# Criminalizing Children under the Sexual Offences Bill 2003

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The Government's flagship Sexual Offences Bill, having passed the Lords, is nearing its report stage in the Commons. As I will show, it is rather hard on children.

## Scope of the Bill

The Bill has been a long time in the making. Moving the second reading, the Home Secretary Mr David Blunkett MP said-

> 'Both actions against sex offenders and the law on sex offences are outdated and arcane, and are sometimes subject, I regret to say, to a great deal of silliness. That is why Governments of all persuasions have been reluctant to act on some of these measures for so long. Consultation on the paper "Setting the Boundaries" and the preparation for the Bill lasted two and a half years.'[1]

It is a flagship Bill because it sweeps away and replaces a wide range of common law and statutory provisions which established at various times in our history what sexual conduct is to be treated by the law as criminal.

> 'The law governing sex offences is complex, and made more difficult by piecemeal changes and amendments. Much of the law dates from a hundred years ago and more, when society and the roles of men and women were perceived very differently. Parliament has not considered the structure of sex offences as a whole since 1956, and even then the Sexual Offences Act 1956 was a consolidation measure that was passed with no real debate. The result is a loose framework of offences, often designed to meet specific problems that caused concern in their day, but with little coherence or structure. Significant changes have occurred since 1956, notably the decriminalisation of homosexuality in private in 1967, changes to the law of rape and increased protection for children. As we enter the 21st century it is time for a root and branch examination of what the law should be and how it should be framed to meet the complex and changing needs of society.'[2]

The Home Office committee which uttered those remarks also said their aim was to produce a new Act that was 'clear and comprehensible to the ordinary citizen'.[3] Unfortunately it has not worked out that way. In an article last week I showed the tangles the Bill inflicts on us when defining the term "sexual". There are many more examples of turgidity, obscurity and unnecessary complexity I could lay before the reader. However in this article I want to concentrate on substance rather than drafting, though drafting does come into it.

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[1] Parl. Deb. Commons 15 July 2003, col.177.

[2] *Setting the Boundaries I* (Home Office, July 2000), para. 1.1.2.

[3] Ibid., para. 1.3.5.

## Criminalization of Children

My main subject this time is the Bill's unwarranted criminalization of the nation's children. Consider the following interchange on second reading-

> **Mr. David Hinchliffe (Wakefield, Labour):** The Family Planning Association and the Joint Committee on Human Rights have expressed concern that the Bill could criminalise young people of 14 or 15 for consensual petting or kissing. I would be grateful if my right hon. Friend could clarify that, bearing in mind that the average age of first intercourse is now 16. Has he considered the possible implications?
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> **Mr. Blunkett:** Yes, I have. As recently as yesterday I thought about whether there was a formulation that would change the existing law in a way that addressed the practical issues . . .[4]

The Bill still refuses to recognise the sexual needs of the under-16s when solitary or interacting with age mates. Of course the sexualised tot, ruined by prolonged abuse, is a horrific spectacle. But for the ordinary child who has embarked on puberty, a natural process essentially sexual, the position is different. We adults should not be so quick to forget our own passage through those troubled waters, or those childish age mates who perhaps added to our happiness when doing so. Of course, as I have said, there are dangers even with childish sex play between age mates. I give the following true-life example as an awful warning.

> 'Katy was 10 when she was referred by a social services department because it had become clear some months previously that she was extensively involved in sexual activities with other children. After having been removed from her own family because of extensive abuse and neglect, she had been placed in a variety of different contexts, finally being placed for adoption. This had broken down and at the time of referral she was placed with experienced professional foster parents. After her sexual activities had been noted, investigation revealed that in her short life she had been involved in sexually-abusive incidents with approximately 29 children . . . The

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> therapeutic task was to help her regain her childhood'.[5]

No one would doubt that such excessive sexual activity between age mates should have been dealt with by the social services long before poor Katy got to that point in her young life. It does not follow even in that extreme case that her colluding age mates should have been charged with criminal offences and hauled before a Crown Court. Yet that is what this Bill proposes.

I would focus on clause 14 of the Bill, which makes anyone between the ages of 10 (the minimum age of criminal responsibility) and 16 (the age of consent) guilty of a criminal offence if they carry out a sexual act on another child between those ages, even consensually. The maximum penalty is five years imprisonment.[6] This is not the only objectionable provision. Clause 6 renders a child between 10 and 16 guilty of an offence subject to imprisonment for 14 years if he or she touches sexually a child under 13 *even with that child's consent*. There are other objectionable features. Mr Humfrey Malins MP (Conservative) said in standing committee-

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[4] Parl. Deb. Commons 15 July 2003, col. 178.

[5] *Children and young people as abusers: An agenda for action*, National Children's Bureau, 1991, pp. 29-31.

[6] Clause 14 also covers sexual acts by persons aged 16 or 17. I am not concerned with these because such persons are over the age of consent.

> 'Clauses 6 to 9, but particularly clauses 6 to 8, will create very serious offences relating to people who perform sexual acts with children under 13. That makes sense to all of us when the defendant is older than the victim, but does it make sense when the defendant is the same age or much the same age as the victim? Perhaps not. Let me give some examples. If a boy and girl aged 12 indulge in French kissing to which each consents, they will be committing an offence under clause 8. If a boy fondles a girl sexually over her clothes[7], or vice versa, both will be committing a sexual offence under clause 8, and that offence will be punishable by 14 years imprisonment. I am not being flippant, but if two 12-and-a-half-year-old boys relieve the boredom of their first year at boarding school by indulging in mutual masturbation - which has happened - a serious offence will have taken place. If, at the suggestion of a girl aged 12, a boy of the same age puts his finger into her vagina, the boy will be committing an offence punishable under clause 7 by imprisonment for life. We think that that is a preposterous proposition, for the reasons I have outlined'.[8]

Clause 6 fell foul of the parliamentary Joint Committee on Human Rights, which said-

> 'In our view, the Government has not established that the impact of clause 6 of the Sexual Offences Bill, imposing liability on children under 13 for all sexual touching whether or not there is consent and whether or not it can properly be regarded as indecent, would be proportionate to a legitimate aim so as to be justifiable under ECHR Article 8.2. The offence seems to us to be over-broad, to impose liability in a way that is not adequately tailored to the legitimate objective, to interfere with the right to respect for private life more than is necessary for that purpose in a democratic society, and to contain insufficient safeguards against violation of the rights'.[9]

The Family Planning Association (fpa) joined in the condemnation.

> 'fpa's major concern about this Bill is that it makes all consenting sexual activity between children, from full sexual intercourse to touching someone through clothes, a criminal offence. At the most extreme, this means that a 12 year-old boy who has sexual intercourse initiated by a girl his age will be automatically guilty of the offence of rape of a child under clause 6, carrying the maximum penalty of life imprisonment.[10] At the other end of the spectrum, two 15 year-olds who indulge in consensual 'sexual touching', which includes kissing, will both also be automatically committing criminal offences under clause 10, imprisonable for up to five years'.[11]

## Clause 14

Because of the curious way the Bill is drafted, this reference to clause 10 brings us in fact to clause 14, which reads-

> 14. Child sex offences committed by children or young persons

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[7] Mr Malins later reminded Standing Committee B that in the well-known children's book *The Secret Diary of Adrian Mole Aged 13¾* there is a page that describes young Adrian's adventures with his age mate Pandora when he says, 'Pandora let me touch her bust today, but I couldn't feel much through her anorak' (col. 159).

[8] Standing Committee B, 11 September 2003 (Morning), col 094.

[9] Joint Committee on Human Rights, Twelfth Report, para. 2.20.

[10] This is inaccurate. Clause 6 deals with sexual assault not rape, and the maximum imprisonment is 14 years.

[11] Briefing by Family Planning Association (fpa), 15 July 2003.

(1) A person under 18 commits an offence if he does anything which would be an offence under any of sections 10 to 13 if he were aged 18.
(2) A person guilty of an offence under this section is liable—
(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years.

This applies clause 10, which reads-

10. Sexual activity with a child

(1) A person aged 18 or over (A) commits an offence if—
(a) he intentionally touches another person (B),
(b) the touching is sexual, and
(c) either—
(i) B is under 16 and A does not reasonably believe that B is 16 or over, or
(ii) B is under 13.
(2) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for a term not exceeding 14 years.

Apart from the objectionable substance, there is a grave drafting difficulty about this. The elements of a criminal
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offence consist of a physical act, called the ***actus reus*** or guilty act, together with a mental element called the ***mens rea*** or guilty mind. A leading textbook on criminal law says-

'. . . until the twelfth century a man might be held liable for many harms, simply because he caused them, without proof of any blameworthy state of mind whatsoever on his part. Under the influence of Canon law and the Roman law, a change gradually took place and the courts began to require proof of an element of moral blameworthiness – a "guilty mind" of some kind. In the developed common law of crime, some such mental element is always necessary, and is known as ***mens rea***.'[12]

Professor Andrew Ashworth says that the essence of the principle of ***mens rea*** is that 'criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and its consequences'.[13] Is this test satisfied in the following case?

A is a girl of 10. Because he asks her to, A intentionally touches the penis of B, a boy she knows to be aged 15.

Clause 14(1) says that A, being under 18, commits an offence if she does anything which would be an offence under section 10 if she were aged 18. Has A done something which would be an offence under section 10 if she were aged 18? An affirmative answer requires that the 'something' A did corresponds exactly to the elements of the section 10 offence as set out above.

We see that this piece of statutory deeming will not work. One cannot pretend that a girl of 10 is an adult woman of 18 because the mental element does not fit. One could not realistically assert that what A actually did in the case given (including the mental element) would have been an offence if done by a woman of 18 because it could not have been done by a woman

[12] Smith and Hogan, *Criminal Law* (1st edn 1965), p. 35.
[13] Andrew Ashworth, *Principles of Criminal Law* (4th edn, 2003), p. 158.

of 18. A normal woman of 18 does not have the inchoate mental equipment of a child of 10. She has adult, mature mental equipment. The ***mens rea*** component does not work, and the deemed translation cannot be made.

**A Magnum of Champagne**

Back to the substance. There are signs that all this pressure on the Government might have an effect. On clause 14 the Home Secretary Mr David Blunkett made out that the Government would remove the objectionable features if only they knew how to draft the necessary amendment.

> **Mr. Blunkett:** I make this generous offer: I will buy a flagon of champagne for anyone who comes up with a satisfactory answer. [Hon. Members: 'A flagon?'] Not a flagon -
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> **The Parliamentary Under-Secretary of State for the Home Department (Paul Goggins):** A magnum.
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> **Mr. Blunkett:** Well, those who come from the north of England need civilising, don't they? We will settle for a magnum of champagne. The hon. Gentleman is entirely right: it is an ass, but we have to deal with the ass by providing a carrot, rather than a stick.[14]

As a former legislative draftsman I have responded to Mr Blunkett's carrot. I have sent him some amendments, but there is as yet no sign of my magnum. My amendments are as follows.

I propose to delete clause 14 and amend clause 10 to read-

(1) A person (A) commits an offence if-
  (a) he intentionally touches another person (B),
  (b) the touching is sexual, and
  (c) either—
    (i) B is under 16 and A does not reasonably believe that B is 16 or over, or
    (ii) B is under 13.

(2) Subsection (1) does not apply if-
  (a) A is under 16, and
  (b) B is not under [13] and consents to what A does, and
  (c) A's act does not cause injury or disease to B or (where B is a female) lead to her becoming pregnant,

and for the purposes of paragraph (b) of this subsection B shall not be taken to lack capacity to consent merely by reason of his age[15].

(3) A person guilty of an offence under this section is liable-
  (a) if under 18 at the time of the offence-
    (i) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
    (ii) on conviction on indictment, to imprisonment for a term not exceeding 5 years;
  (b) in any other case, on conviction on indictment to imprisonment for a term not exceeding 14 years.

I then propose to amend clauses 11-13 in the same way as clause 10 is amended.

## How my Amendments Would Work

The amendments provide a different way of doing what clause 14 at present does. The main difference is that a consensual act would be excluded from criminal liability if B were aged

[14] Parl. Deb. Commons 15 July 2003, col.195.

[15] The meaning of 'consent' in Part I of the Bill is given by clause 75 as: 'For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice'.

13, 14 or 15.[16] Pubescents should not be subject to the criminal law for consensual sexual behaviour between themselves, provided the consent is genuine. However the exception would not operate if A's act injures B, transmits disease, or (where B is a female) causes her to become pregnant. In such a case it would be right for A to be treated as committing an offence.

The words 'and for the purposes of this subsection B shall not be taken to lack capacity to consent merely by

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reason of his age' recognise that one should not automatically assume that just because a child's calendar age is say 13 years and three months he or she necessarily lacks the capacity to consent. The question would arise in each case of whether B, at the time in question was in fact mature enough to give true consent. The onus would be on the prosecution to prove beyond reasonable doubt that an apparent consent was not genuine.

It may be that these words are not strictly necessary. Mr Dominic Grieve MP (Conservative) pointed out in Standing Committee that-

> '. . . it is possible for someone under the age of 16 to consent to rape, thereby reducing it to the alternative offence, which is a sexual act to which no consent can be given . . . So if one has sexual intercourse with a 14-year-old, it may be possible to escape the full penalty of the law, but there is no possibility of that 14-year-old consenting to much lesser behaviour, even though she may consent to the more serious one.'[17]

Mr Grieve is saying that if A is charged under clause 1 of the Bill with rape of B, a child aged 13, 14 or 15, it is a defence to show that B consented. It thus seems to be inherent in the Bill that a B who is of that age may under the ethos of the Bill be capable of consenting without the addition of words such as I am suggesting.[18] Here it also needs to be remembered that in other contexts the law treats children under 16 as able to consent.[19]

If desired, it would of course be simple to exclude one or more of clauses 10-13 from the effect of the amendments. Thus it might be thought desirable not to apply them to clause 13 (causing a child to watch a sexual act).

The Government might object to the amendments on the ground that they undermine the general age of consent (16). However any age of consent provision is essentially artificial and arbitrary, imposing the philosophy of 'one size fits all'. Other countries have different arbitrary consent ages. Denmark, France, Greece and Sweden have 15, Austria and Italy have 14, Spain has 12.[20] Northern Ireland on the other hand has 17.[21] Until 1929 the minimum age for marriage in England and Wales was 12.[22] It is not logically inappropriate to say that the 16 age limit applies where the older participant is over 16, while other provisions may apply where both are under 16. Anyway, a rule of thumb should not be allowed to stand in the way of justice.

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[16] I would prefer the exclusion to extend to 12-year olds as well because nowadays many children reach puberty while they are 12 and the real barrier line is arrival at puberty.
[17] Standing Committee B, 11 September 2003 (Morning), col.194.
[18] I am indebted for this point to Richard Oerton, a solicitor formerly with the Law Commission.
[19] In *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 the House of Lords reviewed the issue of consent and ruled that under-16s can give consent to medical treatment if they have sufficient understanding and intelligence to appreciate fully what is proposed.
[20] *Setting the Boundaries I*, p. 54.
[21] Ibid, para 3.2.7.
[22] Ibid, para 3.5.2.

## Is Discretion the Answer?

The Government's answer to the objections set out above is that the Crown Prosecution Service would use its discretion sensibly and not prosecute in unsuitable cases. But do we want to be ruled in this way by the discretion of officials? I am reminded of the famous dissenting judgment of Justice Douglas in the US Supreme Court-

> '. . . law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered . . . Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions.'[23]

On the present Bill, and in the present context, this was echoed by Mr Dominic Grieve MP-

> 'Speaking as a Conservative, I have an inherent anxiety about administrative discretion. I accept that administrative discretion may be the only remedy in cases where the CPS will not charge. Nevertheless, when such matters are put on to the statute book in such stark terms, I always fear that, at some point, something will not work properly and that we will end up with prosecutions that cause serious problems.'[24]

In my book *Sexual Ethics and Criminal Law*[25] I wrote to similar effect.[26]

[23] *United States v Wunderlich* (1951) 342 US 98 at 101.
[24] Standing Committee B, 11 September 2003 (Morning), col.194.
[25] Lester Publishing Oxford, 2003. The text of the book can be viewed on my website www.francisbennion.com.
[26] See paras. 31-33.