern about the nuisance caused by prostitution, e.g. tart's cards. Such advertisements for sexual services, and the seeking of sexual services through kerb-crawling, often caused great offence and concern and might be dealt with by a separate public order offence. Similarly, the possession of obscene and pornographic material, although not included in the remit of the review, was relevant. There was evidence of a link between the possession and use of such material and acts of sexual violence against men, women and children.

- In general, it was felt that the public was not concerned about activity which took place between consenting adults in the privacy of their own homes. This included issues of sado-masochism unless there was lasting or serious harm to individuals as a result. There were anomalies in the law that needed to be addressed – whilst it was legal for a group of consenting heterosexuals or lesbians to take part in group sex in private, it was illegal for three or more homosexual men to take part in similar activity. This was a monstrous invasion of privacy with clear ECHR implications.
- The issue of privacy was a crucial factor. How should it be defined? Obviously the general public had the right to be protected from witnessing or from being forced or coerced into sexual activity. The common law covered lewd and obscene activity which might cause offence to the public. Offences relating to public nuisance could be used for sexual activity in public – and there was a need to remove the fallacy of police officers being considered as members of the public when on duty. However, care would need to be taken not to create unprosecutable 'hot-spots'.
- There needed to be a rebadging of 'outrage' to perhaps 'offence'. What could cause offence to some sections of the public, e.g. men kissing in public, might be perfectly acceptable to others. Different areas of the country would have differing levels of tolerance, with the metropolitan areas being more likely to be most tolerant. Consistency of treatment was required to ensure that the law was fair and just.
- The term 'gross indecency' was too vague and needed to be replaced by a factual definition of the behaviour involved.

Protection:

Dr Liz Kelly initiated the discussion on protection by explaining how, from a feminist viewpoint, there had been a failure of law and practice relating to sex offences. There had been changes in perspective: everyone had the basic right of bodily integrity and liberty. Although there had been an increasing awareness of the extent of coercive and violent behaviour, the law was perceived as not encouraging the reporting of offences and of not giving adequate protection. How far was this failure due to the construction of the law, and were some of the offences anachronistic? For adults, protection only appeared to be offered when violence was involved, which was too narrow. Many adult women had no confidence in the criminal justice system, which appeared to be ineffective as a deterrent.

There were certain contradictions in the law such as offences of *usui* having strict liability whereas there was a different set of assumptions and protections for rape under the age of 16. There was some question as to whether parallel offences/defences and sentencing regimes were required for children and adults. Violence was not a sufficient threshold: abuse of power was more realistic, e.g. abuse of trust or coercion. The labelling of certain sex offences as minor caused some concern – there was no doubt that such behaviour could form part of the pattern of targeting by a particular offender which caused much distress and damage. There also appeared to be distinctions in



sentencing relating to the relationship, e.g. acquaintance rape and stranger rape. This in itself offered differential levels of protection.

Discussion points were:

- It was necessary to distinguish the fact that any punishment must be necessary and appropriate. There was a grey area between the nuclear family and the complete stranger for the purposes of assessing the proximity of any relationship. It was recognised that within the family there was a much greater likelihood of repeat victimisation which proportionally increased the need for extra protection. Custodial sentences remained as a form of protection by way of containment, although judges could only sentence within the limits of their powers – they did not always have the powers to detain young sexual abusers under section 53 of the Children and Young Persons Act (the offence charged must have a maximum sentence of at least 14 years).
- There was concern about the role of treatment for offenders. Many offenders who ‘progress’ through a range of offences would benefit from early intervention. They themselves had often been abused and had low self-worth which needed to be addressed. The existing law provided for probation orders to contain requirements for attendance at Sex Offenders’ Treatment Programmes (STOP). Although available in prisons, up to 50% of sex offenders refused to attend – they thought that their behaviour was normal. Success of treatment was variable: rapists targeting adults were the most difficult. More centres like HMP Grendon Underwood were needed.
- The needs of lesbians, gay men and transsexuals were referred to – all groups which had a ‘bad experience’ of policing and a feeling of revictimisation during criminal justice procedures. There had been in the courts in the last two years an increasing recognition of victims of sex offences as being much more important than in previous years. There had also been recognition of the trauma of giving evidence. This was one of the arguments for piloting the Piggott provisions in full for children’s evidence. The advantage would be that children would be able to ‘relive’ their experiences sooner, but not be required to attend court to do so. However, this would not necessarily prevent the need to revisit the evidence and might create a false sense of protection.
- The Youth Justice and Criminal Evidence Bill should deal with the perceived problem that section 2 of the Sexual Offences (Amendment) Act 1976 should apply to all sex offences and not just to rape. Another avenue of dealing with offences within families might be the introduction of ‘family therapy orders’ to divert the matter away from the criminal process and prove more likely to keep families together. This already happened to some extent, but there were some unresolved issues: the right of fathers to have access to their children; the need for better liaison between the Family Division and the Criminal Courts; disclosure orders and therapists or social workers; and finally, the fact that some children do not want the matter hushed up, but want justice. Family therapy and the criminal process should work in tandem.
- There was anecdotal evidence about activity at residential care homes where young girls were being collected by taxi to work as prostitutes. They were unwilling to give evidence against the pimps and staff at the home felt powerless to physically stop the girls. There was a perception that there were other powers available which might resolve the problem but were not being used.

- Provision should be made for offences relating to long-term abuse. There was a Swedish equivalent which could be modified and applied in England and Wales. This could include a number of counts on the indictment to span a period of time so that evidence could be by reference to landmarks rather than actual dates. Another problem relating to cruelty to children resulting in murder was where both parents denied carrying out the act and accused the other, which led to conviction on the lesser charge of cruelty.
- The time limit for use of one year from the date of the offence sometimes prevented its use as an alternative verdict where the charge of rape became unsustainable. Courts refused the use of indecent assault where the facts showed use. Time limitations on the offences surrounding indecent photographs of children also caused difficulties. Where a common assault was shown on an indictment, the case could not be transferred but had to go back to the Magistrates' Court.
- There was support for the continuance of an offence of incest. Although the gene pool argument was not seen as crucial, society still found the activity repellent. Protection might need to be widened to include all those with parental responsibility and not just blood relatives, as well as step-siblings, etc. There should also be extension of the offence to include homosexual activities.
- Turning to defences, the young man's defence in use was an anomaly. A younger man was probably better equipped to estimate a young girl's age than an older man. Perhaps the defence should apply across the board with exceptions where there had been previous convictions. In rape the 'Morgan' defence, 'wholly unreasonable but genuine belief' should be removed in favour of a reasonable and genuine belief. There could be an objective test for consent. If there were different standards of rape, e.g. intentional rape or reckless rape (preferably using a description other than reckless so as to avoid the legal or Law Commission definition of recklessness) then it should be dealt with in terms of a different sentencing structure.
- Further discussion on consent related to the suggested terminology of a full and free agreement. 'Consent' had connotations of a dominant relationship where compliance was extracted from the weaker partner. Full and free agreement denoted a relationship of equals, which might lead to more justifiable convictions. However, if there was no real change in meaning, there was a danger of losing useful existing case law on consent which would need to be considered. The answer might be to give a statutory definition of consent, to alleviate any doubt about what did not constitute consent – but even if this were shown as an 'inexhaustive list', it could imply that those which were omitted were not covered. A shopping-list mentality was to be deprecated.
- The current law of rape permitted a man to presume consent. There was a widespread view that rape law was ineffective – this was a combination of evidential problems, inadequate medical and forensic examination and the role of the jury. There was some suggestion that a different description should be used for the rape of a man. The statute as amended was difficult to understand with inelegant language which needed to be tidied up. There was a proposal that either the definition of rape should be extended or that there was scope for a new offence of aggravated indecent assault for which a maximum penalty of life imprisonment should be available.



Closing session:

Betty Moxon invited the three facilitators to sum up the views which had been expressed during the day. These were that:

- the criminal justice system was moving away from moral judgement to looking at the abuse of power;
- consideration needed to be given to the language of substantive offences and its clarity;
- there were many issues around public/private which needed to be resolved;
- the law must determine consent and make sure that the law has the same value for all;
- the seminar had given useful practical examples of where the law worked and where it did not, with suggestions on how it could be drafted;
- reverse burden of proof (e.g. living on the earnings of a prostitute) would need further consideration;
- defences needed to be non-discriminatory;
- the public/private debate still pointed up behaviour that society regarded as so heinous it did not matter where it took place;
- some activities taking place in private can spill over into public life;
- use of public order offences rather than sex offences could be used to regulate inappropriate sexual activity in public, whilst ensuring that 'no-go' areas were not established and clarifying the role of the police;
- the law should have clarity and uniformity;
- there was a tension between legal thinking and public perception;
- the issues involved were very complex;
- that offences were not sufficiently connected to each other either in terms of sentencing or alternatives; and
- there was a need for more dialogue between legal practitioners, legislators and researchers/academics.

In closing the day, Betty Moxon thanked all delegates for their input. The discussion had ranged across the whole gamut of sex offences, and only proved that the review was correct in setting itself the task of looking at the entire structure of the law in that area.

Many thanks to the facilitators and note-takers:

Justice – Shami Chakrabarti (Home Office Legal Adviser's Branch)

Fairness – Sally Cole (Crown Prosecution Service)

Protection – Dr Liz Kelly (University of North London)

Edward Pegg (Home Office Sentencing & Offences Unit)

Linda Bateman (Home Office Special Conferences Unit)

Mark May (Home Office Sentencing & Offences Unit)



Appendix H2

Report of a consultation conference on the European Convention of Human Rights, and its implications for sex offences

10 and 11 May 1999

Jarvis Elcot Park Hotel, Newbury



Introduction

Betty Moxon opened the conference by welcoming all those attending. The opening session provided information about the Sex Offences Review, and in particular its terms of reference, scope, what members of the review hoped to achieve, and how the delegates could provide a positive input to the review. The conference itself emphasised the importance which was being placed on ECHR issues and the implementation of the Human Rights Act. It was also important to recognise concerns that the law at present was not meeting the needs of children and other vulnerable people.

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

Juliet Wheldon QC – Implications of the ECHR for the Home Office Review of Sex Offences

While lawyers and policy makers grapple with questions concerning what the incorporation of the Human Rights Act will mean for our laws and our courts, the public cry out for protection, particularly for the most vulnerable. Recent shocking and tragic events demonstrate that we are not as tolerant and pluralist a society as perhaps we thought, and it is against this back-drop that we begin our discussion.

Other conferences and commentators will deal with the impact of the Convention on our justice system. Will incorporation speed up justice or slow it down? Which of our procedures comply or conflict with Convention rights? What will be the armoury at our judges' disposal in giving effect to those rights?

Ours is a refreshingly different challenge – to ensure that in re-casting the law of sex offences in a fair and effective way, we always keep one eye on the Convention and its inherent checks and balances. To one who has spent a lifetime in Whitehall, that is nothing new. Sound legal advice and sensible policy are as inseparable as a civil servant and his cup of tea.

The substantive criminal law contains one of the most crucial balances between human rights and public protection. Never will this balance be more delicate or important than in a law of sex offences. My hope is that however difficult this balancing act may be, it will seem a little less daunting after this conference.

The notion that there are or should be some fundamental human rights is an old one with which I am sure you are all familiar. For obvious reasons, it gained particular momentum after WW2 following the foundation of the Council of Europe in 1949 and the drafting (by its Member States) of the Convention for the Protection of Human Rights and Fundamental Freedoms in 1950. This became generally known as the European Convention on Human Rights.

The United Kingdom played a major part in its drafting and as a result many of its contents sound deep echoes in our own legal and political tradition. We were the first country to ratify the Convention in 1951 and in 1966, we accepted that an individual person (not just another State) could bring a case against the UK in Strasbourg.

Until very recently the Strasbourg judicial system involved two tiers – the Commission; which decided whether an individual complaint was admissible, and the Court; to which admissible petitions (in the absence of a friendly settlement) were referred for final judgment. Both stages have now been subsumed into the role of the Court. Of course, the Convention's traditional existence lay in international not domestic law. This meant that an individual had to go all the way to Strasbourg to rely on and seek to enforce his Convention rights.



The Convention contains Articles which guarantee a number of basic rights, mostly of a civil and political nature. As one would expect of an instrument of this kind, the Articles are set out in relatively broad terms. It is therefore somewhat dangerous to look at the Articles in a vacuum without some regard for the extensive (if not altogether coherent) case law which has grown up around their interpretation and application. Articles 6, 8 and 14 jump off the page as particularly relevant to an enterprise such as that being conducted by this review.

Article 6 enshrines the right to a fair trial in respect of the determination of an individual's civil rights and obligations, and in relation to any criminal charge which is brought against him. The Article sets out a series of essentially procedural protections. Unsurprisingly, these protections are greater in the case of criminal matters. In the main, one might take the view that Article 6 is far more relevant to criminal justice process than to the substantive criminal law. However there is a possible notable exception to this proposition. Article 6.2 reads:

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

The presumption of innocence may be more than the stuff of defence counsel jury speeches and judicial directions. What if you constructed an offence whereby completely or relatively neutral conduct was criminalised in the absence of making out a defence of innocent excuse? For example, an offence of having sexual intercourse with a defence where the accused proved that he and the other party were over the age of consent and that both were consenting and acting in private. It is more than likely that this contains such a stark reversed burden of proof that no trial for the offence, whatever its procedural guarantees, could deliver the presumption of innocence. Thus Article 6 bites on the *substantive* criminal law.

While Article 6 is relevant to the criminal law as a whole, Article 8 is particularly important in relation to the law of sex offences. It reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the rights and freedoms of others.

Private life is more than 'privacy'. The Commission has discussed it as follows: "***For numerous Anglo-Saxon and French authors the right to respect for 'private life' is the right to privacy, the right to live as far as one wishes, protected from publicity ... In the opinion of the Commission however, the right to respect for private life does not end there. It comprises also, to a certain degree, the right to establish and develop relationships with other human beings especially in the emotional field, for the development and fulfilment of one's own personality.***"

Unsurprisingly, 'private life' includes that most intimate aspect of human activity which is sexual relations. Strasbourg has always recognised that regulation by the State of such relations constitutes an interference with private life whether the relationships involved are heterosexual or homosexual. The more difficult question has always been what and how much interference is *necessary in a democratic society* for one of the reasons contained in Article 8.2. In 1981 the Court ruled that the then total prohibition on male homosexual relations in Northern Ireland constituted an interference which was disproportionate to the aims sought and violated Article 8.

Even in its basic drafting, Article 8 requires a balancing exercise. It does not contain absolute rights, but attempts to ensure that any interference with the protected freedoms is lawful, necessary to a legitimate aim and proportionate to that aim. A lawful interference may or may not be statutory. Importantly however, it must be sufficiently accessible and precise to enable the citizen (with appropriate legal advice) to know how to conform with it. I have already mentioned the legitimate aims (potentially justifying interference) as set out in Article 8.2. Generally, the Strasbourg authorities have not looked too far behind a State's claim that it is pursuing such an aim, but concentrated on whether its action is necessary and proportionate.

I must stress that even if one wanted to, it would not be possible to comply with the Convention merely by adopting an overly lenient or laissez-faire attitude to the criminal law. The Convention recognises both explicitly ('the rights and freedoms of others') and implicitly, that victims have rights too. A girl was raped in a privately-run home in the Netherlands for those with special needs. The prevailing local law at the time did not recognise a complaint unless made by the victim in person. Further, if she lacked capacity, the criminal law could not proceed with the offence. The Court found such a serious absence of protection to be in breach of Article 8. In doing so, it confirmed that the Convention confirmed positive obligations on States as well as negative ones.

The other highly relevant provision is Article 14 which has more than once been used in conjunction with Article 8 to impugn our existing law of sexual offences – most notably in relation to the current differential ages of consent. While not constituting a free-standing right against discrimination, Article 14 protects the individual from discrimination in the application of other Convention rights. Thus in the Sutherland case (on the age of consent) the applicants were able to argue a breach of Article 14 read with Article 8. There was no need to argue that an age of consent set at 18 was in itself a violation of the right to respect for human life – merely that the difference in treatment of, on the one hand, gay men, and on the other, heterosexuals and lesbians constituted a discrimination in the application of substantive rights. Not every difference in treatment will constitute discrimination so as to offend Article 14. What will be repugnant to Article 14 will be a difference with no objective and reasonable justification or which is disproportionate to that justification.

Because of the international nature of the Convention, the Strasbourg authorities sensibly realised that what is necessary and proportionate in Turkey might not go down so well in the UK. In recognition therefore of the highly political nature of some of the balances inherent to the Convention, the Court and Commission allowed Member States a degree of room for manoeuvre – in the application of many of the rights – for local custom, tradition etc., known as the margin of appreciation.

Commentators hotly debate whether such a concept has any role to play once our own domestic judges get their hands on the Convention. I think that the best view must be that however they describe or formulate it, even our own judges will attempt a degree of deference towards the legislature's most difficult and politicised decisions, e.g. about what is necessary in a democratic society for the protection of health or morals. Such judicial generosity will not be inexhaustible and provides no cause whatsoever for complacency.

What then in a nutshell, are my thoughts on the Convention's impact on any new law of sex offences?

- Article 6 means that the law should treat the accused fairly.
- Article 8 means that the law should both respect and protect personal autonomy wherever possible.
- Article 14 means that the law should not discriminate unnecessarily or disproportionately.



I hope you will agree that far from being notions to fear, these ideas represent the kind of disciplined thinking which policy makers and legislators should be applying in any event. The Convention therefore, may be a tool rather than an obstacle in tackling the minefield which lies ahead.

Conrad Prince – Bringing Rights Home

The Human Rights Act (HRA) is one of the most important statutes enacted in Britain for many years. It fulfils the Government's Manifesto commitment to incorporate into British law rights and freedoms guaranteed by the European Convention on Human Rights. The HRA is a central pillar in the Government's agenda for constitutional modernisation in the UK. It will allow British people to claim their Convention rights in British courts, instead of having to go to the European Court in Strasbourg.

The Act underpins this by requiring all public authorities in the UK to act compatibly with the Convention rights. This places new responsibilities on everyone who works in the public authorities, which includes central government, the courts, the police, local government, and many bodies who carry out functions on behalf of the government.

The Convention is binding on the UK under international law – if Strasbourg finds that the UK has violated the Convention then we must take action to bring ourselves into line with it – but the Convention has not been enforceable in domestic law. In general, the courts have not been able to take account of Convention rights in determining cases, and taking a Convention case to Strasbourg can be costly and very time consuming.

The Labour Party committed itself in 1993 to incorporating the Convention into British law. They published a consultation paper 'Bringing Rights Home' in 1996 and made incorporation one of their manifesto commitments. In 1997, the new Government introduced a Bill to give effect to this policy, and the HRA received Royal Assent in November last year.

The Act works in two ways. The first relates to how it affects other legislation. The Act requires that, as far as possible, all legislation (Acts of Parliament, Regulations, Orders, the Common Law) is interpreted and given effect to in a way that is compatible with the Convention rights. This is a very strong provision. It applies to both existing and future legislation.

Where there are two possible interpretations of a piece of legislation, (one which is compatible with the Convention and one which is not), the one which is compatible must be adopted. The fact that a court may have interpreted a law in a certain way before does not mean that after the coming into force of the HRA, it will interpret the provision in that same way. Nor can that earlier interpretation be relied upon by a public authority. If a piece of primary legislation cannot be interpreted compatibly with the Convention, it will remain in force. The courts will not be able to disapply it. That would be to undermine the sovereignty of Parliament – but, a higher court can make what is called a 'declaration of incompatibility'. This is likely to create considerable pressure to amend the legislation so that it is made compatible with the Convention.

The courts **can** quash subordinate legislation that is not compatible with the Convention, unless the legislation or provision has to say what it does because of a provision of primary legislation. In that case, the higher court can make a declaration of incompatibility.

The second main way the Act works relates to the conduct of public authorities. It will be unlawful for public authorities to act or fail to act in a way which is incompatible with ECHR, unless the public authority is acting to give effect to incompatible primary legislation. This covers all aspects of the public authority's activities including:

- drafting rules and regulations;
- internal staff and personnel issues;
- administrative procedures;
- decision making;
- policy implementation; and
- interaction with members of the public.

The Act does not define precisely what counts as a public authority. ECHR is about protecting the individual against abuse of power by the state, rather than protecting one individual against the actions of another. So the Government wanted a wide-ranging definition of the state in order to provide wide protection against an abuse of human rights. The Act does not list out public authorities, but uses the concept of a public function. This covers three types of organisations:

- First, an obvious public authority, such as a government department or the police – everything they do must be compatible with ECHR.
- Second, organisations with a mix of public and private functions – a possible example is Railtrack, which exercises the public function of a safety regulator for the railways, but acts privately in its function as a commercial property developer. The liability of these bodies is limited to their public acts.
- Third, there are bodies, such as most private businesses, which have no public functions and which are not liable under the Act.

It will be for the courts to decide whether or not an organisation is a public authority. A person who believes that their rights have been breached by a public authority will be able to seek redress in the courts. They will be able to sue the authority under the Act or rely on their Convention rights in any other proceedings involving the authority – but only a person who claims that their rights have been breached will be able to bring proceedings. Other bodies, such as civil rights organisations, who are not victims, will not be able to bring proceedings directly, though they will be able to advise and assist those who do.

One key provision of the HRA is already in force. This is section 19, which requires ministers in charge of a bill to make a written statement about its compatibility with ECHR. The minister has to say either that he believes the bill is compatible, or that although he cannot make such a statement, the Government nevertheless wishes Parliament to consider the bill. This means that ministers are already obliged to consider ECHR when developing new legislation.

So you can see that the HRA has powerful provisions with some very significant consequences. They are designed to weave ECHR into the fabric of decision making in law and government. The Government intends the HRA to help create a new culture of rights and responsibilities in Britain. A culture in which public authorities respect and foster the ECHR in everything they do. In this way, the Act provides a new basis for the protection of fundamental rights of every citizen.

At present, the main provisions of the Act are not in force. This is because of the large amount of training and preparation that needs to be done before the Act can be implemented. For example, all **courts and tribunals** will need training to enable them to deal confidently with ECHR points in the cases that come before them. They will be doubly affected by the Act as they will have to adjudicate in human rights cases and consider the compatibility of the legislation. In addition, since they are themselves **public authorities**, they will also have to ensure that they do not breach ECHR. Public authorities will need to review their legislation and procedures for compliance with ECHR, and will also need to train their staff. This is a major undertaking. Because of the need for extensive preparations, implementation will not take place before the year 2000.



Although the Home Office is not in a position to review activity across Whitehall or give authoritative advice on the compatibility of a Department's legislation or procedure, we are helping by co-ordinating a major communications campaign aimed at raising awareness in public authorities about the importance of the Act. The Home Office is also working with the Civil Service College to look at options for training in the HRA.

There is also a Cabinet Office committee which provides some central co-ordination on the Act and draws together some advice on issues that cross departmental boundaries.

The third source of assistance to public authorities is the Human Rights Task Force. This group brings together a wide range of interests from inside and outside government, and includes three ministers, representatives of local government, police and legal interests, the devolved administrations and the leading civil rights groups. The role of the Task Force is to help the Government with preparations for the HRA and increase awareness of the Act and what it means in both the public sector and the population at large.

The Task Force is playing a major role in helping us to shape the way we communicate to public authorities about the HRA. We have developed a major communications programme for public authorities which has the following objectives:

- Alerting public authorities to their new responsibilities under HRA.
- Providing them with a range of guidance material.
- Informing them of training and education opportunities.
- Spreading good practice.

Our communications campaign must make people aware of their new obligations under the Act and how it may affect their legislation and procedures. The HRA will fundamentally alter the balance between those who exercise State power and those who are on the receiving end – but we do not expect that everything public servants have been learning and doing during their careers suddenly to be cancelled and withdrawn. ECHR has been an integral part of our approach to new legislation throughout the post war period. Reviewing new legislation in the light of ECHR has been a continuous process since the 1950s. The HRA significantly strengthens this process, but it is building on something that is already there.

ECHR points will impact at every level of public administration, but we are sending the message to public authority staff that they should not see the HRA as a threat. It is about respecting and fostering ECHR in everything a public authority does. It actually provides an opportunity for public servants to serve the public better.

As part of our communications strategy we have developed a three tier approach to guidance documents:

- a simple leaflet provides a basic introduction to the Act;
- core guidance suitable for all public authorities will give a more detailed overview. Public authorities will be encouraged to develop their own more detailed guidance relating to specific subjects, which could be combined with the core guidance to provide a tailored package; and
- detailed guidance for Whitehall departments has been produced by the Cabinet Office.

The leaflet 'Putting Rights into Public Service' is being distributed throughout the public sector. The core guidance should be available in the summer and the guidance for Whitehall departments is currently going through the final approval process.

We will also be setting up a Human Rights Unit web site on the Internet, where people can access this material and other information about the Act and ECHR. Others are also producing material. Finally, as departments prepare for implementation, they will need to be kept informed of the latest developments and best practice. One of the ways we will be doing this is through a Task Force newsletter.

A major element of all department's preparations for implementation is a systematic review of their procedures and legislation for compliance with ECHR. They are developing strategies to deal with areas where ECHR points may arise. These may be dealt with simply through changes in administrative practice – alternatively, new legislation may be necessary. At the start of this process departments are looking at any possible area where it has been suggested an ECHR point may arise.

We are taking preparations for implementation of the HRA very seriously. This is a very important piece of legislation leading to us having to consider our procedures and laws in a new way.

Keynote Speech: Professor Andrew Ashworth QC – A Question of Balance

Article 8 of the Convention gives the right to respect for private life which is not the same as a right to privacy. What is not so clearly understood is that such rights carry both negative and positive obligations – not only to ensure that a right is not denied, but to ensure that it is provided in the first instance. The leading case to illustrate this is that of *X and Y v the Netherlands*. X was a young female with learning difficulties who had been sexually abused. Because she could not, herself, bring a complaint to the police, there was no recourse to the criminal law – only a civil law route. The European Court determined that a criminal offence was needed to protect her Article 8 rights, so the implications of the Convention are not merely restrictive.

There are specific instances where a state has no obligation to comply – for instance an offence of outraging public decency would not be contrary to Article 8, (because it is not considered necessary for a private life), but the State can only interfere if the conditions in Article 8(2) are complied with. If the State takes the decision (either actively or by omission) to deny a right under the Convention, it has to demonstrate a specific process of reasoning as to why it is not complying. Leading cases include *Dudgeon v UK* which show that there have to be particularly serious reasons for interfering in the most intimate aspects of private life.

That being said, the Strasbourg judgements sometimes produce some surprises. The 1998 case of *PL v Ireland* related to consensual anal sex which was prohibited in all cases – in this instance between a heterosexual couple. The court suggested that this could be regarded as different to homosexual activity because the couple could not claim to be disposed towards anal sex as they could carry out normal vaginal intercourse, and therefore it was not indispensable or necessary for the enjoyment of their private life.

The basic question under Article 8.2 must be: is the State justified in interfering? *Sutherland v UK* relates to the differential age of consent – and the Commission has already indicated that it believes that there is discrimination under Articles 8 and 14. *ADT v UK* provides an examination of the privacy provisions of the Sexual Offences (Amendment) Act 1967.

It has been decided that the phrase 'protection of health and morals' might justify interference. The *Operation Spanner* case (*Laskey and Jaggard v UK* – also known as *Brown*) related to sado-masochistic activity and was taken to Strasbourg on the grounds that the conviction was an interference in their private life – even though some doubts were raised about whether the activity had taken place in private, both from the number of people present and the fact that a video was taken. There is another issue to be borne in mind for ECHR purposes, and that is any penalty must be proportionate. Certainly the initial sentences in this particular case were not proportionate, and would have been contrary to Article 8 if they had not been reduced on appeal.



Although in the Wilson case, consent was given to actual bodily harm (branding of the wife by her husband), the seriousness of the offence was not deemed to be comparable with the previous case, and the consent given was acceptable.

In order to comply with the terms of Article 7, the review must produce a set of coherent and clear sex offences which must be non-retrospective, taking into account whether the development of the law by the courts was reasonably foreseeable with legal advice. Thus it was held that the first conviction for marital rape, in *R v R*, was reasonably foreseeable with legal advice. Furthermore, a recent case (*Elbekkay*) casts new light on fraud and consent. The law has always said that fraud cannot negate consent, with the exception that the impersonation of a husband for the purposes of sexual intercourse was rape. In *Elbekkay* the perpetrator impersonated a woman's unmarried partner, and the Court ruled that it was a rape because her consent, short-lived as it was, was induced by deception, and the importance lay in the question of consent, and not whether the couple were married or not. Was this ruling reasonably foreseeable?

Finally, to comply with Article 6(2), any offence with reverse burden of proof provisions raises some serious questions, as do issues of strict liability. Care will need to be taken in formulating offences to ensure compliance with ECHR and the HRA.

First discussion session: Private Life and Discrimination

Martin Bowley QC

The programme for the conference contained a paper on policy and basic principles for the review, including where the law should intrude on consensual sexual behaviour. The *Spanner* case was lost by a small margin in the Lords, and will no doubt be reviewed and contrasted with *Wilson*, remembering that in *Spanner* there were no permanent injuries and no need for medical attention. Contrast this with the lawful activities of body piercing, tattooing, boxing, ritual circumcision and religious flagellation.

Lord Lester's analysis of the *Sutherland* case which he gave in a recent House of Lords debate showed that the current sexual offences legislation will likely fail the ECHR test as it relates to private life. Sections 12 and 13 of the 1956 Act (buggery and gross indecency) are clearly discriminatory with their privacy provisions relating to more than two men present even when in a private home.

Section 32 is also a discriminatory offence for men. Soliciting for immoral purposes as in the 1898 Vagrancy Act was aimed at brothels and heterosexual prostitution, and was a summary offence. It became indictable through the 1912 Criminal Law Amendment Act (aimed at stopping white slave traffic), which clearly had nothing to do with cottaging and cruising.

There are many contradictions in sexual offences. The penalties available for gross indecency are not comparable to similar heterosexual behaviour. There is no statutory defence as in section 6(3) of the 1956 Act. The case of *Tyrrell* determined that a girl involved in *usi* could not be convicted of aiding and abetting because the law was there to protect her – not so with an under-age homosexual partner. These are the sorts of areas where my perception is that implementation of the HRA is going to have an impact.

I feel optimistic that judges will interpret the Act in a radical way. The tide of public opinion is growing in favour of equality and in the words of Lord Chief Justice Bingham they are showing greater understanding and tolerance. This is a significant time.

John Wadham

There is a three-stage process of learning about the Convention. The balancing process is not one of looking at both sides and weighing it up but of testing against ECHR principles. To take Article 8 as an example, the first step is to identify whether there is a violation of the first part of the Article. The creation of interference through the criminal law by a public authority raises questions. Is the current law clear, precise and sufficiently understood? To interfere in accordance with law, there must be a legitimate aim such as public safety, long-term health effects, etc. The chances in the long term of there being a legitimate (i.e. ‘necessary in a democratic society’) aim remaining for health and morals is not great – particularly for morals.

The law will have to rely on more substantive issues. Privacy with the protection of rights and freedoms of others is necessary in a democratic society. It should be particularly concerned about the rights and freedoms of others, and the extent of the criminal law and punishment. Article 8 gives the respect for private life, which allows and facilitates relationships. Private space is not an exclusive right of occupancy. How do you express your private life? It may be in the public domain with sex on Hampstead Heath. Some cases, such as *Laskey*, will be revisited.

We have no consensus on how the margin of appreciation (or lack of it) will affect rulings, and previous cases may not be indicative. The principles need to be equality between everyone and informed consent of competent adults must be a defence. Proportionality will require **real** harm to others.

The law should be clear and straightforward in order to comply with Article 7 – and imposition of a criminal sanction is only necessary where there is a real harm to others. Some of the issues that need to be addressed include whether consent should be a defence in sado-masochism; and of defectives – not just protection, but the rights of the individual to have sexual relationships. These are difficult issues. Should buggery in privacy have a statutory defence? If the parties in incest are consenting adults that should not be criminal. With indecent photographs of children, who are we protecting? We don’t want a repeat of the *Julia Somerville* case.

Finally, the common law offence of outraging public decency must be used in a tolerant and broad-minded way.

General Discussion:

In discussion the following points were raised:

- Is private life and privacy just a question of geographical location? The current definition of 3 men in a bed clearly falls foul of Article 8, and soliciting offences could be preventing the establishment of a sexual relationship – a part of private life which is normally carried out in public. The boundaries should be redrawn so that the offence is whether someone else has been affected by the behaviour – a single, clear test is needed.
- There are always concerns about the presence of children when any sexual activity is taking place.
- One possible solution is to say that a condition of the offence is that someone is alarmed or distressed. If you want to have sex on Hampstead Heath you have to ensure that no-one is around to see you. Quite often liaison between the police and the gay community leads to a reduction in sexual activity likely to offend the general public. The evil is the offence of nuisance by inappropriate behaviour in public places.



- The general consensus was that the privacy of the home is sacrosanct no matter how many people were involved as long as they were all consenting adults. Although concerns were raised about the possibility of creating 'disorderly houses' it was felt that these could be tackled through remedies for noise and disruption.
- There was uncertainty as to whether the health and morals justification would wither on the vine and the optimism of the speakers was questioned. Incest, for instance, is prohibited for a number of reasons, including the protection of the gene pool and moral repugnance. There is some difficulty in using the criminal law to protect health. Incest between consenting adults can be a continuation of pre-existing coercion and abuse. The role of the criminal law is not just about mischief but about sending signals, but moral disapproval is not sufficient justification.
- The language of the present law is very offensive and presents problems of clarity. Any redrafting should take care with the use of language.
- The Convention sets **minimum** standards that in no way constrain this review.

Second Discussion Session: Fair Trial Issues

Professor Andrew Ashworth QC

Articles 7 and 6(2) relate to the certainty of the criminal law. Its impact ought to be reasonably foreseeable. Some sex offences are very broadly drafted, e.g. 'for immoral purposes', conspiracy to 'corrupt public morals' and conspiracy to 'outrage public decency'. I am glad to see that the review plans to produce coherent and clear offences.

In order to ensure fair trials Article 6(2) gives the right to a presumption of innocence. The leading case here is *Salabiaku v France*. This set the test that reversing the burden of proof may be acceptable within reasonable limits, taking account of the importance of the rights of the defendant. The court must be able to assess fault.

X v UK decided by the Commission is not the Holy Grail. Living off immoral earnings is an example of reverse burden of proof that the Court did not previously find to be in breach. Since then the interpretation of the Convention has been developed and the Court has not considered any reverse burdens since 1988. The Privy Council struck down a reverse burden in relation to the Hong Kong Bill of Rights (the phrasing of which is similar to ECHR) because it was contrary to the presumption of innocence. In doing so they had regard to *Salabiaku*. In Canada their equivalent offence was upheld by a narrow majority, but that offence makes the defendant provide certain evidence rather than clearly reversing the burden of proof. The question of reverse burden of proof is being tested in the *Kebilene* case, which goes before the House of Lords in July.

It is important to remember that even the judges in Strasbourg say that the ECHR is a living document to be developed.

There are also the issues of strict liability, e.g. indecency with children where the boy is 15 and the girl 13 (but probably looked 14). What has to be proved? The prosecuting authorities do not have to prove knowledge. In drafting around knowledge you might use the phrase 'reasonably or understandably', but how do you phrase the fault requirements? Should it have an element of knowledge or strict liability? I feel that where an offence is imprisonable it must not have strict liability.

It will be important for the review to set out clearly the policy reasons and argument for their proposals.

General Discussion:

In discussion, the following points were raised:

- Article 6(2) points up the potential problem of reverse burden of proof where the presumption of innocence is compromised. Both Articles 6 and 7 refer to a common area in which we can expect judges to be particularly active. The key question to ask is whether a law is necessary in a democratic society. For example, the State considers pimping to be a nasty activity and that there may well be an element of coercion when a man lives with a prostitute. This has to be balanced against the fact that these women have a right to a private life and feel that the law prevents them from living with their husband/partner/grown-up son. This might be solved if an element of ‘living with for the purposes of gain’ were to be introduced.
- There is also a need to balance the problems of strict liability and imprisonable offences with the effective protection of children and vulnerable adults.
- Clarity of language is required to ensure certainty in law. In other areas, such as sexual activity with or between children under the age of consent, there is an element of prosecutorial discretion which gives uncertainty.

Ben Emmerson – The Role of the Law in Protecting Victims of Crime

The fundamental distinction to make is that between consensual and non-consensual acts. The law should protect citizens from non-consensual acts but interference in consensual activity requires very strong justification. Article 1 of the Convention puts a duty on the state to secure the rights and freedoms of the individual guaranteed under the Convention. This international treaty, binding on states, allows individuals to take action against a state. Because the state is under an obligation to secure rights, there are circumstances where the state must do more to protect the individual regardless of gender, race or class.

Article 3 gives ‘inhuman or degrading treatment’ as the lowest threshold of violation by a state official or conduct by an individual. Article 8 extends to physical and moral integrity, so if something does not breach Article 3 it may breach Article 8. The state has a duty to guarantee rights in a practical and effective way by:

- having substantive law;
- operational implementation of preventative measures by law enforcement agencies (within practical and sensible limits); and
- an obligation to have independent and effective investigations leading to prosecutions.

Effective law

Victims of sex offences have rights in the criminal justice system. The first important case was **X and Y v the Netherlands**, where a mentally incapacitated 16 year old was not protected from sexual abuse as no criminal remedy was available. The Netherlands’ argued that an absolute prohibition would affect the sexual rights and freedoms of the victim, but the Court found that their law was inadequate to protect the victim and deter the abuse and therefore found them in breach.

Last year, **A v UK**, was a case relating to corporal punishment where a stepfather had been charged with assaulting a child (and acquitted by the jury who deemed it reasonable chastisement) where the natural father took the case to Strasbourg. The Court found the UK to be in breach of Article 3 as the action was ‘inhuman and degrading treatment’. The Government has accepted that the defence of reasonable chastisement should be revised and clarified to ensure that the victim’s rights are protected.



Protective measures

The state has a positive obligation to put in place operational measures to protect the individual. The case of **Osman**, where a child was the object of the obsessional desires of a school teacher who harassed the child and his family, showed that this was a very positive obligation. The teacher had a history of pathological behaviour problems, and although the family reported his activities, no action was taken until, finally, following a bungled attempt to arrest him, the teacher stole a shotgun with which he killed the child's father and seriously injured the child. The European Court established a positive obligation to take all reasonable steps to prevent all foreseeable attacks in the circumstances. Article 2 had been breached.

This obligation can also be triggered by the age and vulnerability of the victim. In **KL v UK** children in a residential home were neglected and abused. The local authority was aware of this as their social services division had received reports describing the children searching through rubbish bins for food on their way to school. The children were not removed from the home or otherwise protected. This failure to protect the children has been ruled admissible for a hearing by the European Court and a decision is expected soon.

Effective investigation and prosecution

When some women in Turkey were raped whilst in custody the public prosecutor undertook no effective investigation and showed a lack of appropriate diligence. The state was subject to complaint under Articles 3 and 13 (the HRA is, for all purposes, Article 13 enacted in UK law). The state's duty to provide protection is not limited to compensation but to a thorough investigation leading to prosecution and punishment.

The jurisprudence is developing rapidly. Anonymous witnesses have been accepted in the last 2-3 years, as a result of the War Crimes Tribunals. A balance is developing between the rights of victims and witnesses in the criminal justice system and the rights of defendants to confront and cross-examine. In **Mason v UK** the victim was cross-examined by the rapist and the ordeal she was subjected to in the trial may have breached Article 3 – the Commission has declared similar applications admissible in the past.

Article 7 provides for no retrospection of criminal law or imposition of penalties heavier than those available at the time of the offence. In **SW and CR v UK** (rape within marriage), the Court found that the law was not specific enough. However the Court has rejected the argument that a requirement to register under the Sex Offenders Act 1997 was an additional penalty but held that it was a prophylactic measure. Victims' rights are getting very serious recognition in Strasbourg.

In constructing new law, there are important issues to consider in creating new offences. The ECHR jurisprudence is not clear about the acceptability or otherwise of strict liability offences. The arguments need to be balanced in each case and an assessment needs to be made about the balance between protecting the victim and ensuring the right to a fair trial under Article 6.

Syndicate Discussions:

- All four groups were asked to identify the answers to 3 questions:
- Identify the key ECHR issues in these offences.
- Identify the key policy questions for the review.
- Identify potential solutions.

Group A – Exploitation & Soliciting:

- The key ECHR issues are Articles 8 and 14 (right to a private life and discrimination).
- Need to consider discriminatory aspects (e.g. gender-based offences) of prostitution related offences, and ensure they protect children and vulnerable people.
- Living on the earnings of prostitution has a reverse burden of proof. Earnings may be too far removed from the evil of exploitation we wish to combat. A clearer definition for that and soliciting is needed, e.g. ‘sale of one’s body for a sexual purpose’.
- The real evil to address is exploitation of another person through control, coercion or through preventing another from leaving prostitution, which must be balanced against the rights given in Articles 3 and 8.

Group B – Children & Vulnerable People:

- Vulnerable people, described as ‘defectives’ pose a need to balance the protection aspects and the rights of the individual. There are two different categories which may negate consent: those who are unable to consent because of profound mental dysfunction and those who are able to consent but who have no understanding of what it is they are consenting to. There can also be a difference because of the inequality of power, e.g. an abusing carer with a patient, as opposed to two patients in a ‘consensual’ relationship. This is a very difficult issue which needs to explore medical and psychological aspects.
- Strict liability offences such as those for children under the age of 13 reflect the degree of vulnerability of the victim and the seriousness society places on the offence.
- There is no need to have separate offences against boys and girls. This would reduce the number of offences and simplify the statute book.
- Offences where one or both parties are below the age of consent could be restructured using age differentials to tackle consensual sexual activity. This involves the interface between criminal and family law and parental care. For any mistake of fact defence there must be reasonable grounds for a defence and symmetry between men and women.
- Aggravating features to an offence could include anyone in a position of trust, although the consensus was that there should be no specific ‘abuse of trust’ offence.

Group C – Sexual Assault:

- Gender neutrality and equal protection are required for all sex offences wherever possible.
- The current legislation on ‘defectives’ is too widely drawn and the issues surrounding marriage to a defective need to be addressed.
- There are discrepancies between the sentences available for similar offences which need to be resolved.



Group D – Homosexual Offences:

- The current law is unclear and needs better definitions, for instance, if there was to be an offence similar to gross indecency, should it be defined as ‘sexual activity between men’?
- There are real ECHR problems with the offences of gross indecency and buggery. They discriminate because they refer only to men. It is uncertain whether they are proportionate – is there a social need? Probably not. Are the sentences available proportionate? No. Heterosexual and homosexual behaviour should be governed by similar requirements about privacy, and this could be achieved by drawing up generic offences.
- There is a need to prevent inappropriate behaviour, such as sexual activity in public. This could be achieved through the use of something similar to section 5 of the Public Order Act.

Conclusions:

The Chair thanked the speakers who had freely shared their experience, and all those who had attended for their hard work over the two days. She also gave particular thanks to Linda Bateman of the Special Conferences Unit for the smooth running of the conference.

All those attending had learned a great deal about the scope and significance of the ECHR and its potential impact on sex offences. This will help the review to look ahead to the needs of society. The ECHR provides a framework for developing proposals for law reform, and would give impetus to the need for law reform. The greatest challenge would be to strike a balance between the role of the law in providing protection, while not unduly affecting the rights of adults to enjoy a full private life. The process of considering all proposals against ECHR rights and assessing their necessity and proportionality would provide a rigorous framework for the review.

Working Group Chairs and Rapporteurs:

Conference Chair: Betty Moxon

Group A: Chair – Debby Grice
Rapporteur – Neil Whitehouse

Group B: Chair – Betty Moxon
Rapporteur – Dan Lambeth

Group C: Chair – Shami Chakrabarti
Rapporteur – Professor Jennifer Temkin

Group D: Chair – Su McLean-Tooke
Rapporteur – Stephen Dawson