The UK Sexual Offences Bill: A Victorian Spinster's View of Sex

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Introductory

I believe that it is necessary, in the public interest, strongly to criticise the proposals contained in Part I (Sexual Offences) of the Sexual Offences Bill, introduced by the British Government in the House of Lords on 28 January 2003. The objections presented here are not exhaustive; and many more could have been put forward.

This critique is based on the fundamental proposition laid down in my book *The Sex Code: Morals for Moderns*[1] that sexual positivism or the healthy acceptance of human sexuality, seeking its fulfilment, is largely absent from British society – even though it is essential for human happiness. Directly or indirectly, that rejection of our sexuality is the root cause of most of the sex crimes that trouble the British. Yet much of this Bill is fuelled by public hysteria and founded on what might be termed a Victorian spinster's view of sex, namely that it is frightening, horrendous, and fit only for life with one's head beneath the bedclothes desperately hoping no wicked man will approach.

There are no fewer than 57 varieties of new sexual offences contained in the Bill. Some, but not many, replace existing offences that would be abolished by it. The Government's proposals are not based on any system of morals and values. On the question of a basis of agreed common morality the Bill is strangely silent, as was the White Paper on which it is based.[2] While some sexual acts are obviously immoral and criminal, the vast majority are innocent and healthy A few others are on the borderline. Here there is a grey area, which needs to be addressed very carefully by those who lay down the criminal law. The proposals in the Bill fail to do that.

One problem with testing the Bill against Britain's morals and values, as emphatically needs to be done, is that the nation is now multicultural. This means those among its people have many different sets of morals and values, some directly opposed to one another. Many are based on various religions, mainly Christian, Muslim, Hindu or Jewish. Yet the majority of the British people are not close adherents of any particular faith and would be classed by an impartial assessor as secular in their values. In a democracy the majority must prevail, which indicates that the British Government's proposed new sex laws should be based upon secular, rather than religious, ideals and ethics. Moreover they should be western secular values, since those are the ones held by the vast majority of British citizens.

The only general basis I can detect for the Bill's proposals is derived from the White Paper. This suggests that they deal with conduct which the Home Office concludes is "unacceptable".[3] That is a weasel word, elastic and varying. It at once demands the question "unacceptable to whom?". This the White Paper does not attempt to answer. If it means "unacceptable to the majority" that is not good enough. To rank as a crime, sexual conduct

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1 Weidenfeld & Nicolson 1991.

2 *Protecting the Public*, subtitled "Strengthening protection against sex offenders and reforming the law on sexual matters" (CM 5668).

3 See, eg, paras 9 and 14.

needs to be far worse than merely unacceptable to the majority. It needs to be vile and vicious. That does not apply to many of the actions branded as criminal by this Bill.

In this vacuum I feel bound to fall back on the moral precepts set forth in *The Sex Code*, which I believe to be a convincing account of western secular sexual ethics in our time. The basis of the book is a code of sixty ethical principles.

Specific proposals in the Bill

Sex with children: The Bill's proposals relating to sexual activity with a child, that is a young person who has not yet attained the age of 16, demonstrate the great danger involved in drawing up legislative proposals concerning sex without first laying down the moral principles that are to be followed. The barrister Antony Grey wrote in his book *Speaking of Sex*[4]:

> Children are sexual beings. Adolescents are highly sexual beings.[5]

Adolescence begins well before the age of consent (sixteen), yet the Bill insists it should be a criminal offence for anyone, even an age mate, to engage in any sexual activity whatever, even though consensual, with such a "highly sexual being" as an adolescent aged under 16. Anyone knows who remembers their own childish consensual sex play, and sexual experimenting and exploring with age mates, that such activities are a universal and important part of everyone's growing-up. The criminal law should not interfere with them; nor should the state's social services.

Sexual activity between minors: This proposed criminal offence, punishable with up to five years imprisonment, deals inter alia with sexual activity between pubescents from 11 to 15 years of age. It will cover a range of behaviour including, for example, "any activity with a child that a reasonable person would deem to be sexual or indecent in all the given circumstances". This is very vague. Is this new law really going to leave vital questions like this to be finally settled only after years of delay and a final appeal to the House of Lords? That would surely be a gross dereliction of duty by Parliament, yet deliberate ambiguity is often used in legislation when clarity might arouse dissent.[6]

A typical current attitude to child sex is that shown in the following comment by the American academic John Pesciallo:

> For siblings close to the same age, incest may merely be sexual exploration that is a part of normal development ***but socially unacceptable or undesired.*** However, when there is coercion or a significant age difference, then it is considered abuse. Generally, the difference of five or more years would constitute abuse by the older child (even if the younger child were willing). Anytime an older sibling manipulates a younger child into sexual behaviour that is not age appropriate ***or socially acceptable,*** it is sexual abuse.[7]

This is confused, even contradictory - and that is symptomatic of the chaotic attitudes to this vexed topic. The italicised words suggest that something that is part of normal development can nevertheless be socially unacceptable or undesired. Yet if conduct is part of normal development it obviously should not be socially unacceptable or undesired. If nevertheless it is socially unacceptable or undesired then obviously society has got things

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4 Cassell, 1993.
5 p 109.
6 See *Bennion on Statute Law* (Longman, 3rd ed 1990), ch 17.
7 "Understanding Sibling Incest" at http://www.bmi.net/jgp/USI.htm. Emphasis added.

wrong, and its mistaken attitudes should not be reflected in legislation enacting criminal offences.

These Government proposals raise the question: what lawful sexual outlets is it supposed that pubescents in the age range 11 to 15 should have? If these borderline creatures are, as must be admitted, "highly sexual beings", they obviously require suitable opportunities to fulfil their sexuality. This could be called one of their human rights, if that topic had been fully developed in the region of sexuality. While many girls may, if unawakened sexually, happily continue in an "asexual" condition until they reach the age of consent or later, this does not apply to most boys. The Bill's proposals limit the lawful sexual activity of pubescent boys to solitary masturbation, which surely cannot be right.

It is wrong that the police and Crown Prosecution Service should be involved at all in such cases. The fact that the CPS might eventually decide that it is not in the public interest to proceed with a prosecution even though technically a crime has been committed is no answer. The existence of this residual CPS discretion should never be used as an excuse for labelling conduct as criminal when truly it is not. The right of any citizen to bring a private prosecution also has to be borne in mind here. This right might be exercised for example by a spiteful neighbour.

Nor in such cases is it appropriate, as intended, to pursue the matter through child protection processes. This still brands the children's conduct as criminal, calling for intervention by state services. Such intervention can do immense harm to the children, and is uncalled for. It needs to be recognised and stated that such childish consensual conduct is not in any way wrong, immoral or criminal. On the contrary it is to be accepted and welcomed. Otherwise the child is inflicted with sex-guilt, a pernicious and very common feature of the way we treat sexuality.

Adult sexual activity with a child: This new criminal offence, punishable with up to 14 years imprisonment, will cover a range of behaviour including, for example, any activity with a child that a reasonable person would deem to be sexual or indecent in all the given circumstances. This sets the standard at that of the reasonable person, so often used in our law – and used throughout this Bill. It is inappropriate as a test simply because, as noted above, so many people are unreasonable when it comes to sex.

Grooming of children: Another new target is what the Bill calls "sexual grooming of children", which will have a maximum penalty of five years imprisonment. This seems to be aimed at internet prowlers, but could also apply in other ways. The object is to catch adults who try to make friends with children so as later to have sex with them. But how is that to be proved? If the suspect goes on to carry out a sexual assault that can be charged as an offence in itself, but there is then no need for the preliminary offence of grooming. Where no assault later ensues how can preliminary grooming be established? How do the acts in question differ from what any kindly adult might do to befriend a child, who is perhaps visibly in distress? Some people like children.

That is not all. It gets worse. The Bill goes on to adumbrate a further hurdle for adults wishing to befriend children. There will be introduced a new civil order intended to protect children under 16 from inappropriate sexual behaviour by adults aged 18 or over. The penalty for breach of that order will be a maximum of five years imprisonment. I acknowledge there is a problem here. A comparatively minute proportion of adults do indeed pursue children in this undesirable way. Yet we must all preserve a sense of proportion. Under Gresham's law bad currency drives out sound. The Home Office seem unaware of the terrible dangers of Gresham's law when introduced into the realms of human sexual behaviour.

Familial sexual abuse of a child: Not content with the new offences outlined above, the Bill proceeds to duplicate them by creating the further new offence of familial sexual abuse of a child. It will protect children up to the age of 18 from abuse by a "family" member of any age. This will include all who have a 'familial' relationship with a child by virtue not only of blood-ties, adoption, fostering, marriage or quasi-marital relationship but also by virtue of living within the same household as the child and assuming a position of trust or authority. The maximum penalty will be 14 years imprisonment.

Prohibited adult sexual relationships: This offence, with a maximum penalty of two years imprisonment, will cover sexual activity between certain adult relatives. The well-known term incest is, for some unexplained reason, dropped. Again the reasons given display sloppy thinking. The Home Office say as their justification that it is generally believed that all such behaviour is wrong and should be covered by the criminal law. They add that there is evidence to suggest that some adult familial relationships are the result of long-term grooming by an older family member, and that the criminal law needs to protect adults from abuse in such circumstances. All this is very doubtful.

Sex with mentally disabled: There is to be a new offence of sexual activity with a person who did not, by reason of a learning disability or mental disorder, have the capacity to consent. The maximum penalty for this offence is to be life imprisonment, the same as for murder. For another similar offence, obtaining sexual activity by inducement, threat or deception with a person who has a learning disability or mental disorder, the maximum penalty is also to be life imprisonment. I consider it to be grossly disproportionate, and a further sign of unhealthy sex-negativism, to allot the highest penalty possible to these two offences, bearing in mind that really serious cases could be treated as rape. I also question the need for the second offence, meant to deal with persons who are capable of giving consent to sexual activity but might be persuaded to do this by gifts or other inducements. Such persuasion is often employed in relations between normal people, and can be seen as part of usual courtship patterns. Once again we find the Bill threatening ordinary behaviour out of exaggerated fears fuelled by sex-negativism.

Bestiality: The Home Office say that sexual activity with animals is generally recognised to be profoundly disturbed behaviour, so a new offence of bestiality will criminalise those who sexually penetrate animals or allow an animal to penetrate them. This offence will complement existing non-sexual offences of cruelty to animals. Tony Honoré, Regius Professor of Civil Law in the University of Oxford, said in his 1978 book, *Sex Law*, that there is no satisfactory reason for including in modern law a crime of having sexual relations with an animal. He added that though the law books would be poorer if they ceased to mention Coke's great lady who supposedly had sex with a baboon and conceived by it, the crime of bestiality should be consigned to the scrapheap.

Sexual interference with human remains: The Home Office complain that there is currently no law that covers sexual interference with human remains, so it proposes to create one carrying a maximum penalty of two years imprisonment. The only justification given is that such conduct is "deviant". The defendant should be "treated and monitored as a sex offender both in prison and after release". But like bestiality, such strange behaviour seems to demand medical treatment rather than the full weight of the criminal law.

Conclusion

The House of Lords gave an unopposed second reading to this lamentable Bill on 13 February 2003. The plea for sex-positivism made so strongly in my booklet was largely ignored. It is many years since I used to sit in the official box listening to parliamentary debates and advising ministers. I had forgotten how few politicians are prepared to stick their necks out (as they would put it), particularly on an electric topic such as sex. That safety-first

attitude has become even stronger over recent years. Enlightened leadership is not on offer, even in the supposedly independent second chamber. So the sticks were out to beat our poor old sexuality. Peers and peeresses could see nothing good in it – or at any rate they were afraid to *say* anything good about it. So they nodded through a measure which would pile up dozens of punitive clauses on often harmless human behaviour, and make criminals of most young adolescents.

[*Francis Bennion is a former UK Parliamentary Counsel. This article is a summary of his 48-page booklet entitled* Sexual Ethics and Criminal Law: A Critique of the Sexual Offences Bill 2003*. The full text of the booklet can be downloaded from his website www.francisbennion.com. Printed copies can also be ordered there.*]

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