BRIEFING ON SEXUAL OFFENCES ACT 2003

Sex Offences by Children

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Introduction

In the grip of the *Zeitgeist* or spirit of the age we of the twenty-first century find ourselves subject to a drastic reversal in sexual *mores*[1]. To object nowadays to buggery, the act which used to be characterised as unfit to be mentioned among decent people, is to lay oneself open to a charge of homophobia, a word freshly invented for the purpose. Another newly-invented word, racism, lies in wait to denigrate those who prefer their sexual partner to be of the same ethnic origin as themselves. The sin of Onan, not long ago known as self-abuse, is now regarded as a worthy means of self-expression.[2] Enlightment has not gone all the way however.

Still we refuse 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 therapeutic task was to help her regain her childhood.[3]

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 criminal court. Yet that is what the Sexual Offences Act 2003 provides for. In the hope that the Bill for the Act would be suitably amended before it was too late, I spent a lot of my time, effort and money in producing the first two editions of this Briefing. The first edition ran to 34 pages. The second editionwas very much longer - but still not long enough to embrace all aspects of a difficult subject. This edition merely alters the second edition to fit it to the new Act, and also adds three new chapters at the end.

I have concentrated on section 13 of the Act, 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.

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[1] The term *mores* is defined as 'those acquired customs and moral assumptions which give cohesion to a community or social group, the contravention or rejection of which produces a reaction of shock and outrage': *Oxford English Dictionary* (2nd edn 1989).

[2] In 2003 a writer in the once stuffy *Times* was allowed to write: 'Today masturbation is deemed to be a guarantor of psychological and physical health. The Lone Shag has become a modish leisure activity': *The Times* Body & Soul, 20 September 2003.

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

The maximum penalty is five years imprisonment.[4] This is not the only objectionable provision in the Bill. Clause 7 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-

> Clauses 6 to 9 [now sections 7 to 10], 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, or vice versa, both will be committing a sexual offence under clause 8 [section 9], 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 [section 8] by imprisonment for life. We think that that is a preposterous proposition, for the reasons I have outlined.[5]

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.[6]

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. 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. fpa believes that the Bill should be amended to permit the defence of consent to those who have 'proximity of age' – specifically, the defence should be allowed for under-16s who have sex with under-13s, and for under-18s who have sex with under-16s.[7]

[4] Section 13 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.
[5] Standing Committee B, 11 September 2003 (Morning), col 094. See pp 43-44 below.
[6] See p 140 below.
[7] See chapter 7 below.

I have added my own arguments against this horrifying intention to make criminals of the nation's children.[8] There are signs that all this pressure on the Government might have an effect. On clause 14 [section 13] 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 -
>
> **The Parliamentary Under-Secretary of State for the Home Department (Paul Goggins):** A magnum.
>
> **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.[9]

As a former legislative draftsman I responded to Mr Blunkett's carrot.[10] I sent him the result, but there was no sign of my magnum.

This Briefing also contains an elaborate account of just how clause 14 [section 13] works.[11] It gives considerable space to exposing a drafting flaw in clause 14 and suggests a solution.[12] It also exposes flaws in the drafting of clause 79 [section 78]. This supplies a definition of the term 'sexual' which occurs throughout the Act.[13] The Briefing contains other material designed to assist understanding of these iniquitous provisions which criminalize our children.

[8] See chapters 4, 6 and 15 below.
[9] See p 24 below.
[10] See chapter 1 below.
[11] See chapter 2 below.
[12] See chapters 11-14 below.
[13] See chapter 8 below.

Chapter 1

Proposed Amendments to Sexual Offences Bill

Clause 14 of the Sexual Offences Bill 2003 [now section 13 of the Act] is worded as follows-

> (1) A person under 18 commits an offence if he does anything which would be an offence under any of sections 10 to 13 [now 9 to 12][14] 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.

I proposed the following amendments to the Bill-

1. Omit clause 14.

2. Instead, amend clause 10 so that it reads-

> (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.

3. Amend clauses 11-13 in the same way as clause 10 is amended by 2 above.

4. Amend clause 79 [section 78] so that it reads 'For the purposes of this Part, penetration, touching, or any other activity by a person is sexual if carried out with a view to the gratification of that person's sexual appetites'.

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[14] For the text of sections 9 to 12 see pp 11-12 below.
[15] The meaning of 'consent' in Part I of the Bill is given by clause 75 [section 74] 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'.

EXPLANATION OF PROPOSED AMENDMENTS

The first three amendments provide a different way of doing what clause 14 [section 13] at present does. The main difference is that a consensual act would be excluded if B were aged 13, 14 or 15. (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.) 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 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 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.'[16]

Mr Grieve is saying that if A is charged under clause 1 of the Bill [section 1] 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 these.[17] Here it also needs to be remembered that in other contexts the law treats children under 16 as able to consent.[18]

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.[19] Northern Ireland on the other hand has 17.[20] Until 1929 the minimum age for marriage in England and Wales was 12.[21] 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 principle should not be allowed to stand in the way of justice.

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[16] See p 24 below.
[17] I am indebted for this point to Richard Oerton, a solicitor formerly with the Law Commission.
[18] 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.
[19] *Setting the Boundaries* I, p 54.
[20] Ibid, para 3.2.7.
[21] Ibid, para 3.5.2.

A further reason for omitting clause 14 [section 13] is that it is based on a faulty concept. To say that a person of say 11 commits an offence if he does anything which would be an offence under any of sections 10 to 13 if he were aged 18 is to postulate an unreal, indeed impossible, hypothesis. An offence consists of both a physical and a mental component. The physical component may be the same for both ages but the mental state of an eleven-year old can never be the same as that of an adult.[22]

The final amendment would amend clause 79 [section 78] for the reasons given in chapter 8 below.

[22] This argument is fully developed in chapter 11 below.

Chapter 2

Unravelling clause 14 [section 13]

Introductory

We cannot arrive at a solution to the problem of clause 14 unless we first get to understand exactly what in detail clause 14 [section 13] provides (and there is a good deal of detail). We do not receive much help from the wording of clause 14 itself. Its entire official text, as set out in the Sexual Offences Bill brought from the House of Lords on 18 June 2003, is as follows.

> 14 [13] Child sex offences committed by children or young persons
>
> (1) A person under 18 commits an offence if he does anything which would be an offence under any of sections 10 to 13 [9 to 12] 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 is the usual sort of impenetrable drafting practised by the UK Parliamentary Office.[23] I make no complaint about that. As a member of the Office I drafted in that way myself for many years. There are very good reasons for its complexity. When fully understood, it provides accuracy and certainty, both highly desirable attributes in this area. To be fully understood however, it must first be unravelled. That is what I propose to do in this chapter.

The official Notes on Clauses tell us that clause 14 [section 13] has only one object.

> Clause 14 makes it an offence for a person aged under 18 to do anything that would be an offence under any of clauses 10 to 13 [sections 9-12] if he were aged 18 or over. The purpose of this offence is to provide a lower penalty where the offender is aged under 18.[24]

This lower penalty is set out in subsection (2) of clause 14, which is straightforward. Subsection (1) of clause 14 is meaningless by itself. It requires us to look at clauses[25] 10 to 13 of the Bill, the official text of which is as follows.

Text of Clauses 10-13 [sections 9-12]

> 10 [9] 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—

[23] Despite the wish of the Home Office Review to 'recommend a law that is clear and comprehensible to the ordinary citizen': *Setting the Boundaries* 1.3.5. This is a vain hope, which only a body unacquainted with the workings of statute law could have been innocent enough to put forward.
[24] Notes on Clauses, para 18. For the Notes on Clauses concerning clauses 10-14 see chapter 3 below.
[25] A provision in a Bill which is called a 'clause' becomes a 'section' once the Bill receives royal assent. Confusingly, a Bill while still going through Parliament refers to its provisions as 'sections' rather than 'clauses'. This is to avoid changing references on royal assent.

(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.

[In the Act subsection (2) is replaced by new subsections (2) and (3).]

11 [10] Causing or inciting a child to engage in sexual activity

(1) A person aged 18 or over (A) commits an offence if—
(a) he intentionally causes or incites another person (B) to engage in an activity,
(b) the activity 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.

[In the Act subsection (2) is replaced by new subsections (2) and (3).]

12 [11] Engaging in sexual activity in the presence of a child

(1) A person aged 18 or over (A) commits an offence if—
(a) he intentionally engages in an activity (B),
(b) the activity is sexual, and
(c) for the purpose of obtaining sexual gratification, he engages in it in the presence of another person (B), knowing or believing that B is aware, or intending that B should be aware, that he is engaging in it, and
(d) either—
(i) B is under 16 and A does not reasonably believe that B is 16 or over, or
(ii) B is under 13.

[In the Act subsection (1) is replaced by an amended version.]

(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 14 [10] years.

13 [12] Causing a child to watch a sexual act

(1) A person aged 18 or over (A) commits an offence if—
(a) for the purpose of obtaining sexual gratification, he intentionally causes another person (B) to watch a third person engaging in an activity, or to look at a photograph or pseudo-photograph of any person engaging in an activity,
(b) the activity 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.

[In the Act subsection (1) is replaced by an amended version.]

(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 10 years.

Subsection (2) of these four clauses provides different penalties for each. Clause 14 [section 13] lays down a uniform lower penalty under the four clauses where the offender is under 18. I am not now concerned with the penalty, but only with the nature of the offence. This is the same whatever the age of the offender, from age 10 upwards.[26] Accordingly I will not spend any more time on subsection (2) of Clauses 10-14, but will concentrate exclusively on subsection (1).

Limited version of Clauses 10-13 [sections 9-12] as applied by Clause 14 [section 13]

As we are not concerned with people who are over the age of consent (16) I will modify the provisions set out above to express the effect of Clause 14 [section 13] in relation only to the children we are concerned with, namely those in the age range 10 to 15. I will also introduce two changes to the official text, apart from the change involved in limiting the statement of the proposed law to the way it operates in relation to offenders aged under 16. The first change converts 'he' to 'he or she', reflecting the effect of the Interpretation Act 1978 s 6[27]. The second change, adding the italicised words in the provisions set out below, gives expression to a necessary implication.[28] We see that there are not really four offences here but eight. I make no apology for spelling them all out, because our game here is elucidation and we need to concentrate.

Moreover that is not the end of the modifications we need to make. The next step in concentrating our microscope on the area of the proposed law with which we are now concerned is to introduce the element of ***consent***. We are limiting ourselves to sex in the age range 10-15. However a further limitation is that we are only concerned with consensual acts. If a boy of 14 rapes a girl of 15 we accept that he should be treated as a criminal. But we do not accept that, as clause 14 [section 13] provides, they should both be treated as criminals if all they engage in is consensual kissing and sexual fondling, or what used to be known as petting. So I will alter the above clauses to deal with that limitation as well. Note that in all the tinkering involved in producing the following eight clauses I am not changing the effect of clause 14 overall. The reader must imagine them accompanied by another eight clauses (with which we are not concerned) which contain what we have taken out. Together, the sixteen clauses would reproduce in full precisely what clause 14 provides. All we are doing is examine a part of the effect of clause 14 without in any way altering it. [The material below does not reflect the changes noted above which were made before enactment.]

<u>10A Consensual sexual activity with a child under 16 but 13 or over</u>
A child aged between 10 and 15 (A) commits an offence if—
(a) he or she intentionally touches another person (B),
(b) the touching is sexual and consensual, and
(c) B is under 16 but 13 or over and A does not reasonably believe that B is 16 or over.

<u>10B Consensual sexual activity with a child under 13</u>
A child aged between 10 and 15 (A) commits an offence if—
(a) he or she intentionally touches another person (B),

[26] The general law provides that a child below the age of 10 can have no criminal liability: see p 69 below.
[27] This states: 'In any Act, unless the contrary intention appears, words importing the masculine include the feminine'.
[28] For the use of implication in Acts of Parliament see F A R Bennion, ***Statutory Interpretation*** (4th edn 2002) ss 172-175.

(b) the touching is sexual and consensual, and
(c) B is under 13.

11A Causing or inciting a child under 16 but 13 or over to engage in consensual sexual activity

A child aged between 10 and 15 (A) commits an offence if—

(a) he or she intentionally causes or incites another person (B) to engage in an activity,
(b) the activity is sexual and consensual, and
(c) B is under 16 but 13 or over and A does not reasonably believe that B is 16 or over.

11B Causing or inciting a child under 13 to engage in consensual sexual activity

A child aged between 10 and 15 (A) commits an offence if—

(a) he or she intentionally causes or incites another person (B) to engage in an activity,
(b) the activity is sexual and consensual, and
(c) B is under 13.

12A Engaging in sexual activity in the presence of a consenting child under 16 but 13 or over

A child aged between 10 and 15 (A) commits an offence if—

(a) he or she intentionally engages in an activity (B),
(b) the activity is sexual, and
(c) for the purpose of obtaining sexual gratification, he or she engages in it in the presence of another person (B), knowing or believing that B is aware, or intending that B should be aware, that he or she is engaging in it,
(d) B consents to be so present, and
(e) B is under 16 ***but 13 or over*** and A does not reasonably believe that B is 16 or over.

12B Engaging in sexual activity in the presence of a consenting child under 13

A child aged between 10 and 15 (A) commits an offence if—

(a) he or she intentionally engages in an activity (B),
(b) the activity is sexual, and
(c) for the purpose of obtaining sexual gratification, he or she engages in it in the presence of another person (B), knowing or believing that B is aware, or intending that B should be aware, that he or she is engaging in it,
(d) B consents to be so present, and
(e) B is under 13.

13A Causing a consenting child under 16 but 13 or over to watch a sexual act

A child aged between 10 and 15 (A) commits an offence if—

(a) for the purpose of obtaining sexual gratification, he or she intentionally causes another person (B) to watch a third person engaging in an activity, or to look at a photograph or pseudo-photograph of any person engaging in an activity,
(b) the activity is sexual,
(c) B consents to be so present, and
(d) B is under 16 ***but 13 or over*** and A does not reasonably believe that B is 16 or over.

13B Causing a consenting child under 13 to watch a sexual act

A child aged between 10 and 15 (A) commits an offence if—

(a) for the purpose of obtaining sexual gratification, he or she intentionally causes another person (B) to watch a third person engaging in an activity, or to look at a photograph or pseudo-photograph of any person engaging in an activity,
(b) the activity is sexual,
(c) B consents to be so present, and
(d) B is under 13.

For short I shall call the legal effect of the above eight clauses combined 'the limited effect of clause 14 [section 13]' because it is, if I may repeat myself, that part of the overall effect of clause 14 with which we are exclusively concerned. I shall call the 10A and B offences 'sexual activity with another child', the 11A and B offences 'causing or inciting', the 12A and B offences 'sexual activity in the presence of another child', and the 13A and B offences 'causing watching or looking'.

Meaning of 'sexual'

All these provisions are expressed to apply only where the activity in question is 'sexual'. What does this mean? The difficulties are examined in chapter 8 below.

Chapter 3

Official Notes on Clauses for clauses 10-14 [sections 9-13]

Clause 10 [section 9]: Sexual activity with a child

14. Clause 10 [section 9] makes it an offence for a person aged 18 or over intentionally to sexually touch a child under 16. Where the child is between 13 and 15, the prosecution must prove that A did not reasonably believe that he was 16 or over. This does not apply where the child is under 13. "Touching" is defined at clause 80(6) [section 79(8)] and covers all forms of physical contact including penetration; "sexual" is defined at clause 79 [section 78]. Whether or not the child consented to the activity is irrelevant.

Clause 11 [section 10]: Causing or inciting a child to engage in sexual activity

15. Clause 11 makes it an offence for a person (A) aged 18 or over, intentionally to cause or incite a child aged under 16 to engage in sexual activity (as defined at clause 79). Where the child is between 13 and 15, the prosecution must prove that A did not reasonably believe that he was 16 or over. This does not apply where the child is under 13. The caused sexual activity may be carried out on A (for example, where A causes the child to have sexual intercourse with him), on the child himself (for example, where A causes the child to strip for A's sexual gratification) or on a third person (for example, where A causes the child to have sexual intercourse with A's friend). The offence is also committed where incitement takes place but the sexual activity itself does not. Whether or not the child consented to the activity is irrelevant.

Clause 12 [section 11]: Engaging in sexual activity in the presence of a child

16. Clause 12 makes it an offence for a person (A) aged 18 or over intentionally to engage in sexual activity (as defined in clause 79) in the presence of a child aged under 16 to obtain sexual gratification. Where the child is between 13 and 15, the prosecution must prove that A did not reasonably believe that he was 16 or over. This does not apply where the child is under 13. The offence is committed if A knows or believes that the child is aware that he is engaging in the activity or intends that the child should be aware of this. This offence would cover, for example, A masturbating himself in front of a child, or A masturbating himself in the presence of the child to whom he is describing what he is doing, perhaps because the child is covering his face.

Clause 13 [section 12]: Causing a child to watch a sexual act

17. Clause 13 makes it an offence for a person (A) intentionally to cause a child aged under 16, for the purpose of the sexual gratification of A, to watch a third person engaging in sexual activity or to look at a photograph or pseudo-photograph of a person engaging in sexual activity. Where the child is between 13 and 15, the prosecution must prove that A did not reasonably believe that he was 16 or over. This does not apply where the child is under 13. The definition of sexual activity is at clause 79. Photograph and pseudo-photograph are defined by reference to the Protection of Children Act 1978 (clause 80(5)). A person who, for his own sexual gratification, forces a child to watch two people have sex or who forces a child to watch a pornographic film, would commit this offence.

Clause 14 [section 13]: Child sex offences committed by children or young persons

18. Clause 14 makes it an offence for a person aged under 18 to do anything that would be an offence under any of clauses 10 to 13 if he were aged 18 or over. The purpose of this offence is to provide a lower penalty where the offender is aged under 18.

Chapter 4

Extracts from 'Sexual Ethics and Criminal Law'

The following extracts are taken from my short book on the Sexual Offences Bill 2003 entitled *Sexual Ethics and Criminal Law*[29].

1. *Sex with children*[30] The Bill's proposals relating to sexual activity with a child, that is a young person who has not yet attained the age of sixteen, demonstrate the great danger involved in drawing up legislative proposals concerning sex without first laying down the moral principles that are to be followed. Antony Grey wrote in his book *Speaking of Sex*[31]-

   'Children are sexual beings. Adolescents are highly sexual beings'.[32]

2. That is obviously true, and should be accepted as postulating a compelling guiding principle when remodelling the laws governing sexual behaviour. 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 sixteen. I find it incredible that the Government should really think this is the right way to proceed when laying down our sex laws for the twenty-first century. No one who had read and absorbed chapter 12 of my book ***The Sex Code*** could seriously put forward such a sex-negative proposition as that. 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 it. The criminal law should have no part to play in it: nor should the state's social services. Yet the white paper says that 'where a person [of any age] engages in sexual activity with the ostensible consent of the child then one of two offences – 'Adult sexual activity with a child' or 'Sexual activity between minors' – can be charged.[33] I go on to discuss these in reverse order.

3. *Sexual activity between minors* This proposed criminal offence, punishable with up to five years imprisonment, deals inter alia with sexual activity between pubescents from eleven to fifteen. 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 will cover a range of behaviour, including, for example, inducing a child to take off their clothes in circumstances which would reasonably be considered as sexual ***and outside the bounds of normal family life.***'[34]

4. The italicised words are a giveaway. Consensual sex play between young siblings or friends who are age mates, say within the age range eleven to fifteen years, is considered by the Home Office to be outside the bounds of normal family life. Or is it? Is the new law really going to leave vital questions like this to be finally settled only after years of delay and a final appeal to our highest court of justice, the House of Lords? That would surely be a gross dereliction of duty by Parliament - handing the final decision to non-elected judges rather than deciding for themselves. Yet

[29] Lester Publishing, Oxford, 2003.
[30] See the Bill, clauses 2, 4, 6, 8-32, 52-55, 76.
[31] Cassell, 1993.
[32] P 109. See also para. 49 of the Code given in chapter 17 below.
[33] Para. 49 of the white paper.
[34] White paper, para. 50 as applied by para. 52. Emphasis added.

deliberate ambiguity is often used in legislation when clarity might arouse dissent.[35] It should not be so used in the present case, when so much depends on being clear.

5. Much childish sex play between consenting age mates is within the bounds of normal family life. That is my view, but many would differ. I suspect that most parents, scared by current propaganda in the media and elsewhere, would indeed differ from that opinion. They would run away from *any* display of sexuality by their supposedly innocent little children.[36] Yet if they only knew it, a child is incomplete without awareness of its sexuality. Usually nature does not permit such ignorance. We should respect nature, in this as other spheres.

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 behavior that is not age appropriate ***or socially acceptable***, it is sexual abuse.[37]

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

8. The Bill shows many signs that the Government is being by driven by unbalanced, indeed uncivilised, attitudes to human sexuality widely held today by the British public. Yet the Government dismisses and disregards similar inhuman attitudes widely held on matters such as capital punishment, homosexuality, racism, corporal punishment, immigration and asylum. Surely it should in the same way insist on enlightened attitudes to sex when it frames new legislation concerning that difficult topic. It should be sex positive, but it is not.

9. A further element is that much public agitation in the sex field is driven by hysteria, and is therefore unreliable as a basis for legislation. In this connection I cite as just one example facing pages in the ***Daily Telegraph*** for 15 January 2003. On page 22 Andrew Marr wrote-

> 'I can't be the only one completely bemused by the paedophilia mania sweeping the country. It cannot surely be that paedophilia is a new thing. So either it has always been going on . . . or we are in the grip of something like mass hysteria. Talking to older people . . . you hear of a Britain in which child sex abuse – what they'd call 'mucking about' – went on all the time . . . but was simply repressed, ignored and certainly

[35] See *Bennion on Statute Law* (3rd edn 1990), chap. 17.
[36] For an account of the hideous damage those blinkered attitudes cause I refer once again to chapter 12 of *The Sex Code.*
[37] 'Understanding Sibling Incest' at http://www.bmi.net/jgp/USI.htm. Emphasis added.

> not publicly discussed . . . But are there so many serious paedophiles about? I simply do not believe it.'

10. On the facing page 23 the editorial said-

> 'As Andrew Marr writes opposite, paedophilia mania is sweeping the land . . .This mania prompted the ludicrous recent decision by Edinburgh City Council to ban parents from making video recordings of their children's Nativity plays without the consent of the parents of the whole cast. It inspired the disgraceful campaign by Rebekah Wade . . . to 'name and shame' convicted paedophiles in the pages of the *News of the World* – a campaign that moved some of her more moronic readers to attack the home of a paediatrician in Newport. It has led some councils to insist that any parent who offers to help out at a school fete must first be vetted by the police.'

11. These Government proposals raise the question what lawful sexual outlets is it supposed that pubescents in the age range eleven to fifteen should have? If these borderline creatures are, as must be admitted, 'highly sexual beings',[38] they obviously require suitable opportunities to fulfil their sexuality.[39] 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. I believe it is horrifyingly wrong.

12. Here the Government's defence might partly lie in para. 37 of the white paper[40]-

> . . . in some circumstances, particularly where the partners are close in age and apparently agree to take part in sexual activity, it may be more appropriate to pursue the matter through child protection rather than criminal justice processes, out of concern for the welfare of both the children involved. In other cases, even when both parties are children, one may already have a history of abusive sexual behaviour towards other children, which justifies the involvement of the criminal law or his or her behaviour may have been sufficiently exploitative or abusive to merit prosecution. The Crown Prosecution Service already has discretion about whether prosecution is in the public interest . . .

13. This apparently applies to all forms of sexual activity between children even where consensual and free from objectionable features such as the infliction of bodily harm (comparatively very rare). So it covers what is described above as 'sexual exploration that is a part of normal development'.[41] It is surely quite 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.

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[38] See above, p 11. [This is a footnote in *Sexual Ethics and Criminal Law*.]
[39] See para. 15 in Annex Two to this report. [This is a footnote in *Sexual Ethics and Criminal Law*.]
[40] See also para 52. [This is a footnote in *Sexual Ethics and Criminal Law*.]
[41] See above, p 12. [This is a footnote in *Sexual Ethics and Criminal Law*.]

14. Nor in such cases is it 'appropriate 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***.[42] Otherwise the child is inflicted with ***sex-guilt***, a pernicious and very common feature of the way we treat sexuality.[43] This brings me back once again to the question of the undeclared and apparently non-existent moral basis of the Government's proposals.

15. A final point on sexual activity between age mates who are both under sixteen concerns gay boys. When the Bill for the Sexual Offences (Amendment) Act 2000, which lowered the gay age of consent to sixteen, was going through the House of Commons Mr Simon Hughes MP for the Liberal Democrats made much play with the fact that clause 2 (later section 2 of the 2000 Act) removed the stigma of criminality, as he put it, from under-16s who became involved in sexual activity with a male homosexual over that age.[44] The present Bill proposes to repeal section 2 without replacing it. So that safeguard for gay boys will go. It is puzzling anyway that it did not apply to protect a boy under sixteen who engaged in consensual sexual activity with another under-age boy, which as we all know very commonly happens.

[42] See in particular paras.7, 12 and 15 in Annex Two to this report. [This is a footnote in *Sexual Ethics and Criminal Law*.]
[43] See para. 8 in Annex Two to this report. [This is a footnote in *Sexual Ethics and Criminal Law*.]
[44] Commons Hansard 10 February 2000, quoted on Mr Hughes's website. [This is a footnote in *Sexual Ethics and Criminal Law*.]

Chapter 5

Extracts from report of Commons Second Reading

The Secretary of State for the Home Department (Mr. David Blunkett): I beg to move, That the Bill be now read a Second time.

. . . . .

Mr. David Hinchliffe (Wakefield): I place on record my appreciation of the work that my right hon. Friend has done in introducing this very important Bill, which is indeed long overdue.

. . . . .

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?

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. As the House of Lords found, and as the Committee in this House will find, it is extremely difficult to come up with a formulation that not only protects young people from those over the age of 16 or 18 engaging in activity preparatory to sexual behaviour **15 Jul 2003 : Column 179** that would put them at risk and is considered in the Bill to be unacceptable, and therefore outside the law, but from those under 16—we have all had experience of this in terms of school exclusions—who have taken equally unacceptable actions against those of a similar age. Drawing the line between penetration—we are going to be dealing with these issues, I am afraid—and actions leading to penetration by those intent on doing so without consent has made it impossible to find another definition, given the well-known difficulty of ascertaining consent in relation to youngsters.

The Under-Secretary of State for the Home Department, my hon. Friend the Member for Wythenshawe and Sale, East (Mr. Goggins), will meet the head of the Family Planning Association tomorrow. I repeat what I said to several groups who raised civil liberties issues in relation to the recommendations of the taskforce. If the people to whom my hon. Friend the Member for Wakefield (Mr. Hinchliffe) has been speaking are of good will—as he certainly is—and believe that we have got it wrong, I ask only one thing of them: that they produce a formulation that overcomes the objections that have been raised. It is extremely difficult. I do not want the law to be an ass. No one will be prosecuted in the circumstances outlined by my hon. Friend—they never have been, and they will not be—but to find a way out of a situation that relies on the common sense of the Crown Prosecution Service has proved impossible.

. . . . .

I need to lighten my mood because going through some of the cases is harrowing. Some of the comments that were made could have come from ‘Round the Horne’ and ‘Beyond Our Ken’. Let us take Lady Saltoun—or Opposition Members can take her. Between her more offensive comments, she came out with some gems. Her statements are almost priceless. She suggested that oral penetration could be considered less serious on the ground that it could be prevented because:

> ‘Clenched teeth can provide quite a good defence. Indeed, not only can they provide a good line of defence, they can be an aggressive form of defence because teeth can also bite.’—[*Official Report, House of Lords*, 31 March 2003; Vol. 646, c. 1054.] **15 Jul 2003 : Column 182**

How could one disagree with such a gem? Lady Noakes also came out with a real classic when she described as a ‘probing amendment’ a proposal to

> ‘leave out 'genitals' and insert 'penis'.’—[*Official Report, House of Lords*, 19 May 2003; Vol. 648, c. 555.]

The good news is that she withdrew it. I hope that the Committee will restrain itself when it reaches these parts of the Bill, but these examples demonstrate the pitfalls that we can all encounter. These are deeply difficult areas, and it is a tribute to the way in which the Bill has been handled that we have got this far. I hope that the Committee will be able to continue that process.

Mr. David Cameron (Witney): On the lighter points of the Bill, the Home Secretary might not have read all the evidence given to the Home Affairs Committee, on which I serve. One of the highlights was when the head of the naturists pointed out that all naturists had to carry a naturist passport, which led many members of the Committee to wonder where they would keep it.

Mr. Blunkett: If the hon. Gentleman will forgive me, I shall move quickly on from contemplating that thought—sufficient unto the day.

Mr. Humfrey Malins (Woking): Where would they keep their identity cards?

Mr. Blunkett: The hon. Member for Woking (Mr. Malins) makes me smile by asking that question. Perhaps the biometric data could be placed on the person.

Clauses 1, 3, 4 and 5 provide for clarity and greater strength in dealing with the law on consent. The definition of consent has been a difficult and problematic issue. In the House of Lords, we managed, through agreement and compromise, to ensure that consent had to be freely given, and that the test of reasonableness was accepted in terms of the genuine belief that consent existed. I am glad that we reached such a compromise because it was important that we were able to move forward in that way.

. . . . .

Mr. Grieve: In relation to the provisions on under-18-year-olds, the Home Secretary pointed out, in some of the final comments in his speech, that some of the problems were related to mental health. The Home Secretary has read the briefing available to other Members and to those who take an interest in the subject. The evidence is pretty overwhelming; in many cases, paedophile behaviour starts in adolescence, in those under the age of 18. If it could be tackled at that age, it could be dealt with successfully, whereas the evidence shows that although it is possible to achieve cures in adulthood, through treatment and rehabilitation, it is much harder. I am sympathetic to the principle that has led the Home Secretary to place a lot of emphasis on under-age sexual behaviour, including that which may take place between two people who are both under age or very close in age; but the consequences are bizarre in places.

Although the Home Secretary is right to highlight the fact that substantial change to the principle of the law has not been proposed, things appear in a pretty stark light when we end up with five-year penalties for those who go behind the bicycle sheds to engage in some

French kissing—that is what it really boils down to even with two 15-year-olds. That is a very odd state of affairs.

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. I admit to the Secretary of State that I am not sure that I know the answers, and I suspect that, if he had known the answers, he would have already put them on the statute book.

It is an odd state of affairs - the hon. and learned Member for Redcar (Vera Baird) also highlighted the oddity of the situation in an earlier intervention - 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. I think that that is how I read the Bill. 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. That is a curious state of affairs, and all I can say to the Home Secretary is that I shall do my best, as will my hon. Friends, to try to improve on matters, but I am by no means certain that we will be able to do so. **15 Jul 2003 : Column 195**

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—

The Parliamentary Under-Secretary of State for the Home Department (Paul Goggins): A magnum.

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.

Mr. Grieve: I am grateful to the Home Secretary for the offer. I think that a flagon would have suited me very well, but I fear that I may not obtain it. However, he has certainly fired me into finding out whether I can provide any improvement.

. . . . .

15 Jul 2003 : Column 200

Simon Hughes (Southwark, North and Bermondsey):

. . . . .

I shall go into detail on only one aspect of the second tier of issues. We have to try to win the Home Secretary's magnum or flagon of champagne—I expected it to be bitter. It is nonsense that we criminalise young people between 13 and 16 for what may be minimal sexual activity that is not of a predatory nature—when it is effectively consensual—and is part of the natural process of an adolescent growing up. We all have to sort that out. There are enough crimes on the statute book and enough people criminalised without adding to it. Let us not be prudish and old fashioned. Throughout the history of the world, teenagers have explored themselves and each other, and that will continue. There is all the difference in the world between that and ensuring that activity with under-13s is unacceptable. That is what the Bill says, which is a good thing. There is no defence or excuse for interfering with under-13s. We should be clear that that is understood outside this place. That is why the event reported today, if it is

true, of an adult running away with a child who is under 13 is serious and needs to be brought to a quick and satisfactory conclusion.

. . . . .

Mr. Hilton Dawson (Lancaster and Wyre): Other Members have referred to the new offence of sexual touching and the problems that could arise in relation to mutually agreed behaviour among peers. When I attended debates on another Bill, bottles of wine were offered as a challenge to people to pronounce the names of Welsh constituencies but, so far, I have not been offered large quantities of champagne by a Secretary of State for a contribution to a Bill. It cannot be beyond the wit of the House to come up with an amendment along the lines that nothing in the Bill should criminalise behaviour that, in the eyes of an ordinary, reasonable person, would constitute normal adolescent experience. In reaffirming the significance of 16 as the age of consent, it behoves us all us to find a sensible way of dealing with the ordinary experiences of adolescence and mutually agreed behaviour among peers.

The strong prohibition against any activity involving children aged under 13 is of enormous significance. In legislating for children, we face a dichotomy: they are seen as either victims or villains. If we set such store by the age of 13, we should also consider raising the age of criminal responsibility to that age, as the implication of the proposals is that we would still be criminalising the disturbed behaviour of under-13-year-olds who abuse other children.

. . . . .

15 Jul 2003 : Column 224—continued

Sandra Gidley (Romsey): I share the concerns of the Chairman of the Select Committee on Health and the hon. Member for Lancaster and Wyre (Mr. Dawson), who find it deeply worrying that the Bill appears to criminalise the sexual activities of all young people, regardless of whether they take place with or without consent. In my kinder moments, I wondered whether I was seeing the dawn of a new age of joined-up government and whether such provision was the Home Office's contribution to reducing the teenage pregnancy rate by saying 'It's simple: let's make it illegal'. The Health Committee's recent report on sexual health, however, highlighted some of the problems in the sex education that our young people currently receive and recommended that greater emphasis be given to relationships and sex education so that young people feel more comfortable and can discuss their sexuality in a non-sniggering manner. Sadly, I must conclude that we have not seen an example of joined-up government, as the measures in the Bill will serve only to reinforce the attitude that teenage kissing and experimental petting are somehow smutty and dirty and should be done behind the bike sheds—a place that has been mentioned already—almost as an underground activity. As adults, not everybody is comfortable with the idea that teenagers are sexually active, but we need to reflect on what is happening out there in the real world and ensure that our laws do not attract ridicule. The matter definitely needs careful review in Committee. Indeed, I thought that that was the case even before the magnum of champagne was offered. We do not need a law that cannot be enforced.

Other European countries have tackled the problem by decriminalising sexual activity between under-16s. I am not suggesting that we should necessarily take that route, as I am not convinced that it is the right way forward. Finland, for example, has taken a different approach. Sex with under-16s is not deemed an offence in Finland if there is no great difference between the ages or mental and physical maturity of the persons involved. That strikes me as the beginning of a pragmatic approach that we might consider. Criminalising consensual activity between adolescents devalues the suffering of genuine victims of child abuse. I strongly believe that we have to find some way of differentiating the two issues. The problem was acknowledged in Committee in the House of Lords, as it has been today. I think

that the Government are well aware of it and I like also to think that they genuinely do not know quite how to take it forward in a practical way.

I was slightly alarmed that, on Third Reading, the Minister in another place proposed safeguards against inappropriate prosecution by suggesting that guidance would be issued by the Director of Public Prosecutions. Such guidance would be implemented by officials, who may have widely varying moral standpoints that will impact on their decisions. That does not seem fair to 15-year-olds throughout the country who are doing what 15-year-olds do naturally. I feel that we need to deal with that matter in the Bill.

. . . . .

Mrs. Annette L. Brooke (Mid-Dorset and North Poole): Although I welcome the approach to protect children from abuse, there is a danger of criminalising children for innocent activities on their part. We know that sexual activity between the ages of 13 and 16 is fairly common. Surveys show that it is as high as 30 per cent. for males and 26 per cent. for females. We must accept life as it is today, although it is of course important that precautions are taken against unwanted pregnancy and advice on the prevention of sexually transmitted diseases is provided. Yes, we must be concerned if kissing and petting become a criminal offence.

I was rather struck by the statement made by my noble Friend Baroness Walmsley in the other place when speaking on this issue. She said that there is a paradox: the Bill stipulates that a child under the age of 13 cannot understand the implications of sexual activity sufficiently to consent to it, but can simultaneously be expected to understand its implications sufficiently to be held criminally liable for it. There is much that we need to consider carefully and sensitively in Committee. Along with other Members, I hope that someone wins the champagne. It is essential that we try to amend the Bill to reflect the real lives and needs of young people today. We will badly let them down if we leave the Bill **15 Jul 2003 : Column 240** in a mess. We must ask ourselves whether it is necessary to criminalise normal adolescent behaviour in order to achieve our overall objectives. As my hon. Friend the Member for Romsey pointed out, between 25 and 40 per cent. of all sex offences against children are perpetrated by juveniles.

. . . . .

15 Jul 2003 : Column 240—continued

Mr. Humfrey Malins (Woking): I understand the problem that clause 14 seeks to address, but is it the right way to do it? The clause, I think—I hope I will be corrected if I am wrong—makes criminals out of two 15-year-olds, both aware of each other's age, who with the consent of each other engage in sexual touching and no more than that. If they are guilty, they are liable to conviction on indictment to five years' imprisonment. The hon. Member for Lancaster and Wyre expressed concern about that, as did the hon. Member for Romsey (Sandra Gidley) and my hon. Friend the Member for Witney. My hon. Friend also rightly expressed some of the concerns of naturists about another aspect of the Bill. **15 Jul 2003 : Column 243 W**hat about clause 14? The Home Secretary was extremely helpful in his opening speech. In response to an intervention from the hon. Member for Wakefield (Mr. Hinchliffe), he may have said that he was considering a formulation and that no one would be prosecuted in the circumstances outlined by his hon. Friend. He said, in effect, that he came to the matter with good will, which I know he does, and that he was prepared to consider the issue. [Interruption.] I am prompted to remember that he also offered a magnum of champagne. If he adds a bottle of gin, I shall have the answer by 10 pm.

Mr. Bryant: Alcohol is the problem.

Mr. Malins: It is a problem among young drinkers. If I qualify as a young drinker then, as Clint Eastwood might say, 'You've made my day'. Clause 14 is troublesome. One must consider the increasing maturity of girls and the way in which young people experiment. One is tempted to be flippant, but I do not want to be. Does anybody remember the back row of the cinema, where 14 and 15-year-olds would have a little bit of fun falling well short of an activity that might be thought harmful? Such young people will face five years on indictment under the clause if they are taken to court. It is a shame that that is the case. Yes, we have some sort of duty to send messages to teenagers about how they behave and to say that having sex at too young an age is wrong, but youngsters are growing up and they will experiment. I am worried that if the clause were enforced, it would send an unhappy message to worried teenagers and parents. Even a decision by the Crown Prosecution Service or the police not to prosecute could be taken only after the child had already been traumatised by a series of questions from somebody, perhaps under caution. That is a tough experience to put a 15-year-old through. I feel unhappy about the clause, but I shall say no more at the moment except that we hope to return to the matter in Committee.

I am bound to say that clause 10 also troubles me a little. It provides that somebody who is just over 18 commits an offence if he touches sexually a person under 16. I am a little troubled by an aspect of that provision. If a mature 15-year-old girl and an immature 18-year-old boy engage in some form of sexual touching, falling short of intercourse, with mutual consent, it is odd that they should be subject to a clause providing that the guilty person will be guilty of an offence that carries 14 years on indictment. There will be no prospect of being tried in a magistrates court—it is on indictment. We need to consider that provision, as the criminal law is not the best tool to deal with teenagers having consensual contact falling short of intercourse, which is part of growing up and experimentation.

. . . . .

15 Jul 2003 : Column 244—continued

The Parliamentary Under-Secretary of State for the Home Department (Paul Goggins):

. . . . .

Now we come to the kissing question, or, as we might come to refer to it in our further deliberations, the champagne challenge. Almost every hon. Member commented on this issue, and concerns were raised that the Bill would criminalise teenagers under 16 who, as part of their normal development, engage in kissing. That is not the intention of the Bill; nor will it be its effect in practice. Strictly speaking, sexual activity between under-16s is already illegal, because the age of consent is 16. It would be irrelevant that both people were under 16. There have, however, been no prosecutions simply for kissing; nor will there be in future. I would say to the hon. Member for Romsey that if we find no other way to deal with this question—if we do not win the magnum of champagne—we shall be able to trust the Crown Prosecution Service to ensure that that intention is followed. The Bill will, however, ensure that, when one young teenager seeks to exploit or abuse another, we shall be able to act. The protection of children must come before all else.

Chapter 6

Sexual activity between children

I am writing this on 4 September 2003. The morning newspapers are full of a typical case of boy and girl infatuation, though in the photographs the two children look almost adult. Clearly both are early maturers, as so many kids are nowadays. I read that in June 2003 Ashley Lamprey, a boy of 14 from Ackworth Moor Top near Pontefract in Yorkshire, was on holiday with his parents on the Greek island of Kefalonia. There he met 12-year old Natasha Phillips from Newport Isle of Wight. They fell in love. Later, back in England, the romance continued at a distance. At the beginning of September they eloped. The girl's mother is reported as saying 'This was just a holding hands and kissing holiday romance which we thought would fizzle out'. She said she had tried to discourage the relationship but was worried that her daughter would become resentful if she interfered:

> '. . . she would get so upset and I was worried she would hate me. Ashley came to visit us for one day in August. I took the day off work to watch them and they went to the pictures together and both cried when they parted'.

When the couple finally eloped Natasha left a note for her mother saying 'I love you but everything is black in my life and I have to go'.[45] Next day it was reported that the couple had been found. The parents said they would let the 'puppy love' relationship continue, adding 'We will try to treat them as young adults'. The report continued-

> 'Police are not expected to take any action against the youngsters, although Superintendent MacDougall said: "Part of the police force's work is to protect life and look for and find missing persons. But if I am honest, we could well do without having to spend the amount of time, effort and energy looking for people like Natasha and Ashley".'[46]

This story has lessons for legislators considering the Sexual Offences Bill. If enacted, clause 14 of the Bill would turn consenting youngsters like these (and there are many of them) into criminals and threaten them with imprisonment for up to five years. That is plainly inappropriate, and could do great harm. The Government's answer is that there would not be a prosecution in such a case. Paragraph 37 of the Government white paper on the Bill states-

> '. . . in some circumstances, particularly where the partners are close in age and apparently agree to take part in sexual activity, it may be more appropriate to pursue the matter through child protection rather than criminal justice processes, out of concern for the welfare of both the children involved. In other cases, even when both parties are children, one may already have a history of abusive sexual behaviour towards other children, which justifies the involvement of the criminal law, or his or her behaviour may have been sufficiently exploitative or abusive to merit prosecution. The Crown Prosecution Service already has discretion about whether prosecution is in the public interest . . .'[47]

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[45] The above details are from *Daily Mail,* 4 September 2003.
[46] *Daily Mail,* 5 September 2003.
[47] *Protecting the Public*, subtitled 'Strengthening protection against sex offenders and reforming the law on sexual matters' (CM 5668). This document, published in November 2002, is referred to below as the white paper.

On this I will quote from the short book I wrote on the Bill entitled *Sexual Ethics and Criminal Law*[48] -

> 'It is surely quite 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 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.'[49]

I am at present concerned only with how the criminal law treats or should treat consensual sexual activity between children who are both under the age of consent (16) but over the age of criminal responsibility (10). This is an age range of only six years, but they are the crucial years of puberty. Clause 14 proposes to criminalise children who are within this age range to a far greater extent than is reasonable or proper. Immense harm will flow from this error if it is not corrected. Almost all children of that age engage in sexual acts to some extent because it is natural to do so; so almost all children will be tainted by our law as criminals. That is absurd. I would also call it wicked, and I am striving to prevent it. It is my second such attempt. Earlier, as mentioned above, I wrote a short book on the same Bill entitled *Sexual Ethics and Criminal Law*. Earlier still I wrote a book on secular sexual ethics entitled *The Sex Code*.[50] This is relevant because no act should be made a crime unless it is immoral (though it does not of course mean that all immoral acts should be made crimes). That poses difficulties in a society like ours, where morality is uncertain or varied. The sponsors of the Bill have not overcome those difficulties; worse they have not even faced them. Indeed they have not recognised their existence. In the sexual field especially, that is unforgivable. Sex law must not overrun sex morality.

The Oxford English Dictionary defines a crime as 'an evil or injurious act; an offence, a sin; especially of a grave character.[51] An act should not be stigmatized by the law as a crime unless it has this grave character. Consensual childish sex behaviour, being entirely natural, lacks this required quality. In early times most human societies did not see the need for their sexuality to be regulated by any legal or ethical system at all. Until the Emperor Constantine introduced the novel precepts of Christianity, ancient Romans saw sexuality as moral-free - to be enjoyed to the full like any other natural human attribute. Those old pagan Romans were sex positive, and did not suffer from our 21st century hang-ups.

> 'We cannot apply our own concepts of what is pornographic, sinful or shameful to the Romans. They bought and enjoyed objects, or even commissioned paintings for their homes, that frankly represented sexual intercourse in many different forms. There are images of men and women making love, but also of men making love to boys and sometimes other men, women pleasuring women, and sexual threesomes and foursomes . . . Looking at these images of love-making with the eyes of the Romans allows us to enter a world where sexual pleasure and its representation stood for positive social and cultural values. Today's society is obsessed with sex as transgression.'[52]

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[48] See above n 29.
[49] Paras 32, 33.
[50] Weidenfeld & Nicolson, London, 1991. For relevant extracts from this book see chapter 17 below.
[51] Second edition 1989, meaning 2a.
[52] John R Clarke, *Roman Sex 100 BC-AD 250* in *The Times* Magazine 26 April 2003.

This author adds that our current attitudes shroud sexual acts in secrecy, and associate sex with guilt, sin and punishment. 'They make what is a guilt-free and ubiquitous human pleasure in other times and other societies into a sick thing . . . Roman people of both sexes and of all classes delighted in looking at love-making . . . Sex was in plain sight of all.'[53]

Our current negative attitudes bear especially hard on pubescent boys, whose new-found virility is commonly denied, if not derided, debased and impugned, by adults close to them. In Britain the boys' plight has been ignored but in the United States there have been indomitable researchers like Alfred C Kinsey and Shere Hite who think this matter requires investigation and exposure. I quote now some findings from the Hite Report on Male Sexuality.[54] These raise questions about the British impulse to criminalise children who partake of under-age sex, even with their age mates. I quote just a few instances out of many in the Hite Report which illustrate the way boys behave when puberty strikes them and no adult is looking.

> 'My best friend and I used to tell each other dirty stories and stimulate each other sexually when we were younger. We started doing so before we knew that society did not approve. When we found out in a fifth-grade sex education class that boys were not supposed to engage in such things, it had little effect on us because we already knew it did us no harm. We continued these friendly sex acts until we were able to start fulfilling our sex cravings with girls. Our last experience was at sixteen. I don't think either of us ever had sex with a male again.'[55]
>
> 'I first experienced intense sensations and my first orgasm at about age thirteen. About this time also several boys and I engaged in mutual masturbation that eventually led to fellatio and anal penetration. As I remember, all I thought about was how good it felt.'[56]
>
> 'My first experiences were with other boys – we talked about sex a lot, compared organs, masturbated together, and also did have some homosexual sex play – I was jerked off by a male friend when I was thirteen and I jerked him off – we did this occasionally for about a year . . . I didn't have the confidence to attempt sex with a girl. The thought during this homosexual play was also heterosexual – the fantasies were always heterosexual. A girl's genitals were a mystery that I very much wanted to solve and a girl's breasts were things I very much wanted to play with.'[57]
>
> 'In seventh or eighth grade, a bunch of us guys discovered masturbation and then discovered that the others had discovered it too; we held jerk-off parties, trying to see who could come first and shoot farthest!'[58]
>
> 'My oldest brother once had me masturbate him while he was in the tub. He was sixteen. I was eight. I thought his cock was huge and beautiful, and I enjoyed it.'[59]
>
> 'I used to suck my brother's penis when I was seven or eight. It felt natural and easy at the time.'[60]

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[53] Ibid.
[54] Alfred A. Knopf 1981. The extracts that follow are from the edition published by Macdonald Optima (London) in 1990.
[55] Ibid, pp 45-46.
[56] Ibid, p 46.
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Ibid.

> ‘When I was at camp when I was twelve and we were all taking showers, we started masturbating and feeling each other. Then we climbed into the steam room, where we all lay down. I was lying there when my friend jumped on me and started pumping (all the other kids were doing the same), and then I remember very vividly how he went crazy till I think he reached some sort of climax or orgasm. We did that a lot that summer.’[61]
>
> ‘I remember at twelve, with a boy, I sucked him by pure instinct.’[62]

Clause 14 will catch many such childish acts that are natural, normal and essentially harmless, and dub them ‘crimes’. What exactly does it provide? In outline, and so far as it falls within the scope of my particular objections, clause 14, as we have seen, renders criminal any consensual sexual behaviour between age mates within the range 10-15. There are four distinct offences, which may be described as sexual activity with another child, causing or inciting such activity, sexual activity in the presence of another child, and causing a child to watch sexual activity. The provisions are highly complex. To be understood they need to be fully explained.[63]

[61] Ibid, p 47
[62] Ibid.
[63] For an explanation see chapter 2 above.

Chapter 7

Briefing by Family Planning Association (fpa)

Note The footnotes in the document put by the fpa on the Internet and here reproduced have been omitted in this version.

July 15 2003

SEXUAL OFFENCES BILL

KISSING A CRIME FOR UNDER 16s

House of Commons Second Reading Briefing

fpa welcomes the Government's wish to reform the law on sexual offences. We agree with the description in the White Paper *Setting the Boundaries* of the current law as archaic, incoherent, discriminatory and inadequate to deal with the needs of modern society.

fpa defines sexual health as 'the capacity and freedom to enjoy and express sexuality without exploitation, oppression, physical or emotional harm' . . . In looking at the provisions of the Sexual Offences Bill we have considered in particular the balance between the need to protect vulnerable people from abuse with the right of all individuals to enjoy good sexual health defined in this way.

The White Paper *Setting the Boundaries* stated that:

> 'It is the role of the criminal law to establish what is and what is not acceptable behaviour: yet it must also treat everyone in society fairly …
> Our guiding principle was that this judgement on what is right and wrong should be based on an assessment of the harm done to the individual (and through the individual to society as a whole).'

Our view, shared by the Joint Select Committee on Human Rights, is that the Bill does not achieve this end because it criminalises the sexual activities of ***all*** young people, regardless of whether this is done with or without consent.

Criminalising consenting sexual relationships between adolescents (clauses 6 to 14)

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.

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.

fpa believes that the Bill should be amended to permit the defence of consent to those who have 'proximity of age' – specifically, the defence should be allowed for under-16s who have sex with under-13s, and for under-18s who have sex with under-16s.

A number of European countries have decriminalised sex between children, either through having a high age of criminal responsibility or explicitly within the criminal code (as, for example, Finland has done by declaring that sex with under-16s shall not be deemed an

offence 'if there is no great difference in the ages or the mental and physical maturity of the persons involved'). We are not suggesting that sex between children in which there has been no valid consent should be decriminalised, though we strongly believe that child sex offenders should have a rehabilitative rather than a penal response.

fpa believes that the Bill as its stands is bad law, for the following reasons:

- Criminalising consenting relations between adolescents fails to distinguish true assault from non-harmful sexual activity, thus devaluing the suffering of genuine victims of child abuse. The work of professionals in child protection will be needlessly complicated because they will be forced to make secret, legally unjustifiable distinctions between 'real abuse' and 'technical abuse'.

- The Bill does not reflect the reality of modern society. Recent figures from the National Survey of Sexual Attitudes and Lifestyles in Britain show that a quarter of women and nearly a third of men in the current 16-44 age group had sex under the age of 16. The average age of first sexual experience ('sexual activity' under the Bill) is now 14 for girls and 13 for boys. The Bill harks back to a time when homosexuality was a criminal offence, a husband could rape his wife with impunity and school pupils were forbidden to hold hands in the street. While the Government may prefer adolescents not to engage in sex, it would be extremely naïve if it thought that an Act of Parliament could put a stop to this – any more than the criminal law stopped homosexuality.

  Although there may not be many prosecutions of consensual adolescent relationships, criminalisation will have the effect of making children feel twisted, furtive and guilty about sex, which can only be harmful to their psychological development. They will be less likely to talk to responsible adults, for fear of getting themselves or their partners into trouble, and will thus be more likely to risk harm to their sexual and emotional development, as well as risking unwanted pregnancies or untreated sexually transmitted infections. In particular, under-13 year-olds, the most vulnerable group, may be terrified of both the criminal justice and child protection systems because sexual intercourse is automatically both rape and child abuse.
- The current Bill breaches children's rights under the Human Rights Act. The Joint Human Rights Committee was specifically concerned about the clauses in the Bill relating to the offence of 'sexual touching' in relation to under-13s (clauses 9 and 10). Their concerns can equally be applied to clauses 10 and 14, relating to the older age group of 13 to 15 year-olds.

  The Committee identified a breach of Article 8.2 of the Human Rights Convention, right to 'private life'; it did not accept that there were any justifications for this breach that are made available under Article 8.2. It said:

  > '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. We draw this matter to the attention of each House.'

  The Committee was of the view the Bill could reflect a better balance between the rights and interests of children and commented:

  > The Government does not suggest that it would be impossible to do this, but it prefers not to try, in case the legislation fails to cover every conceivable case in which one might want to prosecute. Instead of striking a proper balance, this approach in effect refuses to take on the task, leaving it to the discretion of prosecutors to make sure that the legislation does not systematically violate people's rights.

  These concerns were reiterated by the Committee in its more recent Report on the UN Convention on the Rights of the Child (June 24 2003).

- The Government has offered no evidence to show that consenting sexual activity between children is harmful, nor has it made any principled defence of the Bill's criminalisation of these activities.

How the Government has responded on this issue in the House of Lords

While the Bill was passing through the House of Lords, the Government acknowledged at Committee Stage that:

> 'In those cases where sexual activity between minors is truly mutually agreed and there is nothing to suggest that the activity is in any way exploitative, we would not expect and would not want the full weight of the criminal law to be used against them.' (1 April, col 1177).

At House of Lords Third Reading, the Minister further stated:

> 'We accept, however, that genuinely mutually agreed, non-exploitative sexual activity between teenagers does take place and, in many instances, no harm comes from it. It is therefore important that we ensure that these children do not end up being prosecuted or issued with a reprimand or final warning, and we will introduce additional safeguards to ensure that this is not the case'

She therefore proposed these safeguards:

> 'The guidance to be issued by the Director of Public Prosecutions to custody officers under the provisions of the Criminal Justice Bill will provide that the decision whether children under 18 should be charged with child sex offences will be reserved for Crown prosecutors rather than the police. The Crown Prosecution Service will be issuing guidance to its prosecutors about which factors should be taken into account when making such decisions.
> The type of factors to be considered would include the relevant ages of the parties; the emotional maturity of the parties and whether they entered into a sexual relationship willingly; any coercion or corruption by a person and the relationship between the parties; and whether there was any existence of a duty of care or breach of trust.' (June 17 2003, col 690)

However, the Government resisted amendments which would have clarified in the Bill that under-18s who had consenting sex, or 'sexual activity', with adolescents under the age of 16 would not be committing an offence. Various arguments have been raised against this, by the Government and others, to which we respond as follows: 'But children can be abusers as well as adults'.

Yes of course this is true. Indeed, official research suggests that adolescent sex offenders may commit up to a third of all sex crimes. As stated above, we are **not** proposing that rape or sexual assault by children should be decriminalised (though we strongly believe that effective child protection is achieved by the state imposing compulsory treatment, rather than punishment, on these offenders). Children between 10 and 17 should still be liable under the Bill for the offences of rape, assault by penetration, sexual assault and causing a person to engage in sexual activity without consent, under clauses 1- 5. And while the defence of consent could be raised in relation to all victims, obviously the younger the child the harder it would be to prove that any alleged consent was valid. It is inconceivable, for example, that anyone could prove that a child of primary school age validly consented to sexual intercourse.

'The Bill just repeats existing law – so why should it make any difference?'

This seriously underestimates the social effect of enacting new laws. The reason nothing serious happens at the moment is because the law is not understood or is ignored. But a new law sends strong messages, even when it is not enforced. For example Section 28, so poorly drafted it was almost unenforceable, nonetheless had a blighting effect on education about homosexuality for a whole generation of children.

Nor is it true that the Bill just 'repeats existing law'. New offences are introduced, as are new terms – for example, 'indecency' is deliberately replaced by the much more easily proved, and broader, 'sexual activity'. For example, the Minister confirmed to the Joint Human Rights Committee that kissing was an element of sexual activity, although it is doubtful whether this would be judged to be an indecency.

'The Government has promised to instruct the prosecution services not to pursue children engaging in harmless consensual sex'

It seems ill-advised to enact a law that has to be wholly contradicted by subsequent guidance.

In any event, this 'solution' does not deal with the effects of criminalisation discussed above. A decision not to prosecute comes much too late for children who may have had their private lives investigated by strangers and been accused of committing a criminal offence. Their behaviour should not enter the ambit of the criminal justice system in the first place. Moreover, the Government cannot force the prosecution services to overlook breaches of criminal law, though prosecution protocols can advise this. There is no ultimate protection for children against the particular sexual morality of the individual adults concerned in their case – such as the child's parents (who can lay a complaint) or the local CPS officers.

'But we are committed to having an 'age of consent' and this must mean exactly what it says.'

The Bill does not consistently uphold the age of consent because it already permits various kinds of under-age consent. For example:

- Under the Bill someone can plead a defence of consent against a charge of rape of 13, 14 and 15 year-olds. If there has been no consent, then the general rape charge may be brought under clause 1, and with consent a charge of 'sexual activity with a child' may still be brought against the perpetrator since there is no defence of consent available for that offence. Thus 'under-age' 13-15 year-olds may under the Bill consent to sexual intercourse, though not to sexual activity.
- Under the Bill 16 and 17 year-olds may consent to sex unless it is with someone in a position of trust, for example their teacher. If, however, they were having sex before the teacher took up the post, then no offence is committed and they can carry on having sex (clause 26). Thus an under-age person may consent to sex with one 'prohibited' person but not another.
- An adult, but not a child, can be charged with sexually grooming a child under 16 (clause 17). Thus the Bill allows children to consent to sexual grooming by children but not by adults.

What we are seeking is a law setting an age of consent that stops adults from having sex with under-16 year-olds, but which recognises that consent may be possible between adolescents.

'You have to draw a line somewhere. What you are proposing is just as arbitrary as the Bill's provisions.'

It is true that all age-based laws are irrational, since a person is essentially the same on the days before and after their 13th, 16th or 18th birthday. But what we are proposing is

considerably more rational, more just and more likely to protect children from harm than the Bill in its current form.

'Some girls say that they like having an age of consent because they can use it to fend off unwanted sexual pressure from boyfriends.'

Surely the main point is that girls should be helped to understand that they have personal control over their sex lives and their bodies. A logical consequence of this argument is that 15 year-old girls will be unable to resist their boyfriends on their 16th birthday. In fact this allegation appears to be one of those anecdotal 'facts' that are often brandished in debate, but are not held up by the reality of children's behaviour. If the average age for first sexual activity is 14 for girls and 13 for boys, then we have the unlikely proposition that children welcome the criminalisation, not of behaviour they might be faced with in the abstract, but of behaviour most of them are currently engaged in.

Research shows, in fact, that the law has remarkably little effect on young people's sexual behaviour and, if anything, that peer behaviour is the key influence.[i] Girls may indeed need to be more assertive about not wanting sex, but expecting the law to do this for them is wholly unrealistic. Quite the reverse. A belief that the law is keeping girls safe from pushy boyfriends may allow parents and teachers to abdicate responsibility for actively helping girls to be strong in their sexual relationships.

'Decriminalising consenting sex sends the wrong message to under-16s because we want to discourage them from all forms of sexual activity.'

First, the criminal law is a very poor tool for influencing consenting sexual behaviour. Look at how unsuccessful the criminal law was at stopping homosexuality.

Secondly, criminalising teenage sex sends other harmful messages to teenagers. For example, it tells them that the criminal law is stupid. How can we ask young people to respect the law and at the same time tell them that two 15 year-olds having a grope is a criminal offence for which there is no defence?

It tells them that adolescent sexual exploration, a perfectly natural thing, is wrong, bad and a matter for state intervention. The psychological damage that may do to healthy sexual development is incalculable, but profoundly important to the individuals concerned.

And it tells them to be cautious about seeking help for the consequences of their sexual activities—in particular, of course, preventing teenage pregnancies and combating the 'epidemic' of sexually transmitted infection to which the House of Commons Health Select Committee has recently drawn our attention. [ii]

The Bill must be amended to reflect the real lives and needs of young people today. It is unnecessary, and dangerous, to criminalise all normal adolescent behaviour in order to criminalise child sexual abuse.

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Chapter 8

Meaning of 'sexual' (clause 79)

The term 'sexual' occurs throughout the Sexual Offences Bill [Act]. It is defined in clause 79 [section 78], which was amended in Standing Committee. In what follows I first make some general comments, then go on to discuss the original wording of clause 79. Finally I analyse clause 79 [section 78] as it now stands after amendment.

General

A typical use of 'sexual' in the Bill is in clause 10(1) [section 9(1)], which is applied by clause 14 [section 13] and runs as follows-

> 10. [9]. (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.

What is intended to be meant by 'sexual' here? Or to put it more accurately, what is its intended legal meaning?[64] As always, one starts with the dictionary. The Oxford English Dictionary (the OED) gives numerous meanings of the adjective 'sexual'. There are six main meanings, some of which have subdivisions. The list, omitting the numerous examples given, is as follows.

> 1. Of or pertaining to sex or the attribute of being either male or female; existing or predicated with regard to sex.
> (b) *spec.* in ***sexual politics***, the principles determining the relationship of the sexes.
>
> 2.
> a. Pertaining to sex as concerned in generation or in the processes connected with this.
> b. ***sexual organs***, the organs of sexual generation in animals or plants.
> c. Of or pertaining to the organs of sex.
> d. ***sexual system*** (or ***method***): the Linnæan classification of plants, based on the differences in their sexual organization.
>
> 3. Relative to the physical intercourse between the sexes or the gratification of sexual appetites.
>
> 4.
> a. Of animals and plants: Having sex; sexed; separated into two sexes; having sexual organs; producing offspring by means of sexual congress. (Opposed to ***asexual***.)
> b. ***sexual cell***, a reproductive cell which is either male or female; a sperm-cell or an egg-cell.
> c. Of reproduction in animals or plants: Taking place by means of the congress of the two sexes. Opposed to ***asexual*** or ***agamic***.
>
> 5. Characteristic of or peculiar to the one sex or the other.

[64] It is the legal meaning of a term which is important in statutory interpretation: see Bennion, above n 28, s 2.

6. Having reference to the sexes.[65]

Suppose A is a surgeon circumcising a boy of 15, B. When A necessarily touches B's penis is that touching 'sexual' within the meaning of clause 10(1)(b)? If one goes by OED meaning 2c it certainly is. Even if one goes by OED meaning 3 it might be argued that it is. But obviously clause 10 [section 9] is not intended to catch a surgeon carrying out his normal professional duties. Does clause 79 [section 78] help?

The original clause 79

The original clause 79 ran as follows-

> For the purposes of this Part, penetration, touching, or any other activity is sexual if-
>
> (a) from its nature, a reasonable person would consider that it may (at least) be sexual, and
>
> (b) a reasonable person would consider that it is sexual because of its nature, its circumstances or the purpose of any person in relation to it, or all or some of those considerations.

I will here reproduce a passage from my earlier book on the Bill ***Sexual Ethics and Criminal Law***[66]-

> A common formulation in the Bill is that a person commits an offence 'if he (a) engages in an activity, and (b) the activity is sexual'. One wonders why the simpler form 'if he engages in a sexual activity' was not used – or even 'if he commits a sex act'. This vital word 'sexual' is the subject of an elaborate definition. This definition is so important that I must set it out here. [Here the definition given above is set out.]
>
> This is legislative drafting at its most desperate (though one has every sympathy with the driven drafter). What can be the meaning of 'it may (at least) be sexual'? Does this complex definition mean anything more than 'an activity is sexual if a reasonable person would consider it sexual?' If not, it gets us no farther. Here it is worth noting that the Oxford English Dictionary (2nd edn) has no fewer than six quite different definitions of the adjective 'sexual'. The Bill's elaborate definition gets us no nearer grasping which of the six is intended here. We are forced to turn for guidance to the official explanatory notes. They tell us-
>
> > Clause 80 [later 79] defines 'sexual' for the purposes of this Part. This definition is relevant to many of the offences under this Part. For example, clause 3(1)(b) refers to penetration which is sexual and clause 9(1)(b) refers to touching which is sexual. Paragraph (a) requires the reasonable person to look at the nature of the activity in question. If, from looking at the nature of the activity, it would not occur to the reasonable person that it would be sexual, it does not meet the test, even if a particular individual may obtain sexual gratification from carrying out the activity. The effect of this is that obscure fetishes do not fall within the definition of sexual activity. The nature of some activities is such that they are obviously sexual, such as sexual intercourse, and they would meet the test. Other activities may or may not be sexual depending on the circumstances and the intentions of the people carrying them out, for example, digital penetration of the vagina may be sexual or may be carried out for a medical reason. These activities would meet the test in paragraph (a) since the reasonable person need only think

[65] *Oxford English Dictionary* (2nd edn, 1989).
[66] Lester Publishing, Oxford, 2003. For further extracts from this see chapter 3 above.

> that the activities may be sexual; he does not need to come to any conclusion about the matter. Activities which meet the test in paragraph (a) must then be considered under paragraph (b). In order to assess whether the activity is sexual, the reasonable person must look at any or all of the following factors: the nature of the activity; the circumstances in which the activity is carried out; and the purpose of any of the participants. Where the activity is, for example, oral sex, it seems likely that the reasonable person would only need to consider the nature of the activity to determine that it is sexual. But where it is digital penetration of the vagina, the reasonable person would need to consider the nature of the activity (it may or may not be sexual), the circumstances in which it is carried out (if it is in a doctor's surgery, it is probably not sexual) and the purpose of any of the participants (if the doctor's purpose is medical, the activity will not be sexual; if the doctor's purpose is sexual, it will be sexual).

This weighty note overlooks the point made above that there are many meanings of 'sexual'. Under some of them a doctor's digital penetration of the vagina for purely medical reasons would certainly be termed sexual, since it relates to the sexual organs of the patient. We see that the Bill's definition of 'sexual' is useless unless you also have the explanatory note. That should not be the case, because most users of the intended Act will not have that note. Anyway the preface to the explanatory notes is at pains to point out that they have no authority, and should not be relied on.

We have here yet another example of the sex-negative nature of these proposals. What the Bill means by 'sexual' is having to do with sexual desire and what in some places it calls sexual gratification. Yet it is afraid to say so.

As we have seen, the original clause 79 definition had two limbs (paragraphs (a) and (b)), both of which must be satisfied if the activity in question was to be held to be 'sexual'. Paragraph (a) said that from the nature of the activity a reasonable person would consider that it may (at least)[67] be sexual, while paragraph (b) adds that 'a reasonable person would consider that it is sexual because of its nature, its circumstances or the purpose of any person in relation to it, or all or some of those considerations'. I will examine these two tests in turn, drawing on the official note on clause 79 given above.

Paragraph (a) of the original clause 79 The official note says-

> Paragraph (a) requires the reasonable person to look at the nature of the activity in question. If, from looking at the nature of the activity, it would not occur to the reasonable person that it would be sexual, it does not meet the test, even if a particular individual may obtain sexual gratification from carrying out the activity. The effect of this is that obscure fetishes do not fall within the definition of sexual activity.

This confirms that the so-called definition of 'sexual' is not a true definition. It breaks the first logical rule of definitions by using the very term it is defining, and doing so on the footing that the reader ***already knows*** the intended meaning of that term. As Mellone wrote-

> 'A definition must not use the term to be defined. An apparent definition which commits this fault is said to be "circular" or "tautological" . . .'[68]

A further fault is that the supposed definition in clause 79 is obscure. Mellone said-

[67] This little parenthesis was not the least mystifying thing in the original clause 79. I have no idea why it was there, and the official note did not help.
[68] S. H. Mellone, *Elements of Modern Logic*, p. 45.

> 'The definition should not be obscure. This arises usually from the use of expressions which are less familiar than the one to be defined, thus defining "the obscure by the more obscure" (*obscurum per obscurius*).[69]

A clue is given by the reference to sexual gratification in the passage quoted above. Evidently it is assumed that the use of 'sexual' in the Bill is related to sexual gratification. Why not say so? After all there are references to sexual gratification elsewhere in the Bill. We see that something like OED meaning 3 is intended. I repeat, why not say so?

The passage quoted above suggests that the Government does not want 'obscure sexual fetishes' to be caught by the Bill. One wonders why. If a shoe fetishist distresses a woman by an activity which gives him sexual gratification, possibly to the point of ejaculation, why should he not be liable to punishment in the same way as other sexual offenders? This reference also indicates another failure of logic. It assumes that a 'reasonable person' will be unaware of the existence of fetishists, and will thus be an ignorant 'reasonable person'. Why should this unwarranted assumption be made?[70]

The official note on paragraph (a) continues-

> 'The nature of some activities is such that they are obviously sexual, such as sexual intercourse, and they would meet the test. Other activities may or may not be sexual depending on the circumstances and the intentions of the people carrying them out, for example, digital penetration of the vagina may be sexual or may be carried out for a medical reason. These activities would meet the test in paragraph (a) since the reasonable person need only think that the activities may be sexual; he does not need to come to any conclusion about the matter.'

This confirms what is said above that the Government's presumed (but shyly unstated) intention is to confine the meaning of 'sexual' to matters related to sexual gratification. It discloses yet another defect in this so-called definition. By saying that other activities may or may not be sexual depending on circumstances and intentions it shows that an unnaturally narrow meaning is given to the term 'activity'. When a surgeon carrying out circumcision on a boy of 15 touches the lad's penis the surgeon's 'activity' might I suppose be called just that, touching his penis. However a more usual and sensible description of the surgeon's 'activity' would be that he is a surgeon carrying out a routine circumcision operation. His activity is plainly not sexual within the libidinous meaning we now see is being given to that adjective. Paragraph (a) is not satisfied, and there is no need to go on to paragraph (b).

Paragraph (b) of the original clause 79 Paragraph (b) of the original clause 79 says 'a reasonable person would consider that it is sexual because of its nature, its circumstances or the purpose of any person in relation to it, or all or some of those considerations'. As I have indicated, this is unnecessary because in truth an 'activity' comprises its nature, its circumstances and the purpose of any person in relation to it. What is needed instead of the present clause 79 is a definition of 'sexual' which states expressly, without the need for surmise, speculation or guesswork, that the intended meaning is akin to OED meaning 3. I suggest the following-

> For the purposes of this Part, penetration, touching, or any other activity by a person is sexual if carried out with a view to the gratification of that person's sexual appetites.

[69] Ibid., p. 44.
[70] For a discussion of whether a statute user is to be deemed educated or uneducated see Bennion, above n 28, pp 1015-1016.

Admittedly this would include activity by a sexual fetishist, which apparently the Government do not wish to cover. For reasons given above, it may be advisable for that to be reconsidered.

The amended clause 79

Cause 79 [section 78] as amended by Standing Committee B on 18 September 2003[71] and otherwise reads-

> For the purposes of this Part (except section 71), penetration, touching or any other activity is sexual if-
> a reasonable person would consider that—
>
> (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or
>
> (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.

In moving the amendment Paul Goggins MP for the Government said[72]-

> 1. Honourable Members may be aware that the way in which the definition of 'sexual' in clause 79 is currently framed caused concern in [the House of Lords]. It has already been a matter of some debate in this Committee. One of the noble Lords suggested that the clause's wording would be difficult for juries to understand, which could potentially involve their reaching the wrong decision on whether a particular act was sexual. There was also some confusion over the phrase '(at least)' in clause 79(1)(a). We do not want to interfere with the practical effect of clause 79 because we believe that it requires the jury to apply the right tests when deciding whether an activity was sexual. However, we have no wish to complicate matters for the jury and are happy to reword clause 79 in the interests of clarity.
>
> 2. Clause 79 provides a definition of 'sexual' for the purpose of the offences in part 1 and is intended broadly to reflect the definition of 'indecent' in the context of indecent assault in current case law. The jury are required to use three criteria in their assessment of whether an activity was sexual: whether an act is sexual by its own nature or is only ambiguously sexual by nature; the circumstances in which the act took place; and the purpose of any person in relation to the act. In short, the test covers all activity that a reasonable person would consider to be sexual. However, it rules out any activity that a reasonable person would never consider sexual by reason of its nature, such as removing a person's shoes. That ensures that we do not capture activity that no reasonable person would consider to be sexual, and may have been sexual only because the defendant happened to have a secret fetish not made known to the victim - in that example, a foot fetish.
>
> 3. At present the test in clause 79 works as follows. Its first part, in paragraph (a), covers any fundamentally sexual activity such as sexual intercourse or masturbation. In such cases, a reasonable person would be in no doubt, simply because of the nature of the act. Both the tests at paragraph (a) - that the nature of the act is sexual and that because of its nature a reasonable person would consider it sexual - would be met. As well as activity that is obviously sexual by nature, the clause also covers acts that may or may not be sexual depending on the circumstances and/or purposes of any person. For example, digital penetration of a woman's vagina by a doctor may be fundamental to diagnosis or treatment, but could also be wholly irrelevant and only carried out for the doctor's sexual gratification. The jury must therefore consider the circumstances

[71] Cols 311-313.
[72] For convenience of discussion I have added paragraph numbers.

and the doctor's purpose. Similarly, touching a person's thigh is by its nature possibly sexual, but the circumstances in which the touching takes place, and the reason for it, will determine whether it is in fact a sexual act.

4. As currently drafted, the whole of clause 79, including paragraphs (a) and (b), is relevant to all decisions on whether an act is sexual. Although the new version of clause 79 continues to apply the same tests, it clearly separates activity that is sexual by nature, and would be considered to be so by any reasonable person regardless of the circumstances in which it takes place or the purpose of any person in relation to it, from activity that is sexual only because of those circumstances or that purpose. That has exactly the same effect as the current test but will be easier for juries to understand. That should ensure that only activities that a reasonable person would consider to be sexual will fall within the scope of the offence in part 1.

Comments on amended clause 79 [section 78]

The amendment meets some of the criticisms given above, but most of them remain. The drafting is a little clearer, but that is all that can be said in its favour. The definition is still circular. It is still obscure, and not comprehensible without the Notes on Clauses and the Minister's explanation in Standing Committee. It still brings in an unnecessary 'reasonable person', who is still unreasonably assumed to be ignorant of sex fetishism. It is still mystifyingly assumed that a sex fetishist should not be punished like any other type of sex offender. It still misuses language by irritatingly assuming that say routine digital penetration of a woman's vagina by a doctor is not in any way 'sexual' when of course it obviously is. It still mystifyingly avoids saying what the dictionary says, namely that in the sense intended penetration, touching, or any other activity by a person is 'sexual' if carried out with a view to the gratification of their sexual appetites.

Paragraph 2 of the Minister's explanation is obviously defective regarding fetishism. In paragraph 3 the sentence 'Both the tests at paragraph (a) - that the nature of the act is sexual and that because of its nature a reasonable person would consider it sexual - would be met' is baffling in its obscurity. Paragraph 4 overlooks what is said above regarding the true nature of an 'activity'. And so on.

This perverse definition still has to be considered by the House of Commons at the report stage, and then still has to go back to the House of Lords. So there is still time for common sense to prevail. There is still time for criminal judges, magistrates, advocates and juries to be spared much future head-scratching. Do please let us have the obvious – it is so much easier in the long run.[73]

[73] This chapter was published as an article in *Justice of the Peace*, 11 October 2003.

Chapter 9

Extracts from Report of Standing Committee B debates

The following are the names of the MPs who are members of, or in attendance on, Standing Committee for the Sexual Offences Bill 2003 [HL]-

Mr Roger Gale MP (Chairman)
Mr Win Griffiths MP (Chairman)
Ms Vera Baird MP (Labour)
Sir Paul Beresford MP (Conservative)
Ms Annette Brooke MP (Liberal Democrat)
Mr Chris Bryant MP (Labour)
Mr Hilton Dawson MP (Labour)
Mr Neil Gerrard MP (Labour)
Ms Sandra Gidley MP (Liberal Democrat)
Mr Paul Goggins MP (Labour) Parliamentary Under-Secretary, Home Office
Mr Dominic Grieve MP (Conservative)
Ms Harriet Harman MP (Labour) Solicitor General
Mr John Heppell MP (Labour)
Stephen Hesford MP (Labour)
Ms Beverley Hughes MP (Labour) Minister of State, Home Office
Ms Sally Keeble MP (Labour)
Miss Julie Kirkbride MP (Conservative)
Mr Humfrey Malins MP (Conservative)
Ms Julie Morgan MP (Labour)
Mr John Randall MP (Conservative)

Thursday 11 September 2003 (Morning)
Clause 6
Sexual assault of a child under 13

Mr. Humfrey Malins (Woking):

. . . . .

The general proposition that is well understood by all members of the Committee is that aggressive, non-consensual, predatory sexual behaviour on the part of one person towards another is utterly to be deplored. Furthermore, our attitude of horror towards that proposition escalates as the gap in age between the parties involved widens. It is our duty as legislators to protect people, particularly from predatory sexual behaviour. The Bill is designed to modernise the law on sexual behaviour and assault and, by and large, it does that well. However, the other side of the coin is that all members of the Committee find it difficult to criminalise consensual behaviour of a sexual nature between young people who are broadly of the same **Column Number: 094** age. We know that young people experiment with sexual behaviour from a fairly early age.

Such views were well reflected in the debate in the other place. How then do we match those two different points of view in legislation? 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, or vice versa, both will be committing a sexual offence under clause 8, and that offence will be punishable—yes, 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.

The anomaly already exists in principle, because much of the behaviour in question is criminal under existing law. However, the position seems to be worsening, because under the Bill the maximum penalties are much increased. Under current law, some of the behaviour we are talking about would constitute indecent assault and/or indecency with children, which is currently punishable with up to 10 years imprisonment, but the Bill would make such offences punishable with 14 years imprisonment in some cases and life imprisonment in others.

What truly shocks us about sex with children under 13 is if there is a large age gap. Of course, we want to make it seriously punishable for an adult to perform sexual acts with a child under 13; there is no doubt of that. We also feel uneasy and unhappy about, for example, a child of 14 performing sex acts with a child of eight or 10, but we feel far less aghast at—indeed, we understand—the prospect of consensual sexual acts between children who are 11 or 12. I do not think that there is any appetite in society for criminalising that sort of behaviour.

What is the proper course of action? My hon. Friend the Member for Beaconsfield will speak at some length on the various approaches that can be taken. There is the argument—I am not sure that it is right—that there should not be an age gap between the parties of more than, say, two years. If such a provision were brought into force, it would create an exemption from criminal liability in respect of consensual acts only. The child of 12 who forces attentions on an unwilling victim of the same age would still be committing a variety of offences.

Amendment No. 133 to clause 6 would insert:

"as part of an assault".

Column Number: 095

Amendments Nos. 134, 135 and 136 are identical to it, but apply to clauses 7, 8 and 9; that is why I bring them within the scope of this debate. Amendment No. 133 is a probing amendment. The Law Society suggested it to me, and its purpose is to clarify the definition of non-consensual offences against children under 13.

Clause 6, like clauses 7 to 9, covers non-consensual sexual offences against under-13s, so the issue of consent is not relevant there. We understand the plain and laudable purpose of clauses 6 to 9, which is to protect children from suffering abuse. Any touching that is not consented to constitutes an assault. However, as assault is not part of the offence under the Bill as it stands, the provisions will also criminalise consensual child-on-child conduct in which both parties are under 13. Although child-on-child activity can be abusive and damaging, is it the Government's intention to have the threat of criminalisation hanging over the heads of those engaged in consensual activity?

The Law Society and Opposition Members understand that the Crown Prosecution Service intends to issue guidelines for prosecution. I feel distinctly uneasy about passing a draconian law that punishes offences under clauses 6 and 7 with imprisonment for life, and with imprisonment for 14 years under clause 8, and simply relying on the fact that the Government say, ‘Don't worry about the law. We shall make sure that it is never enforced.’ It is not helpful to have legislation that constantly requires modification by guidelines.

In this instance, there is something to be said for the proposition that it is advantageous to spell out the requirement of an assault element to the offence. Of course, things would be

clearer if such an element were introduced into the clause, because if the conduct that is disapproved of resulted from an assault it would become a serious offence.
I conclude with a few general remarks on the age of consent for heterosexual sex. In this country it is 16. Committee members will be interested to know—in fact, they probably already know—that the rules in European Union countries vary. For example, in Austria the common age of consent for males and females is 14; in Denmark, Finland and France it is 15; in Italy, on occasions, it can be 14; in Spain it is as low as 12, and in Sweden as low as 15. There are different approaches to the matter.

I have opened the debate with some comments of general principle on clauses 6, 7 and 8 and stressed that all of us are completely against predatory sexual behaviour. However, it is difficult for the Opposition to accept that draconian sentences for consensual sexual behaviour between youngsters should be on the statute book. More will be said about that as the debate unfolds.

. . . . .

Sandra Gidley (Romsey): I understand the motivation for these amendments, but they fail to achieve the stated purpose. We must not lose sight of the fact that clauses 6 to 9 deal with children under the age of 13. I have particular concerns about clause 8, which deals with sexual touching, and clause 9, which deals with inciting a child to engage in sexual activity.
To return to clauses 6 and 7, I start from the premise that it is difficult to accept that the acts they deal with involving such a young child can ever be regarded as anything but assault. The Family Planning Association suggested amendments that appear to provide a defence of consent for a child under 13. I have problems with that because I am not sure that a 12-year-old is in any position to consent to sexual intercourse—we are talking about full sexual intercourse now, not consensual touching, or any sort of touching. The Family Planning Association must have meant well when it proposed these amendments—which I notice no hon. Member has tabled—because its job is to deal with the practical side of providing advice on contraception and sexual health to young people. However, I was slightly concerned: if the association regularly comes across the problem of 12-year-olds having sex, that is something that unfortunately we have to face, but such activities should not be condoned in any way. The amendments do not help with the consensual aspects. We should consider a different approach. In fact, the amendments provide a loophole. I might not **Column Number: 097** have thought that prior to yesterday's briefing from the Metropolitan police. Clause 6 deals with the penetration with a penis of

> 'the vagina, anus or mouth of another person'.

There are no circumstances in which we would condone 12-year-olds engaging in that sort of sexual activity, or with the activities dealt with in clause 7.

. . . . .

Mr. John Randall (Uxbridge): As I was listening to the Minister on the "Today" programme—he sounded very reasonable-—one thing occurred to me, which follows on from what the hon. Member for Cardiff, North (Julie Morgan) said. If what we are discussing is
Column Number: 101
a criminal offence, although the guidelines will have been published and we have had assurances that it will not be taken further, is there not a danger that some youngsters will not know that the guidelines exist? The myth will then go round the schools that these activities are criminal, and young people who engage in them will think that they are in danger of the police coming around and carting them off. I wonder whether that might defeat the object, and make the issue more undercover than we intend.

The Parliamentary Under-Secretary of State for the Home Department (Paul Goggins): We have already had an indication of the sort of debate that we will have in Committee today.

I thank the hon. Member for Woking for his kind remarks at the start of the debate—it is indeed my first time on a Standing Committee, and it is an interesting and challenging one to be part of. I hope that I am able to maintain the constructive atmosphere that prevailed in the Committee on Tuesday.

The hon. Gentleman reminded the Committee at the outset that, as we tease out the issues, what unites us is greater than that which may divide us. He said that sexual assault on children, particularly very young children, was 'abhorrent'. That is our starting point, and that unites us far more than it divides us.

The hon. Gentleman also made the point, which has been repeated by other hon. Members on both sides, that we will discuss a wide range of issues this morning. I will respond to some of those issues now, particularly those that relate to the current group of amendments. However, it has become clear that many other issues are involved. I will deal with the issue about consensual—what some might call harmless—sexual activity between under-16s later on, when we discuss other amendments. However, I reassure my hon. Friend the Member for Cardiff, North and other members of the Committee that the aim of the clauses under discussion is not to criminalise ordinary developmental, fairly harmless behaviour by children. None the less, we have a duty to make the legislation robust.

Amendments Nos. 133 to 136 would require the activities covered by the offences in clauses 6 to 9 to have been carried out

> "as part of an assault."

The hon. Member for Romsey graphically illustrated the sort of problems that such a strict interpretation would cause. There would be two consequences. First, where consent is raised as an issue—and we can anticipate that that would be in almost every case—lack of consent would need to be proved in relation to each offence. I emphasise to the hon. Member for Woking that that would apply whether the offender was under 18 or over 18. Secondly, where lack of consent could not be made out by the prosecution, any sexual activity with a child under 13 would be charged under one of the child sex offences in clauses 10 to 14. In essence, there would be no point in having a range of separate offences for children under 13. The hon. Member for Beaconsfield referred to that issue.

It is important that the Government and Parliament send out a clear signal through the legislation that **Column Number: 102** although 16 is the age of consent, we have strong views about any sort of sexual activity involving, or sexual assault on, a child under 13. We believe that that is a significant difference. If the amendments were accepted, the legislation would fall far short of the Government's commitment to enhance protection for children.

Let me outline the rationale that led us to define the range of child sex offences dealt with in this group of clauses. Our priority is to maximise the protection offered by the law for very young children. We want to make it clear in statute that sexual activity involving a child under the age of 13 will not be tolerated, so we adopted the policy that a child below the age of 13 is not capable of giving legally significant consent. I am grateful for the support of my hon. Friends and the hon. Member for Romsey on the issue. The hon. Lady referred to the presentation by the Metropolitan police that members of the Committee attended yesterday; unfortunately I was elsewhere and could not be present, but I had a similar presentation from the same unit of the Metropolitan police on Monday, so I am aware of the information that they shared. As we heard, it is important that our deliberations are rooted in the reality that they have to deal with.

We chose the benchmark age of 13 as it reflects the provisions of existing sexual offences legislation, whereby cases involving victims below that age trigger higher maximum sentences than those in which the victims are aged 13 or over, but under 16. We have already debated the age at which people mature and whether that age is rising, falling or staying the same. We have drawn the conclusion that as 13 is the age at which children enter their teenage years and which is recognised by society as marking a significant step towards maturity, it seems appropriate for 13 to be the age threshold below which any ostensible

consent to sexual activity should not be deemed to be legally significant. Regardless of whether a child under the age of 13 may have the necessary understanding of sexual matters to give ostensible consent to sexual activity, we firmly believe that the law has a duty to protect all children from engaging in sexual activity at such an early age.
We are also anxious to ensure that children below that age should not have to endure detailed questioning either about their sexual understanding or about whether they gave consent to sexual activity on the specific occasion in question. The effect of the amendments would be that the under-13 child offences would apply only when the sexual activity was forced upon the child. It would follow from that that in some circumstances children under 13 could be deemed capable of consenting to such sexual activity; that is completely at odds with our position.

If the amendments were accepted, there would be nothing to distinguish between offences involving children under 13 as being particularly serious or deviant behaviour and it is important that the Committee, and Parliament, send the message that we do regard that as serious and deviant behaviour. In addition, in connection with proving that an assault has taken place, children under 13 would have to face cross-examination in relation to consent in court, **Column Number: 103** which is something that we have expressly sought to avoid. Young children should not be put through that experience. The central point made by the hon. Member for Beaconsfield was about maximum penalties. Without making any commitments or promises, I am happy to reflect on the matter in the light of his comments. In my view, the amendments would totally undermine our policy and weaken protection for vulnerable children under 13. For the reasons I have given, I hope that the hon. Member for Woking will withdraw the amendment.

Thursday 11 September 2003 (Afternoon)
Clause 14
Child sex offences committed by children or young persons

Mr. Dawson: I beg to move amendment No. 11, in clause 14, page 5, line 33, at end insert ‘, unless such actions could be considered by a reasonable person to constitute ordinary, consensual adolescent behaviour.'.
We have had an excellent debate, which seems to have lasted for a very long time. Frankly, my overwhelming feeling at the moment is one of relief that my own daughters are now well into their 20s. I am grateful to the three other members of the Committee who have put their names to the amendment and for the words of support for it that I have received from officials of the National Society for the Prevention of Cruelty to Children; from Rachel Hodgkin, who wrote the briefing from the Family Planning Association; and from officials of the Children's Rights Alliance for England.
This is developing into an excellent Bill. It makes a very strong statement about the importance that the Government and hon. Members of all parties attach to the issues. In that context, I strongly support the retention of the age of consent at 16. One of the best things that the Government have done was to equalise the age of consent at 16. Also, as I said earlier, I am very pleased with the concept that children under 13 are incapable of consenting to any sexual activity.
I am also pleased by the introduction of the offence of touching that is sexual, and I am happy with the definitions that are given in the Bill. The sexual abuse of children by other children is a very serious problem that was discussed earlier today. I do not believe that anyone is terribly clear about this, but the figures indicate that perhaps as much as 40 per cent. of sexual offences against children are committed by their peers. We must deal with that sorry statistic with openness and through education and the effective treatment of disturbed children, whether they are victims, offenders
Column Number: 152
or both, and we must have good services that are backed up by sound law.

In a broader context, I am concerned that too many children are losing out on their childhood. The pressure on children to engage in mock-adult behaviour and behaviour that is way beyond their years is immense and growing, and the current age of consent is under threat. How can it not be, when it is reliably reported in The Lancet and other places that 30 per cent. of men and 26 per cent. of women say that their first experience of intercourse occurred before the age of 16? Every Member of Parliament is concerned about the teenage pregnancy rate in this country.

Clause 14 effectively outlaws kissing for under-16s on pain of five years imprisonment. That is how young people see it, but I do not know about other hon. Members. I attended a spirited debate at the annual assembly of the United Kingdom youth parliament in July when young people were well informed and aghast at the implications of the clause. I am extremely concerned that it is deeply flawed and that it will bring the age of consent of 16 into total disrepute and undermine it. The young people to whom I talked at the youth parliament and those from my constituency who visited Parliament earlier this week could not believe that such a provision was even being considered by anyone in this House.
I am concerned that the clause will prevent young people who are involved in consensual relationships from seeking advice on contraception, how to handle those relationships and the emotional implications of deep relationships before the age of 16. I am also concerned that it will leave some young people more vulnerable to abuse because of the need for secrecy. Who could fail to recognise the potential for emotional blackmail of a vulnerable child who is emotionally attached to a domineering partner of a similar age and who cannot tell what is going on because she would not want him to go to prison for five years? We want openness, education, sound advice, counselling and support, and that should be based on effective law that is rooted in the reality of children's experience. Touching may be coercive, but it may be mutually agreed, experimental and normal. Young people develop in maturity and understanding at different rates and the response of parents, family and professionals to the challenges of young people's sexuality should be proportionate, supportive, sympathetic and helpful.

Some of the amendments that we have discussed today are complicated. The Home Secretary said that the conundrum is so difficult that he is prepared to offer a magnum of champagne to anyone who can solve it. I think that we have made it too complicated by trying to allow for the vast range of possible situations in the Bill. That is impossible and the Home Secretary's champagne is completely safe.

The amendment is not perfect, but it is on the right lines. It would introduce an appeal to the common sense and reason not only of the police and the Crown Prosecution Service, but of every parent of every teenage child, every teacher of every teenage child and
Column Number: 153
anyone who has contact with adolescents and is concerned about them. The amendment would not decriminalise anything. It would retain the backing of the serious sanction if and when it is needed, but it would set the matter out in a form that is understandable and explicable. It tries to strike the necessary balance between protection and allowing children to grow. If we over-protect children, we render them vulnerable.

My proposal would be understandable and explicable to young people and I think that we could make it acceptable to them. We need something clear and straightforward in the Bill. We need effective legislation to underpin a change of culture in this country. We need greater openness, understanding and sympathy for young people. We need a realistic point from which to promote a culture that says, "Until you're ready, it's quite all right for you to say no." Amendment No. 11 would help to create that.

Vera Baird: I hope that I did not jump up too quickly; I thought that my hon. Friend was going to end his peroration. Although I sympathise with the reasons why the amendment was

tabled, clause 14 applies clause 10, which is intended to include penetration, to under-18s. Despite his support for the age of consent staying at 16, if his amendment were made, it would appear to give a defence to somebody who penetrated an under-16. Did he intend the amendment to clash with the age of consent?

Mr. Dawson: Actually, it is what I intended. It is far too difficult for us to define different forms of sexual experience. We do not prosecute under-16s who become pregnant. If we are effectively to help young people who are involved in consensual sexual relationships, we must treat them decently. The response to any form of sexual experience for under-16s should not be condemnation, which is implied by clause 14.
We should understand the position of under-16s. We should try to help, understand and assist them—we desperately want to protect them—but they must know that such behaviour is illegal. Such behaviour should remain illegal, and the age of consent should remain at 16. Unless we give the age of consent credibility, which is the purpose of the amendment, we will lose all the under-16s who are engaged in sexual relations. They should see that the Bill is a great attempt to protect them from sexual exploitation, and the implications of clause 14 are preposterous and potentially extremely damaging.

Mr. Grieve: I fully understand the hon. Gentleman's intention. Indeed, the intention is similar, albeit differently worded, to that of the amendment moved by the hon. Member for Romsey (Sandra Gidley) this morning and amendment No. 132, which was my attempt. The amendment is, of course, cast in a different way because it preserves the offence while leaving a saving provision to a jury that concludes that, despite the facts, there is no need to convict. Indeed, a jury would have the option not to convict because it is completely happy with what has been going on.
Column Number: 154
I remember having a discussion at the Bar—not the Bar downstairs—with a barrister about criminal law. We were arguing that it might be possible to get rid of the criminal law entirely, so that people could do whatever they liked, but that if the prosecutor thought that what somebody was doing was wrong they could prosecute them and go in front of a jury, which would have three possible verdicts—that the activity was in order, out of order or totally out of order—and the person would then be dealt with accordingly.
The problem with the amendment tabled by the hon. Member for Lancaster and Wyre is that it raises the obvious possibility that the definitions are so loose that somebody who does some heavy petting in Lancaster might appear in front of a Lancaster jury and see it decide that the activity is in order, while a defendant in Norwich might appear in front of another jury for doing the same thing and, because of the flexibility, see that jury decide that the activity is out of order. I hope that the hon. Gentleman recognises that the degree of uncertainty that that would produce in relation to people's behaviour and conduct is such that the administration of justice would become very difficult. People would legitimately complain that they had a reasonable expectation that what they were doing was in order. They would ask why, suddenly, when they had read in the paper that the activity was held to be in order somewhere else, it was held to be out of order now that they were doing it. However, that is the flexibility that is envisaged.

I will listen carefully to what the Minister has to say on the subject, but I fear that, despite its attractiveness, the amendment would lead to enormous problems. We must either provide a definition of what is acceptable and what is not, or we must stick to what the Minister has proposed, which is that this entire category is unacceptable, without the saving provision. Under the Minister’s proposals, the protection to a defendant is twofold. The first is that the prosecution does not prosecute because it exercises its discretion not to do so. The second, which has always been present, is that even after conviction the judge gives an absolute discharge and says that he regrets that the prosecution brought the case and that he hopes that such a case never gets brought again, which builds a volume of case law on which the prosecutors subsequently exercise their discretion.

I hesitate over the hon. Gentleman's proposal, because it might not work.

Mr. Dawson: Part of my argument is that the reality of the situation is that, hopefully, there are many stages at which these issues can be dealt with long before they ever reach the police or the Crown Prosecution Service. Is it not every parent's experience that they are faced with the challenge of their young person saying, "I want to do this because Fred's or Frieda's parents down the road allow them to do it"? Is not what we are facing adolescent sexuality, which is being challenged and subject to change?

Mr. Grieve: I accept that, but I am not convinced that the proposal should be incorporated into law,

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with the consequences that would flow from that for a person who gets things wrong. Somebody might be convicted even though they claim that they thought about the matter and they were absolutely convinced that what they were doing came within the category of "ordinary, consensual adolescent behaviour." That is a difficult principle of law, and I do not know whether we should start going down that route. Law must have greater certainty than that.

Mr. Bryant: I think that I agree with the hon. Gentleman. Does he not think that there might be a thoroughly reasonable or fundamentalist Christian who believed that it was extremely extraordinary for two young people of 15 to be kissing, or even holding hands, whereas two liberal-minded people living in Hampstead or Highgate might hold completely different views on that? If the law is unable to be specific enough, it will be difficult to direct a jury.

Mr. Grieve: Indeed, I think it would not be possible to direct a jury at all. On the basis of the amendment, the judge would simply have to ask the members of the jury if they as reasonable people thought the case was all about ordinary, consensual adolescent behaviour. That is a complete defence, and one would have to leave it to them.

The proposal is attractive, but there will be people who rejoice because they get acquitted, and people who get convicted, who will feel upset and aggrieved because they will not understand it in the light of what they have done. I do not know what mechanism of appeal there could be. It would simply be a matter of the jury's view. I am wary of it. That is all I want to say on the subject.

Julie Morgan (Cardiff, North): I support the amendment tabled by my hon. Friend the Member for Lancaster and Wyre. I put my name to it because I support the spirit behind it. I accept that there may be a problem with what is "ordinary, consensual adolescent behaviour." We all know what my hon. Friend means and where he is trying to get to. Although the amendment is not perfect, I support the spirit in which it was drafted.

The message we give to young people is important and we must remember the high teenage pregnancy rate in this country. We must not give a punitive message to those young people who have become pregnant at an early age, and who we know engage in sex at an early age. The law as it stands clearly fails, because so many young people under 16 are pregnant. It is important that we give a message that we want to concentrate on young abusers in the Bill, and there is a significant number of them, as has already been said. They cause terrible anxiety and problems. In order to do that, we need to get rid of the concept that we are widening the net and drawing in behaviour that we know is ordinary and part of growing up.

Mr. Bryant: I sympathise with the point that my hon. Friend is making. My difficulty is with the word "ordinary" that she has just used. Another word for "ordinary" is "normal". It is very difficult to use those words without attracting value judgments, which, unless we are prepared to include them in the Bill,

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would make it almost impossible for people to gain justice.

Julie Morgan: I accept my hon. Friend's point. The clause needs to be more specific. The spirit behind the amendment is something that my hon. Friend the Member for Lancaster and Wyre has put forward clearly. We need to reach out to young people. The words in the Bill must be understood by young people. I have had the sort of experience that my hon. Friend said that he had when he spoke to young people in the youth parliament. Their concern about this sort of development in the Bill is a worry. We ought to bear that in mind, and it is in that spirit that I put my name to the amendment.

Mrs. Brooke: I attempted to obviate the need for clause 14. When I was knocked down over that, I thought, "Oh well, it is probably better to go down the simpler route." I now feel rather disillusioned. To return to the main principles, I think that clause 14 is very damaging as far as the way in which young people interact with society is concerned. We have to accept the culture of young people. I do not mean agony aunt columns in magazines, but the sort of magazines that they read, what they read about, the films that they are seeing and the books that they are reading. The clause does not match that at all and we owe it to young people not to give signals that everything that they do is wrong. I find it very worrying that we have had some exceedingly useful discussion and at times edged closer to a solution, but then the lawyers stand up. With all the struggles that we are having, I keep coming back to the point that we are reassured because not many cases will come before the courts if matters are left as they are, but every time we try to change them, a huge problem emerges about cases coming before the courts and how the law will be interpreted.
I would really like to find a solution to that problem. I wish that I had the skills, which I obviously do not, to find it. I just hope that we can keep working on it. We all had a mailing from a Mr. Bennion, which we did not have time to discuss and examine, so I do not know if there is anything in that that the civil servants will be able to consider. I support wholeheartedly every sentiment in the amendment, and I wish that we could find the way through.

Mr. Gerrard: My hon. Friend the Member for Lancaster and Wyre and other hon. Members who have spoken are absolutely right to point to the clause as currently drafted as a real problem. In his amendment, my hon. Friend has tried to take a common-sense approach by looking at what actually happens. It fits in with the tone of a lot of the debate that we have had on this part. I agree with what he said on that sort of approach. I find difficulties with every one of the other solutions that have been suggested. For example, on the suggestion that involved three-year periods, we can think of 15-year-olds who could easily pass for 19 and 13-year-olds who we would not think were 10. There is only a two-year age gap there, but an enormous difference in maturity.
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The question is whether this common-sense amendment is legally workable. I understand what the hon. Member for Mid-Dorset and North Poole said about the lawyers getting hold of matters. On a previous Committee that I served on, I referred to the speech made to Jack Cade in Shakespeare's "Henry VI", which no doubt some hon. Members will be familiar with, which starts:
"The first thing we do, let's kill all the lawyers."
Sometimes, one wonders whether that is the approach that we should take.

Mr. Bryant: That is not an offence under this Bill.

Mr. Gerrard: The hon. Member for Beaconsfield mentioned the interpretation that juries might put on the law. I am sure that that happens anyway with other parts of the criminal law. East London juries might be rather different from juries in Lancaster. I recall an hon. Member telling me that when he started to practise as a barrister his colleagues expressed astonishment that he had managed to get one of his clients convicted at a particular court in London.

However, this is not just about how juries interpret. It is a question of what prosecutors look at when deciding whether to charge.
I took the opportunity of the lunch break to look at the current CPS guidelines, which were mentioned this morning, to see what happens under the law now and how that would relate to the clause. What they say highlights the problem. We are in a situation, which we will still be in when the Bill is enacted, in which, as a matter of law, someone under the age of 16 cannot consent to an act that is otherwise an assault. However, they can consent as a matter of fact. That is the problem: matching together a matter of law in terms of consent and the matter of fact that someone has consented.
What is clearly in the guidelines now is that, if the victim consented, that would be relevant when considering the public interest in whether to prosecute. Factors such as the age of the defendant in relation to the victim, emotional maturity, any element of seduction, the relationship between the parties, a duty of care and breach of trust are, rightly, taken into consideration now. They are exactly the sort of factors that one would want to be taken into consideration. Ideally, we would somehow be able to bring the guidelines into the Bill, but I still have great difficulty in seeing how we could do that and produce a legally workable clause.
I sympathise entirely with what my hon. Friend the Member for Lancaster and Wyre says in the amendment. That is what we are all basically thinking. We need a common-sense approach, so that people are not prosecuted for what we would regard as consensual adolescent behaviour and not a problem. How one defines that may be the difficulty. This is the nearest to being an amendment with which I fully agree. I want to hear the view of the Minister and his officials as to how legally workable it might be, whether there are real problems and, if so, what they

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are and what approaches we might be able to take to improve the amendment so that it works.

Mr. Malins: This is a difficult clause. It is not a happy clause and I have a great deal of sympathy with the approach taken by the hon. Member for Lancaster and Wyre. Let us consider what the clause says. It will make it an offence punishable by up to five years imprisonment for a young person of 13, 14 or 15 to engage in any sexual activity with a person of similar age, even if it is consensual and/or relatively minor. It bears repeating that it would be an offence for a boy and girl aged 15 not only to have sexual intercourse, but to indulge in heavy petting, to fondle one another sexually or even to kiss mouth to mouth.
I mentioned earlier that I had been in contact with Professor John Spencer of Selwyn college, Cambridge. I shall share some of his thoughts on the clause and the amendment, because he is as distinguished an academic as one could find and what he says may be of some help to the Government. I hope that they will take on board what he says. Professor Spencer says of the clause:
"I share the view of many speakers in Parliamentary debates who have said that this is ridiculous. The reason was well put in respect of the existing law by Professor Brian Hogan, who took the case of 'a 14 or 15 year-old schoolboy being familiar with a schoolgirl of similar age.'"
He said in "On modernising the law of sexual offences", which appeared in "Reshaping the Criminal Law" of 1978:
"Such conduct is a crime for him, and a crime for her if she responds in kind. No doubt prosecutions in such cases as these are almost unheard of, but that such conduct is even technically an offence I find wholly repugnant. As all . . . research shows this makes criminals of a sizeable proportion of the population. And it is wholly wrong that conduct which has been a part (and surely not a detrimental part) of the sexual growth of nearly all of us should be stigmatised as criminal. The reformer who explained to fourth, fifth and sixth formers at any school that much of their consensual sexual conduct is criminal and ought to remain so in a modern criminal code would be deservedly laughed out of the class."
How can I distance myself from those observations?
Professor Spencer states:

"It is no answer . . . for people to say 'It's not a change—the present law makes it illegal too.' The Bill is supposed to create a modernised, rationalised law of sexual offences, fit for the 21st Century. Nor is it any answer to say"—

as some do—

"'It's not possible to exclude harmless consensual behaviour between teenagers whilst enabling the law to protect children against sexual exploitation.'

French law managed to find a sensible solution when its new Criminal Code was enacted in 1994. This contains in Article 227–25 a general offence of sexual behaviour with persons who are under 15: but (unlike the earlier law) it can only be committed by adults (i.e. people who have reached the age of 18)."

4.30 pm

The professor thinks that

"the solution for us would be simply to delete Clause 14, without replacement. The sort of predatory minor whom we might want to prosecute, or at least threaten with prosecution, would still be guilty of a whole range of serious offences if he turned his attention to a child under the age of 13, or did any sexual act to or with a child over 13 to which the other participant did not freely consent (in the sense in which clause 75 defines it)."

He adds that he cannot

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"think of much behaviour by minors that we would want to prosecute which would not be caught by one of the other offences in the Bill, or some other part of the criminal law. Perhaps there might be a problem with the over-sexed youth who continually pesters other children for sex: like the 15-year-old defendant in R v B (A Minor) [2000] AC 428, who repeatedly pestered a 13-year-old girl on a bus by asking her for oral sex."

The professor believes that such a scenario could be covered by a prosecution of

"an offence under the Public Order Act—and presumably would be the case if the girl he had pestered had been over 16 (or indeed if this sort of thing were done by one adult to another)."

He concludes:

"If this were thought to be insufficient, then I suppose we could leave Clause 14 in, but limit its effect to some of the offences only (e.g. the incitement offence in Clause 11). I think a respectable case could be made for saying that the criminal law needs to extend to catch a minor who pesters unwilling children for sex, whilst not making consensual sex acts criminal when they are done by consenting minors over the age of 13."

The Government and the Minister should listen carefully to Professor Spencer's views. I do not dissent from anything the professor says. He is a top academic. I do not know what discussions officials have with top academics. Have they run such matters right past the top professors at all the universities in the country? If not, why not? Professor Spencer has been most helpful to me. The last thing he said to me was, 'Have you read *The Secret Diary of Adrian Mole Aged 13¾*?', to which I replied, 'I think so." He said, "Listen chum, look at the page that describes his adventures with Pandora, when he says, 'Pandora let me touch her bust today, but I couldn't feel much through her anorak'. I think that the telephone call then came to an end. We must not forget what Professor Spencer said.

Mr. Randall: Perhaps I should have saved some of my earlier comments—in response to which I received glazed-over looks from members of the Committee—for this amendment because I have a great deal of sympathy with it. Had I done more homework, I might have added my name to it when it was tabled. However, having heard my hon. Friend the Member for Woking, I am interested in what the Minister has to say about clause 14 and whether it is necessary.

I am at a disadvantage because my children range in age from 13 to seven. Listening to what is being said in Committee, I worry when I think of the "ordinary . . . adolescent behaviour" that is to come. I have a problem with laws that may be broken—we must endeavour not to create laws that need be obeyed only in certain ways. That makes an ass of the law.

I understand the position of the legal profession and I do not want to knock it. Before I was elected, it was easy for me to say that Parliament has too many lawyers. Now, when I sit through proceedings in Committee, I say, "Thank God for lawyers," because they are often the

only people who understand some of the intricacies, and they are the ones who will have to deal with the laws we pass. However, it is a shame that common sense is not allowed to be part of the proceedings. I believe that it was my hon. Friend the Member for Beaconsfield who said that common sense cannot be defined in law and that it would be different in different areas, which is absolutely true. I have some

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academic background for that assertion: I remember reading a treatise on different Serbian villages between the wars. One village regarded sex before marriage as perfectly acceptable, whereas a village 10 miles down the road did not. We can understand that. I live in Uxbridge, in suburbia—not the dizzy heights of Hampstead and Highgate, but a fairly ordinary sort of place.

We talked about issuing guidelines, so someone will be making a value judgment about potential prosecutions. Old-fashioned though it may be, I would prefer to rely on the 12 men or women on a jury to take a view. I understand the problems. Perhaps the lawyers on the Committee would consider it a lucrative area of practice.

Mr. Dawson: When the hon. Gentleman's four children reach their teenage years, would he rather that they were dealt with by a jury, the police or the CPS or by their teachers, himself or other members of his family making sensible decisions based on the evidence before them?

Mr. Randall: The answer is obvious. Incidentally, I have three, not four, children—although the change of parliamentary hours might change that.

Mr. Bryant: Too much information.

Mr. Randall: Perhaps it is.

As hon. Members have said, we will be sending out a rather strange, albeit well intentioned, message. One of my constituents, an 11-year-old, was raped by a 13-year-old. I come from a sheltered background, and I found some of things that I heard at yesterday's presentation deeply shocking. We would be sending out a strange message if we said that although we do not expect cases to be taken to court, much normal behaviour is technically a criminal offence. I have a great problem with that.

Vera Baird: I share the sentiments that motivated my hon. Friend the Member for Lancaster and Wyre to table the amendment and I do not want to spoil it, although I cannot stop being a lawyer. I thought that the hon. Member for Beaconsfield overstated the case when he talked about the range of possible findings that would emerge from reasonable juries in different geographical locations. After all, the point of having a jury is that there are 12 members and they cancel out each other's prejudices—at least, that is supposed to be the point. I do not believe that the amendment is all that unworkable, although I have other reservations about it.

Sandra Gidley (Romsey): The hon. and learned Lady might be in a position to answer a question that has been vexing me. In clause 1, the Government appear to be quite happy to leave it to a jury to decide whether a behaviour was reasonable. We seem, somehow, to have a problem with giving the same responsibility to a jury in the few cases that will be brought to court under clause 14. Perhaps she would care to comment on that.

Vera Baird: That thought occurred to me as I listened to the hon. Member for Beaconsfield. I suppose that he would say that what has been left for a jury to decide under amendment No. 11 is a

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much wider question than whether in an individual case somebody behaved reasonably. To some extent I agree with that. One is considering what people think is reasonable consensual behaviour. Perhaps it would be better if the hon. Gentleman answered that question.

Mr. Grieve: Yes, indeed—what is

"ordinary, consensual adolescent behaviour"?

That is the problem. It is a wide concept. Somebody with a Christian background and someone from another cultural background might have very different notions of what is appropriate. People would be uncertain about what is and is not permissible. Whether one could justify one's actions would be a lottery.

Vera Baird: I thought that that was what the hon. Gentleman meant. With the greatest respect, however, there is no suggestion that the amendment is legally drafted, so it is possible that it could be tightened up, leaving the issue couched in narrower terms. I am worried that amendment No. 11 might be compared and contrasted with amendment No. 132. I am surprised, now that I reflect on it, that the hon. Member for Beaconsfield, who tabled that amendment to clause 10, did not table an identical amendment to clause 14 as well as or instead of the amendment to clause 10.

I should like to discuss amendment No. 132 in criticising amendment No. 11. I hope that I am not wandering away from the point, Mr. Griffiths. If amendment No. 132 were made, conduct that would otherwise be an offence under clause 14 would not be an offence if there were only a small age difference between the parties. I suppose the point is that the one who might object the most has the capacity to consent and does so. That might be an appropriate criterion to apply to clause 14.

The amendment tabled by my hon. Friend the Member for Lancaster and Wyre also says that if actions are consensual, they are not unlawful. However, in addition to the activity being consensual, under my hon. Friend's amendment the jury has to decide that it is also "ordinary . . . adolescent behaviour." There are two tests in amendment No. 11 and I do not know whether the second—the more difficult of the two—is necessary.

Mr. Grieve: I initially envisaged amending clause 14. Indeed, that could be done very easily with roughly the same wording. My reason for not doing that was that, on reflection, it seemed that clause 14 was providing for a different tariff of sentencing where an offence had taken place. That is a matter of drafting. If it is better drafting to shift my amendment to clause 14, it could be done quite easily.

Vera Baird: Amendment No. 132 is more attractive. Although it achieves most of the aims, I suggest that my hon. Friend the Member for Lancaster and Wyre intends—
Mr. Bryant: I do not think that my hon. and learned Friend has read the whole of amendment No. 132. It continues over the page, where it says:
"the conduct does not involve penetration."
Would she want to incorporate that into her version of the amendment to clause 14?
Vera Baird: I was about to come to that. I would.
Mr. Malins: The hon. and learned Lady said that she was a little surprised that an amendment was not tabled to clause 14 as it was to clause 10. My hon. Friend the Member for Beaconsfield and I tabled a similar amendment to clause 14, but it was grouped with other amendments debated under clause 10—although I did not speak to it at length at that point. I am not sure it was necessary for me to have mentioned that.
4.45 pm
Vera Baird: Let me shake my head and try to grasp the import of what the hon. Gentleman has just said.
A second aspect of amendment No. 132 makes it preferable to amendment No. 11. The age of consent for sex—or penetration—should either be 16 or not. We cannot say that we agree with that age of consent but then not apply it in some circumstances. That is not practical. Either the state thinks that a girl under 16 cannot consent to sex, or it does not. It does not matter who she has sex with; the state must take a position and keep to it. The other advantage of amendment No. 132, or an amendment along similar lines, over amendment No. 11 is that it would allow consent to everything other than penetration.

Mr. Randall: I understand what the hon. Lady is saying, and in my own small way I was thinking the same. However, if the state says that a girl under 16 should not have sex, why is it that we often do not prosecute?
Vera Baird: There is the option to do that, and sometimes it occurs. I have defended several people who have had sex with girls under 16—sometimes they have been a lot older than her, and sometimes not.
Mr. Randall: I was wondering whether there were cases in which the girl is the one who is prosecuted.

Vera Baird: I am talking about girls being prosecuted. Why, often, we do not prosecute the girl is a good question. I cannot answer that, but I am sure that the Minister can.
The hon. Member for Mid-Dorset and North Poole made the point that if we make legislation that says, "People under 16 can do everything but", we might discourage those people from pursuing family planning. They will think, "We are not going to do that, so we don't need to know." I do not know whether the situation will be made any worse. As the hon. Member for Beaconsfield said this morning in another context, we should draw a line and say, "You should not have sex until you're 16", but none the less provide all the sex education that is given currently. I hope that that unhappy compromise might be a reasonable answer.
As we all agree, this is a difficult area—we are all still touting like mad for the Home Secretary's **Column Number: 163** champagne. However, the Government should think again. In the spirit of what my hon. Friend the Member for Lancaster and Wyre and other hon. Members have said, all of which has confirmed my view, I would say that it might be possible to reach a formulation, such as that of amendment No. 132, that would allow the sort of petting that everyone knows goes on between teenagers preparatory to sex. There could be a formulation that did not criminalise that, as it would make consent a practical proposition. Such an amendment would say that it was against the law to have sex under age, and that would be consistent with our respect for the age of consent. I commend the Government to look again at a formulation similar to that in amendment No. 132.

Paul Goggins: Although the hour is getting late, the quality of the debate has remained excellent and has reflected many of the concerns that have been expressed throughout the day. During our discussions, we have focused on the difficult issues about consensual sexual activity between under-16s, which some would describe as harmless. Clause 14 is important, because it extends the provision to cover serious sexual assaults on children that are carried out by children. This morning, my hon. Friend the Member for Lancaster and Wyre noted that a third of sexual assaults on children are carried out by other children, and that is reflected in clause 14. The clause takes account of age, so the penalties are lower than those in clauses 10 to 13. The object of clause 14 is not to criminalise what some would describe as harmless activity, but to criminalise activity that is seriously harmful to children when carried out by other children.

The amendment attempts to seek clarity, but results in greater complexity. I would be the first to admit that the wording of the amendment, and the aspirations that it reflects, have been devised by very experienced, committed people inside and outside the House, who know about such issues and have been desperately searching for an answer. I support all those who have made positive comments. I echo the point made by my hon. Friend the Member for Cardiff, North (Julie Morgan), in that I recognise the spirit in which the amendment was drafted. However, we must have legislation that works.

Much has been said about how a court would know whether a child had rightly or lawfully engaged in sexual activity, but I ask the question, "How would a child know?" How would a child be able to interpret what was lawful and what was not lawful, as they were about to set out on their sexual activity? The question is relevant and should be asked.
The simple words "reasonable", "ordinary", "consensual" and "adolescent" have vast meaning. For example, when does adolescence begin and end? For some people, perhaps adolescence

never ends, but the term "adolescent" is not defined precisely in terms of years. I think that we have covered the word "ordinary". My youngest son is about to start university in Lancaster, so perhaps we will find out whether there is a difference between what is ordinary in Lancaster and in Manchester. We discussed "consensual" earlier, and said that what may appear **Column Number: 164** to be consensual between a mature 15-year-old and an immature 13-year-old may not be so.

My hon. Friend the Member for Walthamstow asked why the amendment would not work, and I am trying to explain why it would not. Those words are so vast in their meaning that they cannot be pinned down in the Bill in the way that they should be. If each of us in the Room were to define those four words, I suspect that there would be some variation in understanding, and if we were to extend that to the wider community, it would be even more confusing. We must be precise.

Mr. Gerrard: I wonder whether the Minister would address the point raised by the hon. Member for Woking, who cited the opinion of an academic that if clause 14 were not in the Bill at all, people who would have been caught by it would be caught by offences in other clauses. I would like clarification of that point. If the clause were not in the Bill, what sort of activities would no longer be caught by other clauses?

Paul Goggins: My hon. Friend asks a very good question. Clause 14 recognises the fact that in some cases the assault is carried out by another child, so it puts in place lesser penalties. Therefore, at one level it would make no difference, but at another it would, because the penalties are different. That is the substantial difference that clause 14 represents.

Mr. Gerrard: If that is the intention, is there a possibility of other clauses including lesser penalties dependent on age, rather than retaining clause 14?

Paul Goggins: It is important that having had the consultation—I shall come to that later—the Government were asked to take account of the fact that children who commit such offences, heinous though they may be, deserve a lesser penalty. That is the purpose of the clause and without it children could commit the offences but would face longer prosecutions. That is the difference that the clause makes.

Vera Baird: I wonder whether my hon. Friend is right about that. Clause 10 criminalises sexual touching for people aged 18 or over and clause 14 criminalises that for people aged under 18, as well as applying a lighter sentence. If clause 14 were removed, there would not be that specific criminality, although it might exist in other clauses.

Paul Goggins: My hon. Friend the Member for Walthamstow was asking whether amendments could be made to earlier clauses to take account of the fact that children sometimes carry out those actions. That might have been possible, but would not have related to the lower penalties. My hon. and learned Friend the Member for Redcar is correct in that clause 14 reflects the fact that children can commit those offences. It is precisely to capture those offences when committed by children that the clause is in the Bill and linked to lower penalties.

Sandra Gidley: It might not be entirely clear that a long string of amendments that we tabled sought to do precisely that and would effectively have removed clause 14 but provided lesser sentences for under-18s who fell foul of other clauses. However, the

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Committee decided that it did not like those amendments.

Paul Goggins: I simply make the point that we must recognise in the Bill that such assaults are sometimes carried out by children. Either we can amend clauses 10 to 13 to reflect that—but they carry heavier penalties—or we must have clause 14. Having considered the matter and thought long about it, our judgment is that we should have clause 14, which recognises and deals with the fact that the perpetrator is sometimes a child, but relates that to more appropriate offences. I want to press on because time is becoming short. I return to a comment made by my hon. Friend the Member for Lancaster and Wyre, who asserted strongly this afternoon the importance of the age of consent. I agree and I believe that there is general agreement in the Committee about the importance of the age of consent of 16. However, if his proposal were accepted, it would remove the age of consent for people

covered by the exception that he created. There would be a two-stage age of consent instead of one clear age of consent, and one age of consent could be overridden in certain circumstances when the definition of ordinary consensual adolescent behaviour was captured.
Mr. Dawson: Without something like that in the Bill, would not the age of consent be undermined, as it is now? The hon. Member for Uxbridge (Mr. Randall) asked a pertinent question: why are there so few prosecutions when so many young people break the law?
Paul Goggins: My hon. Friend makes an important point. We do not know how many prosecutions occur and I shall try to find out, but they should happen when it is appropriate. I want to link that comment to another comment made by my hon. Friend. The reality is that children and young people do engage in sexual activity. I recognise that. My constituency probably has one of the highest rates of teenage pregnancy in the country. That may be true, but that is not a reason for legalising the behaviour. That is the importance of the age of consent.
Mr. Grieve: If we can improve the law by sending a clear message about what is acceptable and what is not, it might help young people to determine what is acceptable and unacceptable behaviour. Allowing a 13-year-old to engage in heavy petting with someone up to three years their senior provides the benchmark for what is acceptable, whereas penetrative sexual activity is not. That might encourage the sort of improvements in sexual behaviour that the Minister and the Government seek.
5 pm
Paul Goggins: I shall respond to that and link it with the comments of my hon. and learned Friend the Member for Redcar. I almost always find her comments persuasive. The difficulty in applying amendment No. 132 here is that once we get into the mathematical formula of ages and start talking about the difference between penetrative and non-penetrative **Column Number: 166** sexual activity we enter a minefield. We can all think of non-penetrative sexual activity that is extremely serious if it is going on between children.
Mr. Bryant: I am still somewhat perplexed. As far as I can see, if we removed clause 14 a person under the age of 18 would still be liable under clauses 1, 3 and 4. The vast majority of cases involving someone under 18 are already dealt with elsewhere in the Bill. We are talking only about clauses 10 to 13, which do not relate to penetrative sexual activity. Is clause 14 strictly necessary?
Paul Goggins: I will try to provide my hon. Friend with a persuasive answer. Where the activity is clearly non-consensual, the non-consensual offences will apply. We are talking here about cases where some doubt is raised by the defence. As I explained to my hon. and learned Friend, the extension in clause 14 is to cover the reality that far more children than we would wish are engaged in this activity.
Vera Baird: My hon. Friend said that there were some predatory young people. That is right. If one introduces the defence of consent into a clause-14 type offence, someone could still be prosecuted if they had preyed on someone and there was not consent. It would not prevent that from happening. It would simply shift it into the area where consent was an issue. That is a step that my hon. Friend should consider.

Paul Goggins: I shall consider all comments and recommendations. We are trying in these clauses to add more protection where consent is less clear than it is when one of the non-consensual offences applies. The balance is clearly a difficult one, but the objective in this part of the Bill is to add protection for children even when the activity engaged in is with other children. I should like briefly to return to another point that is partly in response to the hon. Member for Beaconsfield. He was talking about the activities of young people and the fact that children and young people sometimes engage in sexual activity. He made a strong assertion about the need for the age of consent. While we accept that children and young people do engage in sexual activity of different kinds, we have a duty to send a message to those who do not that limits the pressure on them to feel that they are odd or not behaving normally.
The hon. Member for Woking asked me how extensively we had consulted academics and others. I am sure that he will be aware that there was extensive consultation before the Bill

was drafted. The consultation involved a wide range of individuals with academic understanding of the issues, and, perhaps even more important, individuals and organisations that work, day in, day out, with children and young people who, as victims or perpetrators, fall within the concerns that we are debating.

I have tried to respond to the issues that have been raised. I say to my hon. Friend the Member for Lancaster and Wyre that I do understand. His professional background has given him great experience of such issues and he speaks in the spirit of demanding to improve the situation. However, in

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his quest for greater clarity, his amendment would introduce greater complexity, and I beg him to withdraw it.

Mr. Dawson: I am prepared to respond positively to the Minister's overtures to withdraw the amendment. As a Lancastrian, I think that he committed a great calumny on my right hon. Friend the Home Secretary. I am sure that if he approached the Home Secretary in the correct spirit and talked about the hard work that has been displayed by all members of the Committee, the Clerks and officials, the Home Secretary would provide that magnum of champagne as a consolation prize. It is worth a try, anyway.

I am sorry that the amendment has not found favour. There is a huge problem involving the law about the age of consent. Across the Room, people have expressed their support. We are talking about something that is breached so often and shrouded in so much confusion. My amendment was an attempt to include in the Bill some of the reasoning that must be employed not only by juries, the Crown Prosecution Service and police, but by parents and everyone in contact with teenagers. I hope that we can continue **Column Number: 168** discussions, perhaps outside this forum, to achieve something a great deal more satisfactory for Report. If we go ahead with the provision in its current form, it will greatly undermine the age of consent and bring the law and Members of this House into disrepute with young people, who are incredulous that, in our worthy attempts to protect them from the serious offences that are often committed by other young people, we are placing just about every single young person at risk from this legislation. I hope that there will be a debate on stand part. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

The Chairman: We do not need a stand part debate because the debate on this subject has lasted well over an hour and has been wide ranging.

Clause 14 ordered to stand part of the Bill.

Further consideration adjourned.—[Mr. Heppell.]

Chapter 10

Comments on Standing Committee B debates

Chapter 9 above sets out the full report of the proceedings in Standing Committee B relating to clause 14 [section 13] of the Sexual Offences Bill. In this chapter I examine what was said by MPs, and add some comments. My object is to add to the argument on whether my proposed amendment to clause 14, set out in chapter 1 above, should be adopted. What is set out below is given verbatim, with indications of where passages have been omitted.

Criticisms of Clause 14

There were many criticisms of Clause 14 by MPs. These indicate that ***some*** amendment of Clause 14 is widely considered to be necessary. Here is a selection of the criticisms.

> **Mr. Dawson:** I beg to move amendment No. 11, in clause 14, page 5, line 33, at end insert ‘, unless such actions could be considered by a reasonable person to constitute ordinary, consensual adolescent behaviour.’.
>
> . . . . .
>
> The pressure on children to engage in mock-adult behaviour and behaviour that is way beyond their years is immense and growing, and the current age of consent is under threat. How can it not be, when it is reliably reported in The Lancet and other places that 30 per cent. of men and 26 per cent. of women say that their first experience of intercourse occurred before the age of 16? Every Member of Parliament is concerned about the teenage pregnancy rate in this country. Clause 14 effectively outlaws kissing for under-16s on pain of five years imprisonment. That is how young people see it, but I do not know about other hon. Members. I attended a spirited debate at the annual assembly of the United Kingdom youth parliament in July when young people were well informed and aghast at the implications of the clause. I am extremely concerned that it is deeply flawed and that it will bring the age of consent of 16 into total disrepute and undermine it. The young people to whom I talked at the youth parliament and those from my constituency who visited Parliament earlier this week could not believe that such a provision was even being considered by anyone in this House.
>
> I am concerned that the clause will prevent young people who are involved in consensual relationships from seeking advice on contraception, how to handle those relationships and the emotional implications of deep relationships before the age of 16. I am also concerned that it will leave some young people more vulnerable to abuse because of the need for secrecy. Who could fail to recognise the potential for emotional blackmail of a vulnerable child who is emotionally attached to a domineering partner of a similar age and who cannot tell what is going on because she would not want him to go to prison for five years? We want openness, education, sound advice, counselling and support, and that should be based on effective law that is rooted in the reality of children’s experience. Touching may be coercive, but it may be mutually agreed, experimental and normal. Young people develop in maturity and understanding at different rates and the response of parents, family and professionals to the challenges of young people’s sexuality should be proportionate, supportive, sympathetic and helpful.
>
> . . . . .

We do not prosecute under-16s who become pregnant.[74] If we are effectively to help young people who are involved in consensual sexual relationships, we must treat them decently. The response to any form of sexual experience for under-16s should not be condemnation, which is implied by clause 14. We should understand the position of under-16s.

. . . . .

They should see that the Bill is a great attempt to protect them from sexual exploitation, and the implications of clause 14 are preposterous and potentially extremely damaging.

Mr. Grieve: I fully understand the hon. Gentleman's intention. Indeed, the intention is similar, albeit differently worded, to that of the amendment moved by the hon. Member for Romsey (Sandra Gidley) this morning and amendment No. 132, which was my attempt.

. . . . .

The problem with the amendment tabled by [Mr. Dawson] is that it raises the obvious possibility that the definitions are so loose that somebody who does some heavy petting in Lancaster might appear in front of a Lancaster jury and see it decide that the activity is in order, while a defendant in Norwich might appear in front of another jury for doing the same thing and, because of the flexibility, see that jury decide that the activity is out of order. I hope that the hon. Gentleman recognises that the degree of uncertainty that that would produce in relation to people's behaviour and conduct is such that the administration of justice would become very difficult. People would legitimately complain that they had a reasonable expectation that what they were doing was in order. They would ask why, suddenly, when they had read in the paper that the activity was held to be in order somewhere else, it was held to be out of order now that they were doing it.

. . . . .

Mr. Bryant: I think that I agree with the hon. Gentleman. Does he not think that there might be a thoroughly reasonable or fundamentalist Christian who believed that it was extremely extraordinary for two young people of 15 to be kissing, or even holding hands, whereas two liberal-minded people living in Hampstead or Highgate might hold completely different views on that?

. . . . .

Julie Morgan (Cardiff, North):

. . . . .

The message we give to young people is important and we must remember the high teenage pregnancy rate in this country. We must not give a punitive message to those young people who have become pregnant at an early age, and who we know engage in sex at an early age. The law as it stands clearly fails, because so many young people under 16 are pregnant. It is important that we give a message that we want to

[74] There are pressure groups who would prosecute. Robert Whelan, director of Family and Youth Concern, says 'I would like to know what the schools are going to do if they get girls of 13 or 14 with chlamydia, are they going to call in the police? They should do because it means these girls are sexually active' – *Daily Mail*, 12 September 2003.

concentrate on young abusers in the Bill, and there is a significant number of them, as has already been said. They cause terrible anxiety and problems. In order to do that, we need to get rid of the concept that we are widening the net and drawing in behaviour that we know is ordinary and part of growing up.

Mr. Bryant: I sympathise with the point that my hon. Friend is making. My difficulty is with the word 'ordinary' that she has just used. Another word for 'ordinary' is 'normal'. It is very difficult to use those words without attracting value judgments . . .

Julie Morgan:

. . . . .

We need to reach out to young people. The words in the Bill must be understood by young people. I have had the sort of experience that my hon. Friend said that he had when he spoke to young people in the youth parliament. Their concern about this sort of development in the Bill is a worry.

. . . . .

Mrs. Brooke:

. . . . .

I think that clause 14 is very damaging as far as the way in which young people interact with society is concerned. We have to accept the culture of young people. I do not mean agony aunt columns in magazines, but the sort of magazines that they read, what they read about, the films that they are seeing and the books that they are reading. The clause does not match that at all and we owe it to young people not to give signals that everything that they do is wrong. I find it very worrying that we have had some exceedingly useful discussion and at times edged closer to a solution, but then the lawyers stand up. With all the struggles that we are having, I keep coming back to the point that we are reassured because not many cases will come before the courts if matters are left as they are, but every time we try to change them, a huge problem emerges about cases coming before the courts and how the law will be interpreted. I would really like to find a solution to that problem. I wish that I had the skills, which I obviously do not, to find it. I just hope that we can keep working on it. We all had a mailing from a Mr. Bennion, which we did not have time to discuss and examine, so I do not know if there is anything in that that the civil servants will be able to consider. I support wholeheartedly every sentiment in the amendment, and I wish that we could find the way through.

Mr. Gerrard: My hon. Friend [Mr Dawson] and other hon. Members who have spoken are absolutely right to point to the clause as currently drafted as a real problem.

. . . . .

Mr. Randall:

. . . . .

I have a problem with laws that may be broken—we must endeavour not to create laws that need be obeyed only in certain ways. That makes an ass of the law.

. . . . .

We would be sending out a strange message if we said that although we do not expect cases to be taken to court, much normal behaviour is technically a criminal offence. I have a great problem with that.

. . . . .

Paul Goggins:

. . . . .

The object of clause 14 is not to criminalise what some would describe as harmless activity, but to criminalise activity that is seriously harmful to children when carried out by other children.[75]

. . . . .

Mr. Grieve: If we can improve the law by sending a clear message about what is acceptable and what is not, it might help young people to determine what is acceptable and unacceptable behaviour. Allowing a 13-year-old to engage in heavy petting with someone up to three years their senior provides the benchmark for what is acceptable, whereas penetrative sexual activity is not. That might encourage the sort of improvements in sexual behaviour that the Minister and the Government seek.

Paul Goggins:

. . . . .

. . . clause 14 is to cover the reality that far more children than we would wish are engaged in this activity.[76]

Age of consent

A Government objection levelled at my amendment is that it would undermine the age of consent. I turn now to passages in the Standing Committee dealing with this aspect.

Vera Baird:

. . . . .

The age of consent for sex—or penetration—should either be 16 or not. We cannot say that we agree with that age of consent but then not apply it in some circumstances. That is not practical. Either the state thinks that a girl under 16 cannot consent to sex, or it does not. It does not matter who she has sex with; the state must take a position and keep to it.

. . . . .

As the hon. Member for Beaconsfield said this morning in another context, we should draw a line and say, ‘‘You should not have sex until you’re 16’’, but none the less provide all the sex education that is given currently. I hope that that unhappy compromise might be a reasonable answer.

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[75] In that case it is strange that the clause does not draw that distinction.

[76] This unmasks the Government’s real intention, which is to stop *all* sexual activity by under-16s.

. . . . .

As we all agree, this is a difficult area—we are all still touting like mad for the Home Secretary's champagne. However, the Government should think again. In the spirit of what my hon. Friend [Mr Dawson] and other hon. Members have said, all of which has confirmed my view, I would say that it might be possible to reach a formulation, such as that of amendment No. 132, that would allow the sort of petting that everyone knows goes on between teenagers preparatory to sex. There could be a formulation that did not criminalise that, as it would make consent a practical proposition. Such an amendment would say that it was against the law to have sex under age, and that would be consistent with our respect for the age of consent.[77]

. . . . .

Mr. Dawson:

. . . . .

There is a huge problem involving the law about the age of consent. Across the Room, people have expressed their support. We are talking about something that is breached so often and shrouded in so much confusion. My amendment was an attempt to include in the Bill some of the reasoning that must be employed not only by juries, the Crown Prosecution Service and police, but by parents and everyone in contact with teenagers. I hope that we can continue discussions, perhaps outside this forum, to achieve something a great deal more satisfactory for Report. If we go ahead with the provision in its current form, it will greatly undermine the age of consent and bring the law and Members of this House into disrepute with young people, who are incredulous that, in our worthy attempts to protect them from the serious offences that are often committed by other young people, we are placing just about every single young person at risk from this legislation.

Consent by underage children

I pass now to the question whether children who are under 16 can give real consent.

Mr. Gerrard:

. . . . .

I took the opportunity of the lunch break to look at the current CPS guidelines, which were mentioned this morning, to see what happens under the law now and how that would relate to the clause. What they say highlights the problem. We are in a situation, which we will still be in when the Bill is enacted, in which, as a matter of law, someone under the age of 16 cannot consent to an act that is otherwise an assault. However, they can consent as a matter of fact. That is the problem: matching together a matter of law in terms of consent and the matter of fact that someone has consented. What is clearly in the guidelines now is that, if the victim consented, that would be relevant when considering the public interest in whether to prosecute. Factors such as the age of the defendant in relation to the victim, emotional maturity, any element of seduction, the relationship between the parties, a duty of care and breach of trust are, rightly, taken into consideration now. They are exactly the sort of factors that one would want to be taken into consideration. Ideally, we would somehow be able to bring the guidelines into the Bill, but I still have great difficulty in seeing how we could do that and produce

[77] It is inconsistent to say on the one hand it is against the law to have sex under 16 and on the other that this is a formulation that does not criminalise the activity.

a legally workable clause. I sympathise entirely with what [Mr Dawson] says in the amendment. That is what we are all basically thinking. We need a common-sense approach, so that people are not prosecuted for what we would regard as consensual adolescent behaviour and not a problem. How one defines that may be the difficulty.

Paul Goggins:

. . . . .

We discussed ‘‘consensual’’ earlier, and said that what may appear to be consensual between a mature 15-year-old and an immature 13-year-old may not be so.

. . . . .

Vera Baird: My hon. Friend said that there were some predatory young people. That is right. If one introduces the defence of consent into a clause-14 type offence, someone could still be prosecuted if they had preyed on someone and there was not consent. It would not prevent that from happening. It would simply shift it into the area where consent was an issue. That is a step that my hon. Friend should consider.

Paul Goggins: I shall consider all comments and recommendations. We are trying in these clauses to add more protection where consent is less clear than it is when one of the non-consensual offences applies. The balance is clearly a difficult one, but the objective in this part of the Bill is to add protection for children even when the activity engaged in is with other children.[78]

Views of Academics

Mr Malins mentioned the views of certain academics, which require consideration.

Mr. Malins: This is a difficult clause. It is not a happy clause and I have a great deal of sympathy with the approach taken by [Mr Dawson]. Let us consider what the clause says. It will make it an offence punishable by up to five years imprisonment for a young person of 13, 14 or 15 to engage in any sexual activity with a person of similar age, even if it is consensual and/or relatively minor. It bears repeating that it would be an offence for a boy and girl aged 15 not only to have sexual intercourse, but to indulge in heavy petting, to fondle one another sexually or even to kiss mouth to mouth. I mentioned earlier that I had been in contact with Professor John Spencer of Selwyn College, Cambridge. I shall share some of his thoughts on the clause and the amendment, because he is as distinguished an academic as one could find and what he says may be of some help to the Government. I hope that they will take on board what he says. Professor Spencer says of the clause:
‘I share the view of many speakers in Parliamentary debates who have said that this is ridiculous. The reason was well put in respect of the existing law by Professor Brian Hogan, who took the case of a 14 or 15 year-old schoolboy being familiar with a schoolgirl of similar age.
He said in ‘On modernising the law of sexual offences’, which appeared in ‘Reshaping the Criminal Law’ of 1978:
‘Such conduct is a crime for him, and a crime for her if she responds in kind. No doubt prosecutions in such cases as these are almost unheard of, but that such conduct is even

[78] This word *protection* is the key to Government thinking. It was stressed all through the discussions preparatory to the Bill. There was no mention of the countervailing fact that underage children have sexual *needs*, which should be viewed positively. This is fully explained in my book *The Sex Code.*

technically an offence I find wholly repugnant. As all . . . research shows this makes criminals of a sizeable proportion of the population. And it is wholly wrong that conduct which has been a part (and surely not a detrimental part) of the sexual growth of nearly all of us should be stigmatised as criminal. The reformer who explained to fourth, fifth and sixth formers at any school that much of their consensual sexual conduct is criminal and ought to remain so in a modern criminal code would be deservedly laughed out of the class.'

How can I distance myself from those observations? Professor Spencer states:

'It is no answer . . . for people to say "It's not a change—the present law makes it illegal too". The Bill is supposed to create a modernised, rationalised law of sexual offences, fit for the 21st Century. Nor is it any answer to say''—

as some do—

'It's not possible to exclude harmless consensual behaviour between teenagers whilst enabling the law to protect children against sexual exploitation.' French law managed to find a sensible solution when its new Criminal Code was enacted in 1994. This contains in Article 227–25 a general offence of sexual behaviour with persons who are under 15: but (unlike the earlier law) it can only be committed by adults (i.e. people who have reached the age of 18).'

The professor thinks that

'the solution for us would be simply to delete Clause 14, without replacement. The sort of predatory minor whom we might want to prosecute, or at least threaten with prosecution, would still be guilty of a whole range of serious offences if he turned his attention to a child under the age of 13, or did any sexual act to or with a child over 13 to which the other participant did not freely consent (in the sense in which clause 75 defines it)'.

He adds that he cannot

'think of much behaviour by minors that we would want to prosecute which would not be caught by one of the other offences in the Bill, or some other part of the criminal law. Perhaps there might be a problem with the over-sexed youth who continually pesters other children for sex: like the 15-year-old defendant in ***R v B (A Minor)*** [2000] AC 428, who repeatedly pestered a 13-year-old girl on a bus by asking her for oral sex.'

The professor believes that such a scenario could be covered by a prosecution of

'an offence under the Public Order Act—and presumably would be the case if the girl he had pestered had been over 16 (or indeed if this sort of thing were done by one adult to another).'

He concludes:

'If this were thought to be insufficient, then I suppose we could leave Clause 14 in, but limit its effect to some of the offences only (e.g. the incitement offence in Clause 11). I think a respectable case could be made for saying that the criminal law needs to extend to catch a minor who pesters unwilling children for sex, whilst not making consensual sex acts criminal when they are done by consenting minors over the age of 13.'

The Government and the Minister should listen carefully to Professor Spencer's views. I do not dissent from anything the professor says. He is a top academic. I do not know what discussions officials have with top academics. Have they run such matters right past the top professors at all the universities in the country? If not, why not? Professor Spencer has been most helpful to me. The last thing he said to me was, 'Have you read *The Secret Diary of Adrian Mole Aged 13¾*?, to which I replied, 'I think so.' He said, 'Listen chum, look at the page that describes his adventures with Pandora, when he says, "Pandora let me touch her bust today, but I couldn't feel much through her anorak"'.

. . . . .

Mr. Gerrard: I wonder whether the Minister would address the point raised by the hon. Member for Woking, who cited the opinion of an academic that if clause 14 were not in the Bill at all, people who would have been caught by it would be caught by offences in other clauses. I would like clarification of that point. If the clause were not in the Bill, what sort of activities would no longer be caught by other clauses?

. . . . .

Paul Goggins: I simply make the point that we must recognise in the Bill that such assaults are sometimes carried out by children. Either we can amend clauses 10 to 13 to reflect that—but they carry heavier penalties—or we must have clause 14. Having considered the matter and thought long about it, our judgment is that we should have clause 14, which recognises and deals with the fact that the perpetrator is sometimes a child, but relates that to more appropriate offences[79].

[79] It seems that this last word should be 'penalties'.

Chapter 11

The mental element of the offence I

Clause 14 [section 13(1)] deeming

As we have seen, clause 14(1) of the Sexual Offences Bill [section 13(1)] deems a person who is under 18, and therefore an infant in law, to be aged 18, and therefore an adult in law. It reads-

> 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.

At first glance this instance of statutory deeming appears to make perfectly good sense, but on further examination it raises questions.[80] Let us look again at clause 10(1) of the Bill. It reads-

> 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.

A number of legal problems are posed by this.

Mens rea

The elements of a criminal 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***.'[81]

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'.[82] Is this test satisfied in the following case?

> A is a girl of 9. 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

[80] For statutory deeming see Bennion, above n 28, index entries for 'deeming'.
[81] Smith and Hogan, *Criminal Law* (1st edn 1965) p 35.
[82] Andrew Ashworth, *Principles of Criminal Law* (4th edn, 2003), p 158.

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 9 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 of 18. A normal woman of 18 does not have the inchoate mental equipment of a child of 9. She has adult, mature mental equipment. The *mens rea* component does not work, and the deemed translation cannot be made.

The minimum age of criminal responsibility

There is another factor to be taken into account. Professor Ashworth tells us that in England and Wales 'the minimum age of criminal responsibility is 10, substantially lower than the minimum age in many other European countries, where teenage children are dealt with in civil tribunals up to the age of 14, 16, or even 18'.[83] At common law the minimum age of criminal responsibility is 7. It was raised to 8 by statute in 1933.[84] Thirty years later it was again raised to the present age of 10.[85] Does the literal meaning of Clause 14 override this general rule and make a child of 9 liable? Probably not, though the point would need to be argued.[86]

The doli incapax presumption

Now let us repeat the example given above, this time raising A's age to 12. By fingering B's penis has 12-year old A done something which would be an offence under section 10 if she were aged 18? Or do we have to answer in the negative because a normal woman of 18 does not have the inchoate mental equipment of a child of 12, so that as before the *mens rea* component does not work and the deemed translation cannot be made?

At common law, that is without the intervention of statute, a child aged 10, 11, 12 or 13 is presumed incapable of committing a criminal offence unless the contrary is proved by the prosecution. This is known as the presumption of *doli incapax* from the Latin *dolus*, evil. It means that the onus is on the prosecution to prove beyond reasonable doubt that the child was aware at the time that what he or she was doing was seriously wrong, as opposed to merely 'naughty' or 'mischievous'.

The presumption of *doli incapax* was abolished in England and Wales by the Crime and Disorder Act 1998 s 34. Carefully avoiding Latin in the fashionable way, it reads: **'**The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished'. Section 34, both in its intention and in the way it was drafted, was founded on a remarkable mistake made by those responsible. *They forget mens rea.* Here's how it happened.

In 1997 the new Blair Government published a consultation paper *Tackling Youth Crime.* In the course of it they said they proposed to 'modernise the archaic rule of **"**doli incapax**"** which currently presumes - unless proved otherwise - that a child under 14 does not know the difference between right and wrong'. Use of the term 'modernise' suggests that the concept that a child might not be mature enough to know right from wrong in the sense used by the doli incapax presumption, namely that the child was not aware at the time that what he or she

[83] Ibid, p 205.
[84] Children and Young Persons Act 1933 s 50.
[85] Children and Young Persons Act 1963 s16 (1).
[86] As to the implied application of general rules of criminal law see Bennion, above n 28, s 334.

was doing was seriously wrong, as opposed to merely 'naughty' or 'mischievous', was not intended to be entirely abolished but merely brought up to date. There was to be no longer an automatic (though rebuttable) presumption that a child under 14 was incapable in this sense, but in itself that did not mean that the possibility of such incapacity would not still have to be considered by the court in an appropriate case.

Later in 1997 the consultation paper was followed by a white paper entitled *No More Excuses*[87]. This proposed various reforms in the handling of youth crime, including the abolition of the doli incapax presumption. It justified this as follows-

> 4.3 Currently, for a child aged over ten but under 14 to be convicted of a criminal offence in England or Wales, the prosecution must rebut the presumption of doli incapax as well as prove the offence. This means they must prove beyond reasonable doubt that the child not only did the act in question, but that he or she knew that what they were doing was seriously wrong, rather than just naughty. To rebut the presumption, the prosecution must adduce evidence separate from the facts of the alleged offence, to show the young person knew the act in question was seriously wrong. This can lead to real practical difficulties, delaying cases or even making it impossible for the prosecution to proceed.
>
> 4.4 The Government believes that in presuming that children of this age generally do not know the difference between naughtiness and serious wrongdoing, the notion of doli incapax is contrary to common sense. The practical difficulties which the presumption presents for the prosecution can stop some children who should be prosecuted and punished for their offences from being convicted or from even coming to court. This is not in the interests of justice, of victims or of the young people themselves. If children are prosecuted where appropriate, interventions can be made to help prevent any further offending.
>
> 4.5 The consultation paper *Tackling Youth Crime* sought views on the Government's proposal to abolish - rather than reverse - the presumption of doli incapax. The Government remains of the view that abolition is necessary to remove the practical difficulties prosecutors and courts face under the current law and which they would continue to face if the presumption were reversed, rather than abolished.

The White Paper was followed by the Bill which became the Crime and Disorder Act 1998. Section 34 of this abolished the doli incapax presumption. In the debates the Government showed they entirely misunderstood the purpose of the presumption. In Standing Committee B the Minister Mr Alun Michael MP said-

> 'The result of the doli incapax rule is that the youngsters who are subject to pressures that are not appropriate to their age are prevented from receiving the help of the courts. They are not being protected from the law, but are prevented from receiving the benefits of the law that are meant to nip their offending in the bud . . .'

This overlooked the elementary need for the prosecution to prove the child defendant guilty of the offence charged before the court's powers can be brought into play to 'help' him or her. That means proving both the *actus reus* and the *mens rea*. If the child is too immature to form the necessary *mens rea* he or she must be found not guilty. That reflects what has been called the golden thread that runs through English criminal law, the duty of the prosecution to prove the accused's guilt.[88] Mr Michael seemed to accept this when he said 'above the age of 10 –

[87] CM 3809.
[88] *Woolmington v DPP* [1935] AC 462.

the age of criminal responsibility as it now stands in law - the courts must take account of the maturity and development of the child concerned'. He went on to say-

> 'The presumption that generally children aged between 10 and 14 do not know the difference between right and wrong defies common sense. Anyone who has worked with children in that age group knows that they have a very well developed sense of right and wrong, *and if that is not so in a particular case, evidence of the problem should be brought before the court.* It is better for the court to take account of the offender's age and maturity at the point of sentence.'[89]

The italicised words indicate the Government recognised that proof of the child's inability to know that what he or she did was 'seriously wrong' would rule out liability.[90] The last sentence is unfortunate in indicating failure to grasp that a child cannot be sentenced unless he or she has been convicted, and that he or she cannot be convicted if it appears that he or she is too immature to grasp the reality of the offence.

The next three chapters contain material illustrating the doli incapax controversy. They are included because the controversy throws light on matters discussed in this chapter. Chapter 12 gives the report of the Standing Committee debate on the Government Bill which abolished the doli incapax presumption. Chapter 13 gives considerable detail on the recent New South Wales decision, after a great deal of research, to retain the doli incapax presumption in line with the rest of Australia and New Zealand. Chapter 14 gives the report of a recent case.

Conclusion

It seems from the foregoing that the clause 14 [section 13] deeming is for various reasons unsound. The notion of what the legal position regarding the child's act would be if the child in question had been an adult instead of a child is unrealistic. One ought not to found criminal liability on such an awkward pretence, especially where it is children who are the subject-matter of the exercise. What the courts will make of it if it is not altered one simply cannot forecast.

[89] Emphasis added.

[90] The controversy over whether clause 14 should apply only to non-consensual acts of course raises the question whether it would be right to hold that A's act was indeed 'seriously wrong' anyway.

Chapter 12

The mental element of the offence II

Crime and Disorder Bill 1998

Standing Committee B, Official Report, 8 April 1998

Debate on what became the Crime and Disorder Act 1998 s 34

Clause 31
Abolition of rebuttable presumption that a child is doli incapax

Question proposed, That the clause stand part of the Bill.

Mr. Clappison: We now come to the doctrine of doli incapax. I note on the selection list that there was an amendment to the clause, but its movers are not present. I shall not detain the Committee long on the question of doli incapax, because the Opposition will not oppose the Government's proposal. However, in view of the importance attached to the issue in some quarters, we should say something about our views.

Doli incapax relates to the rebuttable presumption that children aged 10, 11, 12 or 13 are incapable of criminal responsibility. That presumption can be rebutted if the prosecution proves that a child knew that what he did was seriously wrong and not just naughty or mischievous. In short, the courts must be satisfied that a child knows the difference between right and wrong.

We have given careful consideration to the proposal to abolish the presumption. We know that some quarters have argued that the presumption should be reversed and that a child or his legal representatives should show that the child does not know the difference between right and wrong. We have listened to judicial authority and to practitioners and, on balance, we think that it is right that the rule should be abolished. We shall not oppose the Government even though there is a fair argument for the other point of view. We wonder if the operation of doli incapax is justified by the weight accorded to it by the Government in their presentation of youth justice issues. The doctrine has been with us since the reign of Edward III. It was widely thought that it had been abolished by the divisional court in 1994, until the House of Lords decided, a year later, that it had not been and that an Act of Parliament was needed to abolish it.

I am not aware that any great developments took place in the youth justice system during the period in which doli incapax was thought to have been abolished. I would be interested to hear of any such instances. However, the abolition of doli incapax for 10 to 14-year-olds is given a starring role in the Government's 'No More Excuses' White Paper. On Second Reading, the Home Secretary went even further when he said:

'Rules such as doli incapax and the extraordinary ruling in the Khan case . . . create a moving target before the offender is dealt with. All those factors add up to a system that is replete with excuse, and that is what we are trying to get away from.'--[Official Report, 8 April 1998; Vol. 377, c. 373.]

It would have surprised those who instituted the doctrine of doli incapax in the mid-14th century that they should be blamed for an alleged excuse culture in the youth justice system of the late-20th century.

The Home Secretary made some sweeping assertions, but what evidence are the Government using to back them up? My hon. Friend the Member for Gainsborough (Mr. Leigh) asked some probing questions about the Government's evidence for their proposals with regard to the under-10s. We might ask the same questions about the operation of doli incapax and the

over-10s. Will the Minister tell us what research the Government have carried out into the operation of doli incapax that warrants the Home Secretary's assertions? I asked a parliamentary question about that matter. The Government told me that they were unable to say how many acquittals had resulted from the doctrine. They had no idea how it operated.

Mr. Michael: Will the hon. Gentleman say exactly where he saw words to the effect that the Government had no idea how it operated? That is rather different from saying that there are no statistics available for the way in which it has operated.

Mr. Clappison: I asked the Secretary of State what research his Department had commissioned in respect of the operation of the presumption of doli incapax and if he would publish it. The Minister gave the answer 'None'.

Mr. Michael: Will the hon. Gentleman therefore withdraw the suggestion that we said that we did not know how the system was operating? We know how the system is operating. He asked specific questions about numbers and about our research intentions.

Mr. Clappison: No, I will not withdraw it.

Mr. Michael: Disgraceful.

Mr. Clappison: If the Minister will listen, I will clarify the point. I asked the Minister in a written question how many children had been found not guilty as a result of the operation of the presumption of doli incapax in each year for the last 10 years. He told me that that information was not collected centrally and that a not guilty outcome as a result of the presumption of doli incapax was neither in the interests of the child, or children concerned, nor in the interests of the public. He noted that it was important that the court was not prevented from dealing with the youngster when there was no doubt about the facts of the case. That is all very well, but the Government have no idea how the doctrine of doli incapax was operating in the youth justice system. If they do, perhaps the Minister will share that information with the Committee. When I asked my question, the Government were able to tell me how many cases there had been, but they did not know in how many it had been necessary for the prosecution to rebut the presumption of doli incapax.

In the light of the parliamentary answers that I received, I am justified in saying that the Government have not carried out any research and are not able to give us any illuminating information about the operation of doli incapax. They have made sweeping assertions on the matter based on slender evidence, if any. The Opposition do not intend to oppose the abolition of doli incapax, but I am entitled to make these observations. Now that I have heard the Government's views on other issues relating to very young children in the justice system, I am becoming unsettled by the general picture that is emerging of their attitude towards children and young people. Much of what the Government described as nipping in the bud may not be in the best interests of children's welfare and may not nip offending in the bud as the Government assert. On balance, after thinking about this carefully and considering all the legal authorities, I will not oppose the course that the Government are taking.

Sir Robert Smith (West Aberdeenshire and Kincardine): I do not know whether it is in order to talk to the amendment, I wish to talk to the clause and ask that, in pressing their argument for the change, the Government could make it quite clear what other actions they are thinking of taking to ensure that children should, if at all possible, avoid being brought to court. Finally there is a recognition that the Scottish system--

To continue the theme, we want to hear that the Government have taken on board the fact that it is far more effective to try to prevent children getting into crime. Confronting them with courts as the first point of dealing with them does not seem to make sense. We hope that in England some of the lessons learnt from the children's hearing system and the children's panel in Scotland can be taken on board and that there will be some recognition that such interventions may be a more effective way to proceed.

We hope that the change is being seen as part of a complete package and not just in isolation. It would be a change from a former Home Secretary who argued that the Government could never countenance children's hearings in England because it would be against the concept of natural justice. It is an interesting comment on the United Kingdom that someone can sit in the Cabinet presiding over what he believes to be a complete travesty of natural justice in one

part of the United Kingdom, while not accepting any debate in another part. I hope to hear that the Minister recognises that there are lessons to be learnt.

Mr. Edward Leigh (Gainsborough): I am not in any way trying to make a debating point. The hon. Gentleman is the only Scottish Member on the Opposition Benches. I am genuinely interested in why the criminal age of responsibility in Scotland is as low as eight. What is the practical experience on the ground? Is it true, as my briefing tells me, that children are rarely brought before the courts?

Sir Robert Smith: The age is low for the historical reason that each country in Europe has a different age which has evolved with time. The practical reality is that children are brought before the children's panel where the whole issue is confronted and the family is involved. Discussions are held on the cause of their offending behaviour and the actions that can be taken to try to avoid it in the future. By discussing those issues and involving not just the children but others concerned with their care, the issue is tackled in the round.

Serious cases still end up in court but the system weeds out all the cases where court is not the appropriate way to deal with children. It then hopefully ensures that offending behaviour does not become part of their future lifestyle. In the serious cases where guilt has to be confronted and the sanctions of the court are needed, they obviously have to go to court; but that should be the exception rather than the norm. I hope that something like that can be built upon in England and that the Minister can give us some reassurances about that.

Mr. Malins: I rise to speak about doli incapax. This is a subject where there is clearly room for differing views. My hon. Friend the Member for Hertsmere and I agree on so many things, but in a broad church we are entitled to disagree on certain matters.

Mr. Michael: You can tell the Whip is out of the Room.

Mr. Malins: While it may be good sport for the Minister to point to differences of opinion among Conservative Members on the matter, he will nevertheless recognise that it is one of those serious issues on which people have rather different views. It is sheer madness for us to say as a Committee, that we should effectively treat a 10-year-old the same as an adult for the purposes of criminal responsibility.

Mr. Michael: Can the hon. Gentleman point to anything that I or the Home Secretary have said in support of the changes that suggests that we should deal with a 10-year-old in the same way as an adult?

Mr. Malins: I hope that I have not missed the point entirely. I understand that the purpose of the clause is to reduce the age of criminal responsibility to 10.

Mr. Michael: The age of criminal responsibility is 10. The doli incapax doctrine suggests that we should maintain a theory that, in general, youngsters between the ages of 10 and 14 do not understand the difference between right and wrong. The doctrine therefore sets a test that prevents the courts from dealing with such children unless that point is proved.

Mr. Malins: I chose my words without due care. I sought to express my belief that children should be treated very differently from adults. Is the Minister telling me--I hope that he will forgive me if I am wrong--that clause 31 will impose on children aged 10 to 13 a mens rea very different from that which applies to grown ups?

Mr. Michael: It is important to deal with offenders in a way that is consistent with age and development. That is one reason why younger people are dealt with in separate courts, which take such factors into account when making decisions about the youngsters that appear before them.

Mr. Malins: We must be careful to discover what we are trying to achieve in our debate. I hope that I am supported by my hon. Friends in saying that the doli incapax presumption should remain. I share that view with Barnados, which has made submissions to the Committee and to the Government. It says that it would be wrong to abolish the presumption that a child is doli incapax. In its briefing document it says:

'Whilst it is common sense to presume that most children know the difference between right and wrong in a general sense, we do not believe that this should automatically lead to the conclusion that they can be expected to assume the same degree of responsibility for their actions as an adult.'

Mr. Michael: The hon. Gentleman quotes from a brief from Barnados, which cares deeply about the impact of legislation on children and young people. I say that, having worked closely with Barnados workers on the ground over the years. However, I invite the hon. Gentleman to examine the impact of the doli incapax rule. What is he arguing for when he says how the doctrine will prevent consideration of some cases?

Mr. Malins: I will tell the Minister exactly what I am saying. I will quote from Archbold so that Committee members may be aware of what the doctrine means and how it applies in everyday life in the courts. Archbold says:

'there is a presumption that a child between these ages'

--that is, between the ages of 10 and 14--

'is doli incapax; (b) this presumption can only be rebutted by clear positive evidence that the child knew that his act was seriously wrong (as opposed to mere naughtiness or childish mischief) at the time when he did it; (c) mere proof of the doing of the act charged, however horrifying or obviously wrong that act might have been, cannot establish the requisite guilty knowledge and rebut the presumption'.

That is the law as it stands.

Archbold continues in relation to particular cases, and this graphically illustrates the importance of the doctrine:

'Proof that the child runs away after doing the prohibited act is not sufficient to rebut the presumption; running away is consistent with a belief in the child that what he has done was naughty and/or in breach of some school or parental rule. The nearer the child is to 10 years the stronger the evidence that is required to rebut the presumption'.

It goes on, and this is very telling:

'As in a bad home a child is likely to be brought up without knowledge of right and wrong, evidence of home background and circumstances, even though it may be on other issues highly prejudicial to the child, should be admitted on the issue of knowledge of wrong'.

That point about child's upbringing affects its maturity, its ability fully to understand the difference between right and wrong, its habits, family standards and so forth.

Mr. Michael: Will the hon. Gentleman explain how the doli incapax doctrine helps the court to consider what should happen to a particular youngster who has committed a particular offence?

Mr. Malins: I shall give the Minister a particular example. Let us consider a youngster of an age to which the doctrine of doli incapax is applicable who commits an act that constitutes the actus reus of theft--the entry into the shop, the taking of an item and the going away from the shop. If I do that, the court has to prove that my intention was to steal--a full mens rea direction about dishonesty will be given. Theft is the intention permanently to deprive someone of his property: it is a dishonest intention. That is fine for an adult, but does the Minister accept that stronger protections are needed for youngsters in relation to the level of mens rea--or the level of guilty knowledge--necessary for a court to convict a child? That is a practical application of the doctrine.

Mr. Michael: I do not think so. If factors pertaining to a particular youngster can be put before the court, is it not important for that court to consider what is appropriate in his particular case, having regard to his state of development and his understanding of the act that he has committed, and to come to a decision that will help to prevent his future offending? That would not only protect potential victims in the wider community, but be in the best interest of the child.

Mr. Malins: I understand the Minister's point, but should not a particular standard be required for the child--in shorthand terms, that he knew that what he did was seriously wrong, as opposed to mere naughtiness? What troubles me about this clause, clause 32 and earlier clauses in the Bill is that we are moving far too far in the general direction of imposing on young people the same standards that we are imposing on older people. I am worried when I hear that no minimum age limit is being proposed for some of the orders and that a child

under 10 can be taken to court, albeit a magistrates court, with all the panoply of criminal proceedings. I wonder whether the different nuances of civil and criminal proceedings can be understood by the child.

Mr. Michael: Magistrates courts dealing with care proceedings are not dealing with criminal matters. Is the hon. Gentleman addressing his criticism to all magistrates courts when they are dealing with non-criminal issues?

Mr. Malins: No, because there is a difference in a child's mind between appearing in court in care proceedings, for example, and going before a magistrates court for what might be described as naughty behaviour. To a child, that is tantamount to saying, 'You have done wrong, you will be punished.'

Mr. Michael: I suggest that the hon. Gentleman goes back to his source at Barnardos and discusses what goes through the minds of children in respect of care proceedings. Often, a child suffers a considerable burden of guilt, some of it unjustified, but it exists. The hon. Gentleman's distinction is clear in the minds of lawyers, who know the law, but not in the minds of children.

I accept that it is important not to be excessive in these cases. Children under 10 must be dealt with carefully so that there is no suggestion that criminal matters are being considered, but it is very difficult for a child to make that distinction even when care issues are being considered in a magistrates court.

Mr. Malins: Other colleagues want to speak and we are coming to an important debate on the next clause. I am aware of time constraints and of what might happen at about 6 pm. It may, therefore, be appropriate for me to sit down now, as I have made my point. However, I hope that Government Members might share some of my concerns: the hon. Member for Wellingborough (Mr. Stinchcombe) seems to have a conscience and to know about the practice of the law. He may have some sympathy with my point of view. However, I remain increasingly unhappy that the Bill contains so many references to 'age 10'. It goes too far towards bringing into the criminal justice system children who are too young to be part of it.

Mr. Leigh: This is a difficult clause. Against the Government is Barnardos opinion, quoted by my hon. Friend the Member for Woking, that the proposal

'would place a child aged over 10 years in the same position as an adult at the point at which innocence or guilt is being determined. The assumptions on which the Bill are based fly in the face of opinion that the child is still developing and maturing during the teenage years.' That, basically, is the purport of my hon. Friend's case.

At first sight, I was sympathetic to the point of view of my hon. Friend the Member for Woking, especially as the presumption has been in place since the time of Edward III. Conservatives should remember Lord Falkland's dictum that when it is not necessary to change it is necessary not to change. One of the problems with Conservatism in recent years is that we have tried to be too radical in too many areas. I am beating my breast now and apologising for the shortcomings of the Government whom I supported. However, it should be said that the Government, having considered matters carefully, came down against changing the presumption as recently as 1990.

In support of my hon. Friend's view is the fact that the Bill will reduce the age of criminal responsibility to one of the lowest in Europe. Only in Cyprus, Ireland, Liechtenstein, Malta and Switzerland will the age be lower than in this country. The age in the United States is 18, which is very high. The matter is of such importance that we should consider it on Report, when we have more time.

Against my hon. Friend's view is that the presumption existed in our law because the penalties that the law could impose were so gruesome and draconian.

Mr. Clappison: Speak for medieval England!

Mr. Leigh: My hon. Friend says that I should speak for medieval England, which I am happy to do. My hon. Friend the Member for Woking may wish to comment on the following remarks made by Glanville Williams, writing in the Criminal Law Review in 1954. It is perhaps the clincher; it is probably why my hon. Friend the Member for Hertsmere is right not to vote against the Government on this occasion. Glanville Williams stated that in the present

day--in 1954--the 'knowledge of wrong' test stood in the way, not of punishment but of treatment. The article said:

'It saves the child not from prison, transportation or the gallows, but from the probation officer, the foster-parent or the approved school. The paradoxical result is that, the more warped the child's moral standards, the safer he is from the correctional treatment of the criminal law. It is perhaps even possible to argue that the tests should now be regarded as even legally obsolete. The test was designed to restrict the punishment of children and should not now be used where no question of punishment arises.'

Those are wise words. Perhaps we should move on and consider the presumption carefully.

We need to know more about the provision's operation in practice. Our aim is not primarily to punish children from the ages of 10 to 14; we should try to direct their behaviour. If I understand the Minister correctly, he does not suggest that children aged between 10 and 14 will be treated in the same way as adults. My hon. Friend the Member for Woking pressed the Minister on that. I believe that my hon. Friend is right: it may not be the current practice in the courts, but once the presumption is abolished, children will be treated in the same way as adults. We must consider that carefully.

Mr. Malins: When the Minister responds to our useful debate, I hope that he will explain in detail how 10 to 14-year-olds will be treated differently from adults. The same burdens and standards of proof must apply in every criminal case: the burden is on the prosecution and the standard of proof is high. But we are considering intent--my hon. Friend is right to urge the Minister to focus on that.

Mr. Leigh: It is vital. The presumption that my hon. Friend quoted from Archbold is sensible. It states that the prosecution must establish beyond reasonable doubt that the child knew at the relevant time that what he was doing was seriously wrong and not merely naughty or mischievous.

The Minister should share with the Committee the practical experience of the courts and explain why legal opinion, recent criminal cases and criminal records suggest that the presumption is no longer workable. The Government are taking a serious step after many centuries.

Why not reverse, rather than abolish the presumption? The court would then start with the presumption that children of 10 to 14 were capable of acting with criminal intent, but that a child would be acquitted if the defence could prove on the balance of probabilities, that the child did not know that the action in question was seriously wrong. I do not have a settled view on abolition or reversal, but the point is interesting, and although it was considered in the consultation document, it has not been made in the debate. I hope that the Minister will respond to it.

Mrs. Eleanor Laing (Epping Forest): I find myself at odds with some of my hon. Friends on the matter, and I should be grateful if the Minister would elaborate on a few points.

Have the Government considered where the line of criminal responsibility should be drawn? The hon. Member for West Aberdeenshire and Kincardine (Sir R. Smith) rightly pointed out that the age of criminal responsibility in Scotland is and always has been eight. I say that it always has been eight, but it was once seven. Some members of the Committee might allege that children in Scotland are in some way more responsible or mature than their counterparts in England. I see that some hon. Members might possibly agree with me, but far be it from me to suggest it--

Mr. Michael: You will not get a majority.

Mrs. Laing: As usual, the Minister is right. I am not seriously suggesting that those of us who were brought up in Scotland were more mature at eight than those who were brought up in England. I want merely to highlight the fact that many schools of thought exist--each one thought to be right in the relevant country. I have it on good authority that the age of criminal responsibility in Germany is 14. There are vast differences in the western world about where to draw that line.

Was research done before the clause was drafted, and if so, what were its conclusions?

As has been mentioned, the doctrine of doli incapax was originally introduced in the 14th century, when it protected 10 to 13-year-olds from harsh adult justice. Surely things have

changed significantly, so that rather than being exposed to harsh adult justice, a child is in the 1990s more likely to be helped than punished on being found guilty of a crime at that age. If we do not abolish the doctrine of doli incapax, we shall be denying another chance to children who, if found guilty, could be protected, given additional education or removed from unfortunate surroundings. That view of the matter leads me to support the clause.

My hon. Friend the Member for Woking made a very good case about the way in which 10-year-olds should be treated in the context that we are discussing. However, my concern is not with them, but with 13-year-olds. If a person is considered to be a child and therefore doli incapax until the age of 14, someone a week short of his or her 14th birthday can escape justice and proper punishment. In the real world today, 14-year-olds--both girls and boys--are frequently parents.

Mr. Leigh: Frequently?

Mrs. Laing: Occasionally.

Mr. Malins: I am sorry; my attention was drawn elsewhere and I misheard my hon. Friend. Did she say that children are often parents at 13 or 14?

Mrs. Laing: I take my hon. Friend's point. Perhaps I was exaggerating in using the word 'frequently', which I withdraw. I merely point out that while the Committee is right to debate the issue of 10-year-olds, young people some weeks or months short of their 14th birthday are leading adult lives. As a result of unfortunate circumstances, such as ignorance or the lack of the chances that we should like children to have, often--or, to keep my hon. Friend happy, I gladly say sometimes--boy and girls aged 14 are parents. They act in an adult fashion.

Sir Robert Smith: I hope that a signal will go out from the Committee that it is not very adult behaviour to become a parent at 14.

Mrs. Laing: I agree that it is unfortunate behaviour and that the Committee is not encouraging 14-year-olds to become parents. However, becoming a parent is behaving in an adult fashion.

Mr. Michael: The hon. Lady is in danger of being misinterpreted by some Conservative Members. Her point is perfectly valid. The result of the doli incapax rule is that the youngsters who are subject to pressures that are not appropriate to their age are prevented from receiving the help of the courts. They are not being protected from the law, but are prevented from receiving the benefits of the law that are meant to nip their offending in the bud and to help them in the circumstances that the hon. Lady has outlined.

Mrs. Laing: I thank the Minister for interpreting my point so succinctly.

It would be sensible to examine whether children over the age of 12 should be considered as capable of crime and capable of understanding right from wrong. There is a considerable difference between a 10-year-old and someone who is almost 14. That is why I asked the Minister whether research had been carried out into the behaviour of 10, 11, 12 and 13-year-olds.

Will the Minister confirm that the abolition of the rebuttable presumption of doli incapax will merely change the balance of proof? Is a young person, aged 10 or 11, more likely to be convicted, therefore, and to receive the help offered by the system? Alternatively, if the burden of proof were stricter and there was no conviction, the child might slip through the net. At the same time, an older child, aged almost 14, and living in an adult world and behaving in an almost adult fashion, might less easily escape the punishment, if the court considered that there were mens rea and that the child was capable of understanding right from wrong.

Mr. Michael: I shall start with the point made by the hon. Lady. I agree with her. Abolition of doli incapax would not prevent the court from considering an offence in relation to the age and maturity of the child. The assertion of doli incapax prevents the court from ensuring that reparative action and appropriate rehabilitation can begin as soon as possible, when a young person is behaving in an unacceptable way.

The abolition of doli incapax would allow intervention to prevent reoffending and allow the possibility of stopping that youngster from engaging in activities that would be likely to damage his future--perhaps I should say his or her future, but it is more often boys who need that form of attention and intervention. Abolition is in the interests of the child, of the

potential victims and of the wider community. It is certainly in the interests of the victim of the particular offence that the matter should be dealt with by the court and that the doctrine of doli incapax should not provide a senseless barrier to the court's ability to act.

The hon. Lady made a number of good points. However, I should like to deal specifically with her remarks about the age of criminal responsibility in order to set that matter on one side. She asked whether the Government had considered changing the age of criminal responsibility. The answer is no. She is right to refer to the fact that children develop at different rates. Many children develop a great deal between the ages of 12 and 14. There might be other arguments about whether the age of criminal responsibility should be 10, or 12, or 14, or eight--to take the Scottish direction--but they are not germane to the debate about doli incapax.

There is no intellectual argument for maintaining the doctrine of doli incapax. It is an obstacle to justice for everything, especially the young person involved. Children today are not subject to the draconian penalties of former times; the protection offered by doli incapax against overly harsh punishment is no longer appropriate. That view was shared by the House of Lords, which, following the case of C v. DPP recommended that Parliament should review the presumption, which had been inconsistently applied and was capable of inconsistent results. The House of Lords was right so to advise us and we have taken their lordships' advice.

The consultation document, 'Tackling Youth Crime' asked the view of respondents how best to carry forward a reform of doli incapax. Of those who responded, 111 felt that the presumption should be abolished, 48 though it should be reversed and only 20 believed that it should be retained in its current form.

The hon. Member for Woking rightly said that there is room for different views on the issue, and there are several different views on the Conservative Benches. I acknowledge the integrity of those who disagree, especially those whose primary concern is for children, but I believe that their views are entirely mistaken and misguided. I respect the hon. Gentleman's sincerity, but I do not regard the setting of 10 as the age of criminal responsibility as a mistake. It is simple and straightforward, and above the age of 10--the age of criminal responsibility as it now stands in law--the courts must take account of the maturity and development of the child concerned.

The hon. Member for Gainsborough apologised for not being Conservative enough, but he should have apologised because his Government did not tackle this mischief, and it is a mischief that children between the ages of 10 and 14 are not helped because the courts cannot consider their cases and offer assistance.

Several hon. Members, especially the hon. Member for Hertsmere and the hon. Member for West Aberdeenshire and Kincardine--I am gradually getting a grasp on his interesting constituency--invited me to say something about the context in which the issue is being considered and about our attitude to children and young people. Our attitude is that we should bring out the best in children and young people and discourage the worst. There needs to be a balance in our approach; we must be tough on crime and tough on the causes of crime and we need to provide opportunities for young people. For example, youth action groups give youngsters an opportunity to look at the problems that crime causes and to come up with their own solutions. That is an excellent approach that we want to encourage.

We want positive intervention in the lives of individual young people. The youth offending teams ensure that a youngster's educational development, health and family background are dealt with, as well as the offence that brings him before the court. It is far more effective to intervene to stop youngsters reoffending than to ignore the activities in which they are becoming involved.

I tell the hon. Member for West Aberdeenshire and Kincardine that we are glad to learn from Scotland and from other countries. The White Paper 'No More Excuses' sets out our proposals for the reform of the youth courts. Part of those reforms will include reform built on principles underlying restorative justice and making youngsters face the fact that they have damaged other people and that they should do something to repay a debt to a victim or to society. We propose that children who end up in the youth court for the first time and plead

guilty can be referred by the court to a youth panel. Panel members will draw up a contract with the young person setting out clear requirements that will, among other things, tackle the causes of the offending behaviour.

We are considering ways in which parents can become more involved. On one hand, we will require parents to take responsibility for their children and offer the mechanism of the parenting order, and on the other we will look for ways of engaging parents and young people constructively in what has gone wrong in their lives. We want to examine the specific offence and wider examples.

We want to intervene more quickly. The final warning means that instead of having repeat cautions, giving youngsters the message that nothing much happens when they do something wrong, there will be interventions. There will be the final warning, which draws a clear line for that youngster and involves the youth offending team asking questions about the behaviour at that early stage. Questions such as whether the young person is attending school, or whether truancy is a problem, would be asked. These issues will be dealt with later, but the report of the social exclusion unit has highlighted the association between truancy and offending - particularly later, serious offending. That point needs to be tackled, but all the matters that I have referred to are important to society and to the reduction of crime and protection of the community - as well as to the interests of the young people who come before the courts.

The hon. Member for Hertsmere, apart from appearing a woolly-minded old liberal who cannot bring himself to vote against the clause -

Mr. Clappison: I am agreeing with the Minister.

Mr. Michael: I think I would characterise the hon. Gentleman's speech as agreeing with faint damns. He is wrong to say that the Government have no idea how the system works. The hon. Gentleman raised the question of the number of cases in which it had been necessary for the prosecution to rebut the presumption of doli incapax. In all prosecutions involving children under 14 the prosecution must rebut that presumption; that is the whole point and the reason we want to get rid of it. In 1996, the most recent year for which statistics are available, 7,125 children under 14 were proceeded against in a magistrates court. The presumption of doli incapax has been in force over the past five years except for a period between a divisional court judgment in 1994, which ruled that it was no longer part of English law, and the House of Lords judgment in 1995 that reinstated it. That was referred to earlier, and surely such inconsistency of treatment is nonsensical.

The hon. Member for Hertsmere also referred to research, as if its absence were a problem. The lack of research is a problem only if one is not sure what the problem is. In fact, it is clear. In March 1995 the House of Lords commented, in the case of C. v. DPP that the common law presumption of doli incapax had been inconsistently applied. In 1997 we published our proposals. There has been considerable debate for some time, and the problems are clear to the courts.

The essence of the doli incapax doctrine is that children under 10 are below the age of criminal responsibility, and nothing in the proposal will change that. The presumption that generally children aged between 10 and 14 do not know the difference between right and wrong defies common sense. Anyone who has worked with children in that age group knows that they have a very well developed sense of right and wrong, and if that is not so in a particular case, evidence of the problem should be brought before the court. It is better for the court to take account of the offender's age and maturity at the point of sentence.

The remarks of the hon. Member for Hertsmere contained a suggestion that under the clause we should be treating children under 14 as if they were adults. That is not true. For all juveniles aged between 10 and 18 who are convicted of a criminal offence, the court has available to it a different range of sentences, graduated by age and taking into account the age and development needs of the person convicted. The range would be widened still further by the Government's new proposals, which would strengthen the capacity of the system to deal with child offenders in the most focused way. For those reasons we do not believe that the abolition of the presumption will conflict with international obligations under the United Nations convention on the rights of the child or the European convention on human rights. It

has been suggested that conflict would arise, but I do not believe that. We shall be applying common sense.

If children of the age in question have committed a criminal offence, it is more, not less, necessary for their wrongdoing to be acknowledged, and corrective action to be taken. Appropriate punishment and effective intervention at that stage would prevent many such children from becoming tomorrow's adult criminals. Neither justice nor the young people are served by permitting the latter to evade responsibility for their actions.

Anecdotal examples can be given in multitudes, but I recently heard the case of three youngsters who were involved in a serious arson. The doli incapax doctrine prevented the court from dealing with them. I am certain that whatever the rights and wrongs and whatever the degree of culpability, that was a serious offence. It was regarded in that way by the victims and the community. In such circumstances, is it not sensible for a court to have the unfettered right to use its judgment in the appropriate way that I suggested--that is, appropriate to the needs of the child at its particular age and development--to ensure that the child is put on the right track? Is it not neglect for society to allow the doctrine of doli incapax to stand in the way? I hope that all members of the Committee will support the clause.

Question put and agreed to.

Clause 31 ordered to stand part of the Bill.

Chapter 13

The mental element of the offence III

Doli incapax in New South Wales

New South Wales Commission for Children and Young People

March 2001 Issue

Doli Incapax debate resolved

A review of the Law on the Age of Criminal Responsibility of Children has been resolved following a recommendation by the Attorney-General's Department Criminal Law Division that there be no change in the law.

In July 1999 the NSW Attorney-General's Department outlined a series of options for reform of ***doli incapax*** which indicates that where a person under the age of 14 is charged with a criminal offence the prosecution has to prove that the young defendant knew that his or her conduct was seriously wrong and not simply naughty or mischievous. The Commission, with assistance from National Children's and Youth Law Centre, made a detailed submission pressing for the rule to be retained in its present form. The submission argued that ***doli incapax*** is an important way of protecting the rights of vulnerable children in the legal system.

The Commission argued that there was no scientific or medical evidence to suggest that children and young people today are more able to make judgements about right and wrong than their predecessors were in the centuries when ***doli incapax*** developed.

The submission also cautioned that we should not confuse an increase in factual knowledge and children's greater access to sophisticated technology with a corresponding increase in the ability to make moral judgements.

The Commission will continue to resist any weakening of the ***doli incapax*** presumption and advocate for its inclusion into statutory law, as has already happened in Queensland, Tasmania, Western Australia and the Northern Territory.

Follow this link to read the Commission's submission to the Review of the Law on the Age of Criminal Responsibility of Children. [See below.]

Submission from the Commission for Children and Young People

to the

Review of the Law on the Age of Criminal Responsibility of Children

EXECUTIVE SUMMARY

This submission discusses the status of children in the criminal justice system in NSW with regard to the statutory age of criminal responsibility and the effect any attempt to change the rebuttable presumption of ***doli incapax*** may have on ten to thirteen year old children if the age where a child is presumed to possess full adult criminal capacity is lowered from 14.

The Commission for Children and Young People strongly supports the retention of the *doli incapax* presumption in NSW for the following reasons:

There is no medical or scientific evidence to suggest that children and young people today are more able to make judgments about right and wrong than their predecessors were in the centuries when *doli incapax* developed.
The *doli incapax* presumption requires no more than that the prosecution prove that the child knew that the act of which they were accused was serious and wrong. This is requirement is consistent with current community expectations about the protection which should be afforded to children.
Doli incapax recognises that the capacities of children develop over time and that all children do not develop at the same rate. It provides an additional legal protection for children who have a disability, are immature or are otherwise vulnerable.
The *doli incapax* principle arises in no more than 10% of NSW Children's Court cases involving criminal charges against 10 to 14 year olds – which means two cases per week. There is no evidence to suggest that the principle is being inappropriately applied in the 10-14 age group, or that there is a noticeable number of miscarriages of justice as a result of the operation of the principle.

The Commission recommends that the protection of vulnerable children is best served by enacting *doli incapax* in statute in NSW, as has already occurred in four Australian jurisdictions. Its maintenance as a common law presumption continues the current discriminatory practice where children in rural and regional parts of the state have less access to justice because solicitors in local courts are unfamiliar with the presumption.

CHILD DEVELOPMENT AND THE CRIMINAL JUSTICE SYSTEM

2.1 Age and Criminal Responsibility

The laws applicable to children in the earliest stages of Australia's colonial development were the laws of England. Children who committed offences were tried in the same courts as adults and were generally subject to the same penalties. There were no special measures for dealing with them. The most important concessions which the English law made to children were expressed in two common law presumptions. There was the irrebuttable presumption that a child under the age of seven was incapable of committing a crime and a rebuttable presumption to the same effect regarding children between the ages of seven and fourteen. During the nineteenth century it was accepted that the presumption as to capacity applied regardless of the type of offence charged.[91]

2.2 Statutory recognition of age and criminal responsibility

All Australian states gradually gave statutory form to the irrebuttable presumption regarding children under seven. Most states raised the age of criminal responsibility to 10. Children below the age of 10 are not deemed criminally responsible in the NSW Criminal Justice System, under Federal Criminal Law, or in any other state jurisdictions except the ACT and Tasmania where the threshold is seven and eight respectively [92]

[91] John Seymour, *Dealing with Young Offenders,* Law Book Company, Sydney,1988 pp 4-6.
[92] Criminal Code (Qld) s 29(1); Children (Criminal Proceedings) Act 1987(NSW) s5; Young Offenders Act 1993(SA) s5; Children's & Young Persons Act 1989(Vic) s127;Criminal Code (WA) s29; Criminal Code NT s38(1);Children's Services Act 1986(ACT) s27(1);Criminal Code(Tas) s18(1).

The Human Rights and Equal Opportunity Commission and the Australian Law Reform Commission's Report: *Seen and Heard: priority for children in the legal process* recommended that the minimum age of criminal responsibility in all jurisdictions should be 10 years, and that the Tasmanian and ACT Governments should enact legislation to this effect.[93]

None of the ages presently accepted in Australia can be said to reflect universally observable facts of child development. The development of law in regard to the criminal capacity of children has more its foundation in a mix of cultural mores and moral values. Laws were enacted to protect 'the child' if they were under a certain age and therefore seen not to have the capacity to commit a criminal act. If they were over that age they were expected to bear the full consequences of their actions.

The concept of an intermediate stage between childhood and adulthood is a relatively recent one. Because each individual develops at a different rate, there is no guarantee that ageing automatically brings with it maturity and the required capacity.

The age of criminal responsibility can therefore be seen as a device which gives effect to the opinion that the very young should be shielded from the rigours of the criminal law. The concept of an age of criminal responsibility reflects the notion that young children are slow to develop social capacity, and an acknowledgment that the criminal justice system is an inappropriate place to deal with the misbehaviours of a very young person.

2.3 International examples regarding the age of criminal responsibility

There are wide differences internationally in relation to when criminal capacity is deemed to commence. Within Europe for example, the lowest age is Ireland (7 years) while in Sweden it is 15 years. In USA, different states have adopted different ages, with the lowest being 10 years, and the highest being 18 years.[94]

The United Nations Committee on the Rights of the Child has expressed concern about 'the low age of criminal responsibility in the UK.' The Committee has also asked if Australian jurisdictions envisage raising the age of criminal responsibility.[95]

In Africa the trend has been towards raising the age of criminal capacity. In the 1996 Uganda Children's Statute, the age of criminal capacity was fixed at 12 years. In Ghana there was a recommendation that the minimum age of criminal responsibility be fourteen years[96].

The Convention on the Rights of the Child places a duty on state parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe penal law. The Beijing Rules (Rule 4) recommend that when states establish such an age of criminal responsibility 'the beginning of that age shall not be fixed too low an age level bearing in mind the facts of emotional and intellectual maturity.'[97]

Appendix 1 sets out the age of criminal responsibility in other countries.

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[93] Human Rights and Equal Opportunity Commission and Law Reform Commission Report No 84, 1997 Recommendation 194 p 470
[94] South African Law Commission Issue Paper 9 1997, Project 106, *Juvenile Justice.*
[95] Ibid, p 5.
[96] Ibid.
[97] UN Standard Minimum Rules for the Administration of Juvenile Justice.

2.4 Rebuttable presumption for children over the age of criminal responsibility – *'doli incapax'*

In addition to the statutory minimum age of criminal responsibility the rebuttable presumption of *doli incapax* has been incorporated into statutory law in the Criminal Codes of Queensland, Tasmania, Northern Territory and Western Australia [98].

The presumption applies to children in criminal proceedings of ten until they turn fourteen, (fifteen in Queensland). Children in this age range are presumed incapable of committing a crime because they lack the necessary criminal intent. The presumption can be rebutted if the prosecution can show beyond a reasonable doubt, that the child concerned was aware that their actions were 'seriously wrong' (as opposed to merely naughty or mischievous)[99].

After the age of 14 (or 15 in Queensland), the law presumes that a child assumes full criminal responsibility, but is still able to be tried in the Children's Court up to the age of 18 in NSW. At 18 the child assumes full adult legal responsibilities in the criminal justice system in NSW, South Australia, Western Australia, Tasmania and the A.C.T. In Northern Territory, Queensland, and Victoria the age is 17. [100]

Under Article 1 of the United Nations Convention on the Rights of the Child, a child means any human being under the age of eighteen years, unless under the applicable domestic law, majority is attained earlier. Accordingly, at international law 18 years has been recognised as the appropriate age for separation of young people from the adult criminal justice system.

2.5 Sentencing Provisions recognising age vulnerability

There is also varying recognition in jurisdictions as to the continuing vulnerability and developmental factors of young people in the criminal justice system, even after they have turned 18 (or in the case of Victoria, NT, Queensland and Tasmania, 17), in relation to sentencing, detention and imprisonment.

In NSW under the *Children's (Criminal Proceedings) Act 1987*, the NSW Children's Court, is able to issue a control order for a young person up to the age of 18, for up to a period of two years, to be served in a detention centre. Cumulative orders may be made up to a maximum of three years[101]. Effectively, this means that the NSW Children's Court is able to issue a sentence for detention in a Youth Training Centre which could see a young person under the age of 18 sentenced to a period of detention in a Youth Training Centre up to the age of 21. This also recognises that even after the age of 18, young people already serving a period of detention should be protected from the rigours of the adult prison system.

Such a philosophy is better exemplified in Victoria, in what has become known as the Dual Track System, where under Section 32 of the *Sentencing Act 1991* (Vic), an adult

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[98] *Children's Services Act 1986* (ACT) Criminal Codes of Queensland s.29, Tasmania s 18 Western Australia s 29 and Northern Territory s 38 - Senior Children's Magistrate Stephen Scarlett *Doli Incapax and the Age of Criminal Responsibility:*Paper the Continuing Legal Education Department of the College of Law, 11-12th April 1997.

[99] R v CRH; Ivers v Griffith 22/5/98 Supreme Court NSW Newman J: C v DPP [1996] 1 Ac 1.

[100] Section 5, *Juvenile Justice Act 1992 (Qld)*; Section3, *Juvenile Justice Act 1983 (NT)*; Section 3(1) *Children's and Young Person's Act 1989 (Vic)*; Section 3(1) *Child Welfare Act 1960 (Tas)*; Section3, *Children's (Criminal Proceedings) Act 1987 (NSW)*; Section4, *Young Offenders Act 1993 (SA)*; Section3, *Young Offenders Act 1994 (WA)*; Section 4(1), *Crimes Act (ACT)*.

[101] Section 33 and Section 33A, Children (Criminal Proceedings) Act 1987 (NSW).

Magistrate's Court may impose an order for a young person to serve a period of detention in a Youth Training Centre. The young person must be over the age of 17, but under 21 at the day of the Court hearing, and the maximum period for such a term of detention is 24 months.

2.6 **Why Change?**

The staggering of assumption of full adult criminal responsibility in the Juvenile Justice System is an attempt to recognise that up to the age of 18, children and young people are at different stages of development and understanding. Indeed, this acknowledgement extends beyond the age of 18, in relation to issues of detention and imprisonment.

Australian law with regard to age and criminal responsibility has always taken some account of the different stages of development of children and by so doing has acknowledged that within the developmental process some children fall through the cracks. To take away the rather limited protection currently offered by the principle of *doli incapax* without any consideration of the harm that may result is unwarranted.

CHILD DEVELOPMENT AND OTHER ASPECTS OF THE LEGAL SYSTEM AND CIVIL LAW

Apart from the criminal law, the legal system affords protection for children and young people in a range of areas. These include the age of consent for sexual intercourse, the age at which civil proceedings can be issued, the age at which a person can obtain access to alcohol, MA or R rated films, and gambling activities, the age at which one can drive motor vehicles, marry, leave home, vote or be employed. These ages vary for each issue and each jurisdiction. However, they serve as examples of the legal system recognising that young people are at different stages of development and have different levels of understanding. Accordingly the law affords them some protection.

It is appropriate that the law make special allowances for such age vulnerabilities, by providing children in various age groups with some protection from the inflexible operation of the legal system. The principle of *doli incapax* is not unique in the legal system in recognising the particular varying vulnerabilities and developmental characteristics of a defined age group of young people.

Indeed, in asserting that it is appropriate to review the relevance of the *doli incapax* principle, or the appropriateness of the 14 year upper age limit, in a time of greater sophistication, universal education and information technology, then equally, the other age limits of safeguards and limitations placed on various ages of children and young people should also be reviewed.

The following are all examples of the legal system in New South Wales recognising that young people are at different stages of development and have different levels of understanding.

3.1 Civil Proceedings

A person under 18 years of age cannot sue another person without a 'tutor' – that is an adult whose name appears on the documents and who has given guarantees to pay costs if they are ordered against the child. If a person under 18 is sued, the defence must name an adult as a

tutor. A document cannot be served on a person under the age of 16 – for people under the age of 16, it must be served on their parent or guardian. For people aged 16-18, it can be served on either the young person, or their parent(s) or guardian.

Contracts and Leases

As a general rule, people under the age of 18 are not bound by contracts, leases and other transactions unless it is for their benefit (*Minors (Property and Contracts) Act*).

3.3 Driving

Young people can apply for a learner's permit at 16 years, for a motorcycle permit at 16 years and nine months, and for a provisional licence at 17 years.

3.4 Alcohol

A young person under the age of 18 is prohibited from possessing or consuming alcohol in a public place unless they have a reasonable excuse or are with a responsible adult (*Summary Offences Act*, Section 11). It is an offence for a person under 18 to be on licensed premises in a restricted area, unless they are in the company of a responsible adult (*Liquor Act*, Sections 112, 117).

3.5 Medical treatment

At 14 years or over, young people can legally give consent to their own general medical or dental treatment (*Minors (Property and Contracts) Act*, Section 49). Where the medical treatment is a 'special treatment' (such as treatment likely to render the child permanently infertile) then such treatment of a child under 16 years can only be carried out with the consent of the Supreme Court (*Children (Care and Protection) Act*, Section 20B).

3.6 Voting

At 18 years of age, young people are eligible to vote. At that age, voting is compulsory for Federal Government elections, State Government elections, and Local Government elections.

3.7 Marriage

The marriageable age for both women and men is 18 years. Young people between the ages of 16 years and 18 years need the consent of their parents/guardians and the authorisation of the court to marry (*Marriage Act (Cth)*, Sections 11, 12 and 13).

3.8 Leaving Home

A person under 18 years of age has no absolute right to leave home, although young people over the age of 16 would normally not be forced to return home against their wishes.

3.9 Sexual Relationships

The legal age of consent for a girl or boy to have sexual intercourse with a person of the opposite sex is 16 years (Section 66C, *Crimes Act*). The legal age of consent for a girl or boy to have sexual intercourse with a member of the same sex is 16 years for girls and 18 years for boys (Section 66C, *Crimes Act*).

3.10 Employment

Except where a child is 15 years or older or has an exemption from attending school from the Minister for Community Services, it is an offence for a person to employ a child (*Children (Care and Protection) Act*, Section 52).

Children under 14 years may not be employed in factories. Children aged between 14-16 can only be employed in factories in special circumstances (*Factories Shops and Industries Act 1962*, Section 49).

3.11 Income Support

Anyone under the age of 15 years does not qualify for the Youth Allowance. Anyone aged between 15-18 can qualify as long as they satisfy the various eligibility criteria.

Young people under 15 years can apply for a Special Benefit, but before they can be considered for this payment, they are assessed under the Youth Protocols, which consider the needs of young people under the age of 15 who are homeless or at risk of becoming homeless.

DOCTRINE OF *DOLI INCAPAX*

4.1 Definition

Doli Incapax is a Latin term which literally translates as 'incapable of doing wrong'.

Under the common law in NSW the *doli incapax* principle gives rise to a rebuttable presumption that children who have turned 10 and not yet reached the age of 14 are incapable of knowing that their criminal conduct is wrong. They are presumed incapable of committing a crime because they lack *mens rea* – i.e. the necessary criminal intention to commit a criminal offence.

This does not mean that children aged between 10 and 14 will automatically be found not guilty of criminal offences. *Doli incapax* can be challenged by the prosecution, if it can establish beyond reasonable doubt that the child knew that when he/she committed the act, that he/she knew that it was a wrong act of some seriousness, and not just mere naughtiness or mischief. To rebut *doli incapax,* the prosecution must prove that the child did the act charged, intended to do the act and that when doing that act, the child knew that it was a wrong act of some seriousness, as distinct from childish mischief [102].

The most recent and clearest articulation of the principle of *doli incapax* is that of Lord Lowry in the UK House of Lords in the matter of *C (A Minor) v Director of Public Prosecutions*[103]-

[102] R v CRH; Ivers vGriffiths 22/5/98,Supreme Court, NSW Newman J; C v DPP[1996] 1 AC 1.
[103] [1996] 1 AC 1; [1995] 2 WLR 383.

> I turn, therefore to consider what must be proved in order to rebut the presumption and by what evidence … A long and uncontradicted line of authority makes two presumptions clear. The first is that the prosecution must prove that the child defendant did the act charged and that when doing the act he knew it was wrong as distinct from an act of mere naughtiness or childish mischief. The criminal standard of proof applies. What is required has been variously expressed as 'strong and clear beyond all doubt or contradiction, or ... 'very clear and complete evidence'… 'Guilty knowledge must be proved and the evidence to that effect must be clear and beyond all possibility of doubt.' No doubt the emphatic tone of some of the directions was due to the court's anxiety to prevent merely naughty children from being convicted of crimes and in a sterner age to protect them from the draconian consequences of conviction. The second clearly established proposition is that evidence to prove the defendant's guilty knowledge, as defined above, must not be the mere proof of the doing of the act charged, however horrifying or obviously wrong that act may be…. a guilty knowledge that he was doing wrong, must be proved by the evidence, and cannot be presumed from the mere commission of the act.[104]

In his judgement, Lord Lowry provides a detailed review of previous English common law authorities for the principle, a discussion of the principle in Government Reports and White papers, and various Commonwealth case law authorities.

4.2 Developments in Australian Law

Several States have now incorporated the doctrine of *doli incapax* into statute. A child in NSW, Victoria, and South Australia who is over the age of ten and not yet turned 14 still needs to rely on the common law presumption, to require the prosecution to rebut the presumption that he or she lacked the capacity to form the necessary criminal intent.

The Supreme Courts in those States have held that *doli incapax* may legitimately be argued.[105]

4.3 Common Law and *doli incapax* - NSW

In New South Wales, Lord Lowry's judgement was accepted as a clear statement of the application of the law in Australia in relation to the *doli incapax* principle, in the Court of Criminal Appeal in the matter of *R – v – CRH* (Case No. 60390 of 1996, unreported 18 December 1996*)*. This was referred to by Sully, J. in the NSW Court of Criminal Appeal matter ***Regina v Meola***[106]. Sully, J. referred to the principles encapsulated in the expression *doli incapax*, and the way in which it is to be applied in a particular trial context.

The relevant point to note was that where *doli incapax* arises it is for the Crown to establish to the criminal standard (i.e. beyond reasonable doubt) that the alleged offender had the capacity that the law requires that he have before he is vulnerable to conviction.

4.4 Statutory incorporation of *doli incapax* in Australia

In Queensland, Section 29(2) of the *Criminal Code Act 1899* states:

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[104] Ibid.
[105] Treffilletti v Robinson (unreported 9 February 1981, Supreme Court of NSW, Woodward J), R v M (1977) 16 SASR 589 (FC), BrayCJ (Bright J concurring) at 591, R (a child) v Whitty (1993) 66 A Crim R 462.
[106] Regina v Vito Meola NSWCCA 388 (23 November 1999)

> A person under the age of 15 years is not criminally responsible for the act or omission, unless it is proved that at the time of doing the act or making the omission the person had the capacity to know that the person ought not do that act or make that omission.

In Tasmania, Section 18(2) of the *Criminal Code Act 1924* states:

> No act or omission done or made by a person under 14 years of age is an offence unless it be proved that he had sufficient capacity to know that the act or omission was one which he ought not to do or make.

In the Northern Territory, Section 38(2) of the *Criminal Code Act 1983* states:

> A person under the age of 14 years is excused from criminal responsibility under an act, omission or event unless it is proved that at the time of doing the act, making the omission or causing the event he had capacity to know that he ought not to do the act, make the omission or cause the event.

In Western Australia, Section 29 of the *Criminal Code Act 1913* states:

> A person under the age of 10 is not criminally responsible for an act or omission. A person under the age of 14 is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not do the act or make the omission

4.5 International Developments in relation to the Doctrine of *doli incapax*

4.5.1 Review of *doli incapax* in South Africa

Section 28 of the Constitution of South Africa defines a child as a person under 18 years of age. Section 28 also enshrines certain rights relevant to juvenile justice that then apply to those below 18 years.[107]

In South Africa the minimum age of criminal capacity is determined by the *doli capax/incapax* rule. Below the age of 7 the child is irrebuttably presumed to lack criminal capacity. Between 7 and 14 there is a rebuttal presumption of *doli incapax,* that children are deemed to lack criminal capacity unless the State proves that the child in question can distinguish between right and wrong and knew nothing of the wrongfulness of the offending at the time of commission of the offence.

The *South African Law Reform Commission Issues Paper 9.31* (August 1997) notes that the presumption is all too easily rebutted and it in fact does not present an impediment to the prosecution and convictions of young people. Examples are given of mothers being asked if their children understand the difference between right and wrong, and an answer in the affirmative being considered sufficient grounds to rebut the presumption.

In interpreting *doli incapax* the South Africa courts appear to not necessarily follow English or Australian interpretation of the doctrine in regard to the evidence required to rebut the presumption.

The South African Courts have noted that caution should be exercised where the accused is illiterate, unsophisticated and moreover a child with a limited grasp of proceedings. Statistics

[107] South African Law Reform Commission *Issue Paper 9* 31 August 1997

quoted in the Law Reform Commission Paper illustrate that in a sample of 970 cases fewer than 10% concerned children below the age of 14. No child of 10 or younger was actually tried in a criminal court. In 80% of the cases where the accused was 12 years or younger, no criminal trial eventuated.

The Issue Paper canvassed a number of options including raising the age of criminal capacity to 10 and retaining the presumption for children 10-14, with a criminal standard of proof required to show capacity and state led expert testimony on the accused child's development. It is not known whether any of the proposals are now law in South Africa.

4.5.2 Statutory Incorporation of *doli incapax* in New Zealand

Like Queensland, Tasmania, Northern Territory and Western Australia, New Zealand has given legislative recognition of the *doli incapax* principle. Section 22(1) of the *Crimes Act 1961* (NZ) states:

No person shall be convicted of an offence by reason of any act done or omitted by him when of the age of 10 but under the age of 14 years, unless he knew either that the act or omission was wrong or that it was contrary to law.

4.5.3 Recent History of *doli incapax* in United Kingdom

The presumption has been in existence since the fourteenth century. In 1989 the British Law Commission included the presumption in their Draft Criminal Code. It was said the presumption should be included unless there was a raising of the age of criminal responsibility. In 1990 the then Conservative Government recommended the presumption be maintained-

'The Government does not intend to change these arrangements which make proper allowance for the fact that children's understanding, knowledge and ability to reason are still developing'.[108]

There was brief period in the 1990s when the presumption was dispensed with. This was due to the 1994 decision of Mr Justice Laws of the Divisional Court in the case *of C (A Minor) v Director of Public Prosecutions* [1994] 3 WLR 888 (see above). This decision was overruled on appeal to the House of Lords C (*A Minor) v DPP* [1995] 2 WLR 383, where it was held that *doli incapax* was a rule of the common law that could only be abrogated by statute. As stated, this decision was recognised by the NSW Court of Criminal Appeal as reflecting the common law position in New South Wales.

In his judgement, Lord Lowry recommended that, 'there is a need to study other systems… Whatever change is made, it should come only after collating and considering evidence and after taking account of the effect which a change would have on the whole law relating to children and anti-social behaviour'[109]

This recommendation appears not to have received much notice, as the government looked to radically reorganise the youth justice system. The Government decided to abolish *doli incapax*, a decision that was explained in a White Paper [110]. This paper formed the basis of the Crime and Disorder Act 1998 (UK), which subsequently abolished the doctrine of *doli*

[108] Quoted in paper by Charlotte Walsh *Irrational Presumptions of Rationality and Comprehension*- Web Journal of Current Legal Issues in association with Blackstone Press Ltd, 1998.
[109] *C (A Minor) - v - DPP* [1995] 2 WLR 383. at p 403.
[110] *No More Excuses* (White Paper 1997).

incapax in the UK. The white paper gave the reasons for abolishing the presumption as that it is archaic, illogical and unfair in practice.

The Act commenced on 30 September 1998. As a result, the age of criminal responsibility in England and Wales is now 10 years of age [111].

The net result of the Government's decision to dispose of this presumption is straightforward: once a child reaches the age of ten, s/he is presumed by the Courts to have the capacity to reason which can be fully equated with that of an adult. It is not until sentencing that their tender years are taken into account. The transitional period previously created by the existence of the rebuttable presumption of *doli incapax* between lack of criminal responsibility (under ten years of age) and presumed responsibility for one's actions (fourteen years and over) has been disposed of.

There are no statistics available on the effect of the abolition of *doli incapax* on conviction rates for children aged 10-14, since the legislation became operational only 16 months ago.[112]

4.6 *Doli incapax* – keep, alter or abolish?

As mentioned above, the British government has recently abolished the common law doctrine of *doli incapax* completely, giving as it reasons that the doctrine was archaic, illogical and unfair.

In addition, the Discussion Paper released in January by the Criminal Law Division of the NSW Attorney-General's Department raises the question as to whether the presumption should be retained or altered. In considering whether it should be retained, it asks whether it is still necessary, given that children are no longer subject to the draconian penalties of former times.

In questioning whether the presumption should be altered, the discussion paper refers to a statement from NSW Senior Children's Magistrate, Mr. Stephen Scarlet that the age of 12 is a more suitable cut off point for the doctrine of *doli incapax* than the age of 14. Advocates for such a position are reported as stating that children today are more sophisticated, mature and aware than children in past decades or centuries, by virtue of the fact that there is greater access to education and information.

4.6.1 Is *doli incapax* archaic?

In *C (A Minor) v Director of Public Prosecutions*, Lord Lowry stated:

'It is true that there (and has been for a considerable time) compulsory education and… perhaps children now grow up more quickly...But better formal education and earlier sophistication do not guarantee that the child will be more readily able to distinguish right from wrong'. [113]

There is no evidence that participating in the education system is more likely to lead to one's maturation at a faster rate, than for example being forced to enter the workplace at eight (or younger) as was generally the case when the doctrine was developed. Access to education and information does not, of itself, lead to a faster rate of development or awareness of

[111] Children and Young Persons Act 1933 s50 as amended by CYPA 1963 s16 (1)
[112] Communication from the Children's Legal Centre Essex UK to the National Children's & Youth Law Centre dated 27 January, 2000.
[113] [1995] 2 WLR 383 at 396.

responsibility. Indeed, at the time when the *doli incapax* principle was developed, children were required to assume a greater level of adult responsibility at a much earlier age than presently. Children were usually required to enter the workforce at a young age, contribute to the family finances, and be responsible for the rearing and education of younger siblings. They were often married before they turned fourteen.

Doli incapax developed as a legal concept during centuries that were very violent and lawless in comparison to the present day. Children were exposed to crime in their communities to an extent which is difficult to conceive of today. Even though children were often assuming such adult responsibilities at a very young age, and had much more personal contact with crime than today's children do, the criminal law still recognised their developing capacities and level of awareness, and made an allowance accordingly. Twentieth century developments, both in education and in the juvenile justice system have sought to lengthen the process of childhood, and, therefore to make it a more fulfilling era of one's life. Accordingly, the principle of *doli incapax* has even more relevance today.

Moral development is a process of which education is only a part. It is a process which occurs at different stages in different children. The presumption of doli incapax accounts for this factor.

'Far from being an outmoded survival from an earlier era, the doli incapax rule is fully consistent with our increasing knowledge of child development and learning, which tells us that children mature and learn over differing time spans.'[114]

According to Charlotte Walshe, Lecturer in Law, University of Leicester:

'Clearly a time period has to be placed around the acceptable leeway allowed for moral development, and, to some extent this will always be arbitrary. However, it is submitted that a system which allocates a flexible four year period during which moral culpability can be assessed is preferable to a system which assumes that by the age of ten all children have reached the same level of moral culpability as an adult.[115]

In Britain the argument put forward by the government to support *doli incapax* being abolished was that there was no need for children to be protected from the criminal law. It was asserted that children under 14 no longer needed special protection from the harshness of criminal punishment (e.g. death penalty, mutilation, transportation, etc.), and that today, the criminal law places a far greater emphasis on preventing re-offending, than on punishment for the crime. This proposition assumes that criminal justice intervention will help rehabilitate young offenders and it is therefore for their own good that they are deemed criminally culpable at such a young age.[116]

Lord Lowry makes the following statement to counter this proposition:

'while times have changed greatly since the days when children of 8 or 10 years were hanged for offences much less heinous than murder, it should be observed that the purpose and effect of the presumption is still to protect children between 10 an 14 from the full force of the criminal law'. [117]

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[114] Paul Cavadino (1997), 'Goodbye Doli – must we leave you?' 9 Child & Family Law Quarterly 165, at 168.
[115] Charlotte Walshe, 'Irrational Presumptions of Rationality and Comprehension', in Web Journal of Current Legal Issues, Blackstone Press Ltd.
[116] Lord Williams of Mosytn 1998, cols 831-841, as quoted in Charlotte Walshe, Op Cit.
[117] [1995] 2 WLR 383 at 399

The truth of the matter is that in both Britain and Australia there are very substantial penalties for ten to thirteen year olds found guilty of a criminal offence. Indeed, the trend in many jurisdictions to consider initiatives such as mandatory sentencing and grid/matrix sentencing regimes for minor property offences, burglary, etc. serve to illustrate a growing enthusiasm for increasing the severity of sentences for young offenders.

Indeed, the notion that intervention of the criminal justice system will assist in the rehabilitation of young offenders is juxtaposed with such initiatives as are included in the *Young Offenders Act 1997 (NSW*). The legislation provides diversionary options which seek to divert young offenders away from the formal court processes of resolving criminal matters, by use of youth justice conferences, police warnings and police cautions[118]. The underlying philosophy of such initiatives is that the rehabilitation of young offenders is best achieved by initiatives which divert young offenders away from the criminal justice system. A study into Recidivism of Juvenile Offenders in NSW in 1996 discovered that sanctions characterised by minimalist intervention were associated with relatively low levels of re-offending, and that the more access young people have with the Criminal Justice System, the more frequently and deeper they will penetrate it. It concluded that the younger a juvenile is at the time of the first proven criminal appearance, the greater the likelihood that he or she will be found guilty of a subsequent proven offence as a juvenile, and that there was a strong relationship between the age at first court appearance, and the probability of re-offending as a juvenile. It found that 65% of 10 year olds at the time of their first proven court appearance went on to commit subsequent proven offences, compared with 32% of juveniles who were 16 years of age at their first proven court appearance.[119].

This debunks the rationale of abolition or alteration of the *doli incapax* principle, on the basis that the intervention of the Criminal Justice System will lead to rehabilitation.

4.6.2 Is *doli incapax* Illogical?

The British Government Home Office Consultation Paper, *Tackling Youth Crime,* (1997, London: HMSO) criticised the doctrine as illogical on the grounds that the doctrine itself presumes that children between 10 – 14 normally do not know right from wrong, but requires the prosecution, in order to rebut the presumption, to prove that the child is of normal mental development for his or her age, i.e. the doctrine presumes that children aged 10-14 normally do not know right from wrong, so to rebut the presumption by proving the child's normality is logically inconsistent.

Again, Lord Lowry provides a response to this argument:

'the presumption itself is not, and never has been completely logical; it provides a benevolent *safeguard* which evidence can remove'. [120]

Charlotte Walsh argues:

Whilst it may be true that, in practice, evidence that the defendant is of normal mental development for his or her age is often sufficient to rebut the presumption (*J.M. (A Minor) – v – Runeckles* (1984) 79 Cr App R 255) this is not the essence by which the presumption of doli incapax can be rebutted. The issue is simply whether or not the child concerned knew that their actions were 'seriously wrong': illogical rebuttals of the presumption in practice do not deem the concept illogical in principle. [121]

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[118] Section 3 (a), *Young Offenders Act 1997 (NSW)*.
[119] Cain, M., *Recidivism of Juvenile Offenders in NSW*, NSW Department of Juvenile Justice 1996.
[120] [1995] 2 WLR 383 at 397.
[121] Charlotte Walshe, Op Cit, p 4.

The real issue is the nature of the evidence which is required to rebut the presumption. This will be discussed below.

4.6.3 Is *doli incapax* unfair?

The British Government Home Office Consultation Paper, *Tackling Youth Crime,* (1997, London: HMSO) also criticised the doctrine as being unfair in practice. It stated that to rebut the presumption, the prosecution must produce evidence separate from the facts of the offending – for example, the defendant's response to police questioning, reports from his or her teachers, etc. The paper suggests that this evidence may not be available. Ironically, as indicated above, the Home Office advocated that the presumption was so easily rebutted that its existence was illogical. Accordingly, it runs contrary to the previous proposition that the presumption is illogical. Indeed, the fact that the conviction rate for defendants aged 10-14 is still almost 80% of total numbers appearing before the NSW Children's Courts is indicative that the presumption is easily rebutted, and that it is often not to the advantage of the child defendant to raise the issue of *doli incapax* in his or her defence.

The *Seen and Heard* Report by the Human Rights and Equal Opportunity Commission and the Australian Law Reform Commission[122] pointed to the fact that in order to rebut the presumption, the prosecution was sometimes permitted to lead highly prejudicial evidence that would ordinarily be inadmissible [123]. In these circumstances, the principle may not protect children but be to their disadvantage.

According to Charlotte Walshe:

'Even if one accepts that the evidentiary burden required to dislodge the presumption may occasionally result in a morally culpable child going unpunished, this is not an argument for disposing with the presumption altogether. It is true that the pursuit of procedural justice may sometimes lead to substantive justice not being done, in the sense that a potentially guilty person goes free. However, the abandonment of procedural justice may lead to substantive injustice, in the sense of an innocent person being convicted.'[124]

Again, in the words of Lord Lowry:

'If the prosecution's case must fail sometimes because some or all of the probative evidence cannot be given, that is not a unique situation and it must be borne with fortitude in the interests of fairness to the accused.'[125]

4.7 Legal safeguards for the vulnerable in the Criminal Justice System

The criminal law has many provisions for rights and principles, which in practice, serve as safeguards and protections for the most vulnerable in the community, including young people and children, people with an intellectual disability, people with psychiatric illness, and people

[122] HREOC/ALRC Report No. 84, Seen and Heard: Priority for Children in the Legal Process, p471.
[123] *R v M* [1977] 15 SASR 589- contrast to C v DPP [1996] Lord Lowry stated a child defendant ought not to be put in a worse position than an adult by having evidence of his or her pervious convictions admitted unless they can be admitted under a generally applicable evidentiary principle e.g, if the defendant has put his character at issue.
[124] C. Walshe, Op Cit, p.5.
[125] [1995] 2 WLR 383 at 399.

from a non-English speaking background. *Doli incapax* is just one example of these principles.

4.7.1 The Right to Silence and the Privilege Against Self Incrimination

One of the most well known safeguards is the right to silence and the privilege against self incrimination. The right to silence and the privilege against self incrimination are based on the principle that no person can be required to answer a question, if the answer would have a tendency to expose that person to a criminal conviction. It is fundamental to the notion that if the State alleges a crime has been committed, it is up to the State to prove its allegations beyond reasonable doubt. The rationale for such rights is that they are human rights designed to protect the dignity of accused persons, and they serve to protect persons, particularly those individuals who have certain vulnerabilities, against the power of the State or its law enforcement officials.[126]

These principles have their origins in seventeenth century England, and developed as a result of the unjust and inhumane methods of compulsory interrogation of accused persons being used in such courts as the Star Chamber and the Ecclesiastical Courts. Today, the principle manifests itself in the right of accused persons to not answer any questions from police, or make any statement to police either before or after arrest 0[127].

In its 1999 Report into the Inquiry into the Right to Silence, the Victorian Parliamentary Scrutiny of Acts and Regulations Committee recognised that the right to silence was a most important safeguard against wrongful conviction for members of particular groups who should be considered to be at particular risk of falsely incriminating themselves during police interrogation. These groups included: Indigenous Australians, young people, people with intellectual disability, people with psychiatric illness, people from a non-English speaking background, and people disadvantaged because of the effect on their mental processes of drugs or alcohol [128].

4.7.2 Vulnerable People Under Arrest

In New South Wales, certain provisions detailed in the Police Code of Practice 1998 and the *Crimes (Detention after Arrest) Regulation 1998* must be followed in situations where a 'vulnerable person' is arrested. A 'vulnerable person' includes people with an intellectual, mental or physical disability, children, Aboriginal and Torres Strait Islander people, and people from non-English speaking backgrounds.

If a vulnerable person is being questioned, the custody manager at the police station must take steps to contact a support person to be present during the police interview. The support person could be a guardian, anyone having the care of the detained person, a relative or friend, or any other person who has expertise in dealing with the category of vulnerable person to which the detained person belongs. People 16 years and over must consent to the presence of a support person; children under 16 cannot waive this right – their support person must be a parent or any other person who has lawful custody or care.

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[126] Submission of the Federation of Community Legal Centres (Vic.) to the State Parliamentary Scrutiny of Acts and Regulations Committee Inquiry into the Right to Silence, July 1998, p.4.
[127] Ibid, p 4.
[128] Victorian Parliamentary Scrutiny of Acts and Regulations Committee, *Inquiry into the Right to Silence*, Final Report, March 1999, p 9.

The custody manager must inform the support person that they can assist the vulnerable person and ensure the interview is conducted properly and fairly, and that they should identify any communication problems that may arise in the interview.

4.7.3 *Doli incapax* as a safeguard for the vulnerable

The *doli incapax* principle is a practical vehicle by which it is acknowledged that for the age group of 10 to 14 in particular, children have wide ranging rates of intellectual and emotional development and differing levels of understanding. Importantly, it recognises that the rate of development cannot be standardised across this particular age group.

An advanced and mature 11 year old may have a greater awareness of the criminality of his/her conduct than a developmentally delayed 13 year old. The principle forces prosecutors to acknowledge and consider the degree of responsibility, maturity and awareness of individual child defendants.

Importantly, the principle also recognises that the 10-14 year age group is a vulnerable age group with uncertain levels of maturity and understanding. Like many other aspects of the legal system, it is appropriate that the law make special allowances for such vulnerabilities, by providing children in that age group with some protection from the inflexible operation of the letter of the law.

In particular, the *doli incapax* principle is a mechanism by which developmentally delayed, disadvantaged, disabled and emotionally immature children in the particularly vulnerable age bracket of 10-14 are protected from the rigorous presumptions of adult criminal responsibility.

The doctrine of *doli incapax* is one of a number of safeguards for the vulnerable. If the upper age limit is lowered to make a child of 12 fully responsible under the criminal law it will lead to extremely vulnerable individuals in the 12-13 age group being disadvantaged.

4.8 How *doli incapax* works in practice

4.8.1 The NSW Children's Courts

Statistical Analysis

In reviewing the appropriateness of the *doli incapax* principle in the current criminal justice system, it is necessary to analyse the extent of its current application in the NSW Children's Court.

Unfortunately, there is no statistical information available from the Department of Juvenile Justice or the NSW Children's Courts which indicate the number of cases an acquittal has occurred when the *doli incapax* principle was raised and not successfully rebutted by the prosecution. Likewise, there are no figures available to indicate the number of cases where an acquittal was secured only by virtue of the failure of the prosecution to rebut the *doli incapax* principle.

In conducting a review of the *doli incapax* principle, the Attorney General's Department should ensure that empirical research is undertaken in all urban, suburban and rural Children's Courts in NSW to ascertain the exact number and proportion of cases where *doli incapax* has resulted in the acquittal of a child defendant.

Accordingly, it is necessary to analyse information available from the NSW Department of Juvenile Justice regarding the statistics obtained from the NSW Children's Court for criminal matters before it. It is also necessary to observe the anecdotal information provided by practitioners and magistrates serving in the Children's Court jurisdiction.

According to Senior Children's Magistrate in NSW, Mr. Stephen Scarlett, use of the ***doli incapax*** defence is virtually unknown outside the Sydney/Newcastle/ Wollongong regions of NSW [129]. He states that the reason for this is that children's matters outside of these regions are heard in local courts, and are run by solicitors who usually have little experience of proceedings in specialist Children's Courts. This is a strong argument for the principle to be given statutory recognition, as this would result in greater awareness of the principle for practitioners, and lessen the likelihood of defendants under 14 years in rural and regional areas having a lesser standard of justice than their urban counterparts.

However, on the basis of figures for matters resolved in the NSW Children's Courts, it is quite apparent that the acquittal rate as a result of the application of the ***doli incapax*** principle is extremely low.

In 1997/98, a total of 15 672 matters were heard and completed in the NSW Children's Courts. 1771 matters (11.3%) involved pleas of not guilty and 3681 matters had unproven outcomes. A total of 1117 matters involved children aged between 10-14. According to the Discussion Paper issued by the Attorney-General's Department, 247 of these matters involved a plea of not guilty, these being the matters in which ***doli incapax*** is most likely to be argued. This is incorrect.

A total of 119 (10.6%) matters for defendants aged between 10-14 involved a plea of not guilty, and in a total of 297 matters for this age group, charges were not proved against the defendant (Table 1). This latter figure includes matters where charges were not before court, defendant was unfit to plead, withdrawn, withdrawn – no evidence offered, no evidence offered dismissed, transfer interstate, deceased child, destroy fingerprints and records, adjourned generally, no return of service, stood over generally and termination of an order, no prima facie case dismissed, the defendants failed to appear at court, or a finding of not guilty was returned. It is only in these 119 matters where a not guilty plea was entered, when the principle of ***doli incapax*** may have been in issue. However, there is no indication as to what number of these matters subsequently resulted in a finding of not guilty, and what proportion of those found not guilty, was due solely to the application of the ***doli incapax*** principle.

For the 12-14 year age group, Table 2 indicates that only 97 of the total of 965 matters (10%) involved a plea of not guilty, and there were 247 unproven outcomes. The offences which are most common in the 10-14 year age group (and also in the 12-14 age group) were assaults, burglaries, thefts (including motor vehicle thefts) and damage to property (Table 3).

TABLE 1:
1997/98 Criminal Appearances in NSW Children's Court – Plea by Age for 10-14 Year Olds, and Total Unproven Outcomes

AGE	Not Guilty Plea	Guilty Plea	Ex Parte	S.75B	Unknown	Unproven Outcomes	Total
10-11	1	28			2	5	35
11-12	21	60	2	6	17	45	117
12-13	39	169	18	7	28	86	289
13-14	58	442	23	20	69	161	676

[129] Letter from Stephen Scarlett, Senior Children's Magistrate, to Executive Officer Juvenile Justice Advisory Council of NSW 25 January 1997.

TOTAL	119	679	43	33	116	297	1117

Source: NSW Department of Juvenile Justice Annual Children's Court Statistics Criminal Matters 1997/98

TABLE 2:
1997/98 Criminal Appearances in NSW Children's Court – Not Guilty Pleas, Unproven Outcomes and Total Appearances for 12-14 Year Olds

AGE	Not Guilty Plea	Unproven Outcomes	Total Appearances
12-13	**39**	**86**	289
13-14	**58**	**161**	676
TOTAL	97	247	965

Source: NSW Department of Juvenile Justice Annual Children's Court Statistics Criminal Matters 1997/98

TABLE 3:
1997/98 Criminal Appearances in NSW Children's Court – Aggregate Offences by Age for 10-14 Year Olds

OFFENCE	10-11	11-12	12-13	13-14	Total
Aggravated Assault			**3**	**4**	7
Other Acts Intended to Injure	**5**	**15**	**46**	**90**	156
Aggravated Sexual Assault	**1**	**1**		**5**	7
Aggravated Drink Driving Offences				**1**	1
Other Dangerous Acts			**1**	**10**	11
Robbery/Extortion	**1**	**1**	**7**	**19**	28
Burglary/Break & Enter	**8**	**19**	**54**	**102**	183
Motor Vehicle Theft & Related Offences		**8**	**13**	**61**	82
Other Theft & Related Offences	**9**	**25**	**77**	**189**	300
Illicit Drug Offences			**7**	**23**	30
Weapons & Explosives Offences		**2**	**1**	**3**	6
Property Damage & Environmental Pollution	**6**	**14**	**35**	**49**	104
Public Order	**4**	**8**	**10**	**40**	62
Road Traffic & Motor Vehicle Regulations	**1**				1
Justice & Govt. Offences		**4**	**13**	**15**	32
Misc. Offences		**20**	**22**	**65**	107
TOTAL	35	117	289	676	1117

Source: NSW Department of Juvenile Justice Annual Children's Court Statistics Criminal Matters 1997/98

The figures for 1998/99 reveal a similar situation. In 1998/99 a total of 13 674 matters were heard and completed in the NSW Children's Court. 1483 matters (10.8%) involved pleas of not guilty, and 3395 had unproven outcomes. There were 822 matters involving defendants aged between 10-14. Of these, in only 77 matters did the defendant plead not guilty (9.4%) and in 255 matters, the charges were not proved against the defendant. Again, there is no information as to what proportion of the 77 matters in which a not guilty plea was entered, resulted in a finding of not guilty, and no information as to what proportion of these was solely as a result of the application of the ***doli incapax*** principle (Table 4).

For the 12-14 age group, only 71 matters out of 734 (9.7%) involved a plea of not guilty, and 226 matters had unproven outcomes (Table 5).

The most common charges for the 10-14 age group (and also in the 12-14 age group) were again assaults, burglaries and break and enters, thefts (including motor vehicle thefts) and damage to property (Table 6).

TABLE 4:
1998/99 Criminal Appearances in NSW Children's Court – Plea by Age for 10-14 Year Olds, and Total Unproven Outcomes

AGE	Not Guilty Plea	Guilty Plea	Ex Parte	No Plea	S.75B	Unknown	Unproven Outcomes	Total
10-11	**2**	**10**		**4**	**2**	**2**	**9**	20
11-12	**4**	**44**	**2**	**4**	**2**	**12**	**20**	68
12-13	**15**	**120**	**4**	**23**	**3**	**35**	**70**	200
13-14	**56**	**306**	**13**	**45**	**6**	**108**	**156**	534
TOTAL	77	480	19	76	13	157	255	822

Source: NSW Department of Juvenile Justice Annual Children's Court Statistics Criminal Matters 1998/99

TABLE 5:
1998/99 Criminal Appearances in NSW Children's Court – Not Guilty Pleas, and Unproven Outcomes as a proportion of total appearances for 12-14 Year Olds

AGE	Not Guilty Plea	Unproven Outcomes	Total
12-13	**15**	**70**	200
13-14	**56**	**156**	534
TOTAL	71	226	734

Source: NSW Department of Juvenile Justice Annual Children's Court Statistics Criminal Matters 1998/99

TABLE 6:
1998/99 Criminal Appearances in NSW Children's Court – Aggregate Offences by Age for 10-14 Year Olds

OFFENCE	10-11	11-12	12-13	13-14	Total
Homicide		**1**			1
Aggravated Assault		**1**		**1**	2
Other Acts intended to Injure	**3**	**14**	**33**	**86**	136
Aggravated Sexual Assault		**1**	**1**	**4**	6
Other Dangerous Acts		**2**	**4**	**7**	13
Robbery/Extortion		**1**	**8**	**17**	26
Burglary/Break & Enter	**5**	**10**	**35**	**94**	144
Motor Vehicle Theft	**2**	**4**	**11**	**50**	67
Other Theft	**4**	**16**	**43**	**92**	155
Illicit Drug Offences		**1**	**8**	**28**	37
Weapons & Explosives Offences		**1**		**3**	4

Property Damage & Environmental Pollution	**2**	**1**	**23**	**43**	69
Public Order	**1**	**4**	**8**	**30**	43
Road Traffic & Safety Regulations			**1**	**4**	5
Justice & Govt. Offences	**2**	**5**	**10**	**29**	46
Misc. Offences	**1**	**6**	**15**	**46**	68
TOTAL	20	68	200	534	822

Source: NSW Department of Juvenile Justice Annual Children's Court Statistics Criminal Matters 1998/99

Conclusion

On the basis of the information provided by the Department of Juvenile Justice regarding the Annual NSW Children's Court statistics for the last two years, there is no indication that the existence of the *doli incapax* principle is resulting in massive acquittals for the 10-14 age group, or for the 12-14 age group. It is clear that the *doli incapax* principle is relevant in an absolute maximum of only 10% of all matters involving 10-14 year olds coming before the NSW Children's Court. Given that the total numbers of 10-14 year olds, and 12-14 year olds who obtain acquittals solely on the basis of the operation of the *doli incapax* principle will be considerably less than this absolute maximum of 10%, it is clear that the operation of the principle is effecting only a very small minority of matters for 10-14 year olds and 12-14 year olds.

In addition, the proportion of not guilty pleas for matters involving 10-14 year olds, and 12-14 year olds is, in fact, less than the overall proportion of not guilty pleas for all matters in the NSW Children's Court. Accordingly, there is no evidence to suggest that the *doli incapax* principle is being inappropriately applied in the 10-14 or 12-14 age groups, or that there is a noticeable number of miscarriages of justice as a result of the operation of the principle.

What is clear is that the mere availability of the *doli incapax* presumption does not result in a higher rate of not guilty pleas for matters involving either 10-14 year olds or 12-14 year olds. This supports the anecdotal comments from practitioners in the Children's Court jurisdiction, that it is not always advantageous to build a defence around the *doli incapax* principle in isolation, as it can lead to the introduction of prejudicial evidence against the accused, by the prosecution attempting to rebut the presumption. Defence counsel are also mindful that in many cases, it is not difficult for the prosecution to rebut the presumption. It is in these matters, where defence counsel makes a tactical choice to resolve the matter by way of a guilty plea, rather than put the prosecution to the test of rebutting the presumption.

Accordingly, the *doli incapax* principle retains its essential function: a safeguard for the disadvantaged child who may be developmentally delayed, disabled, or otherwise emotionally immature. As a principle, it is not, in practice, being abused or leading to miscarriages of justice. Accordingly, there is no basis for it to be limited in the manors canvassed by the Criminal Law Division Discussion Paper.

4.8.2 In what matters will *doli incapax* be relevant, and how can the prosecution rebut the presumption?

What charges?

The *doli incapax* principle applies in all criminal matters involving a 10-14 year old, where the child defendant has entered a plea of not guilty. As articulated by Lord Lowry in *C (A*

Minor) v Director of Public Prosecutions, in presenting its case, the prosecution is required to rebut the presumption, by proving beyond reasonable doubt that the young defendant was aware that their conduct was seriously wrong, not just mere mischief or naughtiness.

In practice, the types of offence committed by 10-14 year olds are generally limited. As indicated in Tables 3 and 6 above, the most common offences for the 10-14 year age group are assaults, burglaries and break and enters, thefts (including motor vehicle thefts) and damage to property. Occasionally, more serious offences against the person (murder, manslaughter) and sexual offences are committed by 10-14 year olds.

What must the prosecution prove?

The nature of the offence before the court will often dictate the nature of the evidence to be produced by the prosecution in order to rebut the presumption. The decisions of superior courts give some indication as to the nature of the evidence which the prosecution must produce in order to rebut the presumption. However, there is no absolute formula which can be applied in every case. The reason is that in rebutting the presumption, the court would need to consider the particular background of the particular child, as well as the unique features of the case, before arriving at its decision as to the knowledge of the child at the time in question. The actual age of the child, though an important factor to be taken into consideration, is not conclusive. However, in most cases, matters such as the circumstances of the case, things said or done by the child both before and after the act, the age of the child, and the individual particulars of the child are considerations relevant to the court's consideration.[130]

The Supreme Court of Queensland Court of Appeal, in the matter of ***R v Folling: ex parte A-G***[131] looked at the test for evidence which must be applied to rebut the presumption of ***doli incapax*** as stated in Section 29(2) of the Criminal Code (Qld). It stated that the prosecution can call evidence in order to rebut the presumption, or draw inferences from:

> the accused's age and education;
> false denials of the accused, admitted without objection which asserts a false alibi; and
> the surrounding circumstances if the offence included rendering the complainant incapable of identifying the perpetrator and/or summoning assistance during the commission of the offence.

Other factors the court deemed relevant include the surrounding circumstances of the commission of the offence in question, if they can show that at the time of doing the act or making the admission charged the person had the capacity to know that the act was seriously wrong. It also stated that the in order to rebut the presumption, the prosecution may be permitted to produce evidence of previous convictions and/or dealings with police. Again, the Court of Appeal reaffirmed that evidence of the accused's age alone cannot rebut the presumption, but must be considered together with evidence of the accused's education, the surrounding circumstances of the offence, and with observations of the accused's speech and demeanor. However, it noted that the older the accused, and the more obviously wrong the conduct, the easier it would be for the prosecution to rebut the presumption.

Simon Brown L.J in ***R v Sheldon***[132] provides a useful summary

[130] Law Reform Commission of Hong Kong, Consultation Paper on The Age of Criminal Responsibility in Hong Kong 1998, p 6-7.
[131] [1998] QCA 97.
[132] [1996] 2 Cr App. R 50 at 53,

The older the defendant is and the more obviously wrong the act, the easier it will generally be to prove guilty knowledge. Note, though that mere evidence of the act amounting to the offence itself, however horrifying or obviously wrong that act may be, will not of itself be sufficient.

The surrounding circumstances are clearly relevant and what the defendant said and did both before and after the act may go to prove guilty knowledge. Certain conduct, however, such as running away or lying, may, depending on the circumstances be equivocal, as consistent with naughtiness and with wickedness.

Proof that the defendant was a normal child for his age (which must not be presumed but, assuming guilty knowledge can otherwise be established, need not be proved) will not necessarily prove also that he knew his action was seriously wrong. The less obviously wrong the act, the less likely is it to do so.

It is important to note that although knowledge of a serious wrong, coupled with any necessary implication from the age, can be inferred from the circumstances of the case, a child cannot be presumed to know the nature of the act simply because other children of his age and background would normally be held to possess such knowledge.

4.8.3 Case Study Examples of *doli incapax*

R (A Child) v Whitty (1993) 66 A Crim R 462 (Supreme Court of Victoria):

The child defendant had admitted to a police officer that she went into a department store and 'stole' a pair of jeans. It was held that by using the word 'stole' in her admission, no other conclusion is reasonably open but that the defendant used it deliberately and appropriately and knew what it meant. Accordingly, she knew what she was doing was wrong in terms of her appreciation of the true nature and quality of her act, and this was not just reliant on the facts relating to the theft, but also on the admission she had made to police. In this way, the prosecution successfully rebutted the *doli incapax* presumption.

Regina v CRH (Unreported No. 60390 of 1996), Supreme Court of NSW Court of Criminal Appeal:

The 12 year old defendant was charged with two counts of sexual assault on his six year old cousin. The prosecution sought to rebut the *doli incapax* presumption with evidence that on one of the occasions, the defendant had forced his cousin to have oral sex with him in the family lounge room, by forcing her head into his lap. Upon hearing a noise, and being disturbed by the cousin's older sister, the defendant pulled a blanket over the cousin's head. The prosecution relied upon the furtive nature of the conduct of the defendant in waking his young cousin in the dead of night, taking her into to the lounge room, and then seeking to hide his cousin when they were disturbed. The prosecution submitted that this indicated knowledge on the part of the defendant that what he was doing was particularly wrong. On appeal, it was held that this was not sufficient to rebut the *doli incapax* presumption, as the defendant's conduct may have revealed nothing more than mere embarrassment, as opposed to knowledge that his conduct was wrong.

R v Folling; ex parte A-G [1998] QCA 91 (19 May, 1998), Supreme Court of Queensland, - Court of Appeal

The defendant was charged with assault, breaking and entering with intent, and aggravated armed robbery. At the time of the alleged offences he was 14 years and nine months (the

relevant upper age limit under statute in Queensland being 15). The evidence proved that the defendant, with another, entered the victim's house in the early evening whilst he was asleep, woke him, assaulted him, demanded drugs from him, bound him and blindfolded him and warned him not to move for five minutes after they left. He also cut the victim's telephone cord. In his interview with police, he gave a false alibi, denying that he was in the victim's house. The prosecution relied upon the evidence of the circumstances surrounding the commission of the offence, the false alibi, the proximity of the defendant's age to 15, and his educational standard (year 9, plus additional Trades courses). The Trial Judge held that this was not sufficient to rebut the presumption. The Attorney General appealed to the Court of Appeal, stating that the Trial Judge applied the incorrect principles. The Court of Appeal held that the Trial Judge was incorrect.

JM (A Minor) v Runeckles (1984) 79 Cr App R 225, Supreme Court of Victoria:

The 13 year old defendant attacked and stabbed another girl with a broken milk bottle. Her account of events when she was interviewed by police was not dissimilar to that of the victim. She had gone to the victim's home, knocked on the door and threatened to break in. She then taunted the victim, stabbed her and then ran away. On her way from the attack she was seen by police, who pursued her. She ran away from them but once caught, made admissions. The court held that evidence of her running away from the scene was sufficient to rebut the presumption.

C v Director of Public Prosecutions [1995] 2 All ER 43, UK House of Lords:

The 12 year old defendant was seen by police, with another boy, using a crowbar to tamper with a motorcycle in a private driveway. The defendant ran away but was caught and arrested. The motorcycle had been damaged. At hearing, the magistrate concluded that by running away, and the fact that the motorcycle had been damaged, the defendant knew that what he had done was seriously wrong. The Divisional Court dismissed the defendant's appeal. The House of Lords allowed the appeal, and ordered that the charges be dismissed, as the *doli incapax* presumption had not been rebutted, as the proof of flight and criminal damage did not show that the defendant knew his conduct was seriously wrong, as distinct from mere mischief or naughtiness.

The Queen v M (1977) 16 SASR 589, Supreme Court of South Australia:

The 12 year old defendant was charged with murder, following an assault on another child which led to the death of that child. He had been questioned by police as to offences of stealing, breaking and entering, assault on other children, and arson, which had previously been committed by him. He had admitted to police that when committing these offences, he knew he was doing wrong. The prosecution was able to lead evidence of the police questioning and the defendant's admissions, to show that the child knew he was doing wrong when he committed the assault that led to the death of the other child, and that this successfully rebutted the presumption of *doli incapax*.

K v Rooney (July, 1996) unreported, Supreme Court of New South Wales:

A 12 year old defendant was charged with sexual assault of a ten year old in the pool room of a Juvenile Justice Centre. The defendant had threatened to assault the ten year old if he did not pull down his pants, and then the defendant proceeded to sexually penetrate the victim. The magistrate held that the actions of the defendant were so intrinsically wrong, that no further explanation was required by the prosecution in order to rebut the presumption. The Supreme Court subsequently decided that the magistrate was incorrect, and that in this case, the presumption had not been successfully rebutted merely by the nature of the defendant's actions.

4.8.4 Conclusion

The guidelines provided as to what issues are relevant for the prosecution to rebut the presumption indicate that the burden placed on the prosecution is not overly onerous. This is borne out by the above examples decided in the superior courts.

The guidelines indicate that for the older child, it is conceivably easier for the prosecution to rebut the presumption. However, by maintaining the principle and the burden on the prosecution to rebut the presumption, the 13 year old who is disabled, immature or developmentally delayed is not disadvantaged, as the prosecution will have to adduce evidence other than age to rebut the presumption.

Likewise, the more mature, educated and developed a child is, the easier it will be for the prosecution to rebut the presumption. However, the *doli incapax* principle remains an important safeguard for those children who cannot be classified as advanced, or even 'normal ' or 'average'. As has been previously stated, like other safeguards in the criminal justice system, the *doli incapax* principle forces the prosecution to acknowledge that not all children in 10-14 age group develop at the same rate, have the same levels of understanding and awareness, or exercise the same level maturity. Indeed, each individual child's stage of maturity and development is acknowledged, and must be addressed by the prosecution in its efforts to rebut the presumption. Maintaining the operation of the principle for the 10-14 age group ensures that the large variances of development within this age range are addressed. Whilst the variances of development may diminish the nearer to 14 the defendant is, maintaining the upper age limit at 14 acknowledges that significant variances still exist up to the age of 14. There still remains the strong possibility that that some who are nearing the age of 14, will be less mature and developed than the majority. To remove the presumption of doli incapax for this age group would prejudice the less well developed children in the 12-14 age group.

THE SCIENTIFIFC AND MEDICAL EVIDENCE

The Commission strongly supports the principle that decisions about legislation, policy and practice should be based on sound evidence. To this end, the Commission asked the Psychology Department at Sydney University to undertake a search of the international scientific, medical and sociological literature to determine whether there was any evidence to suggest that the ability of children to make moral judgments had increased to a level which would justify the abolition of *doli incapax.* The results of that search form this chapter of the submission.

An annotated bibliography of the evidence is at Appendix 2.

5.1 What constitutes scientific or medical evidence?

Much research and discussion has taken place over the past century into children's understanding of right and wrong. These have included theological, philosophical, medical, legal and social science based reports. The main databases examined for the present purpose were education, law, medicine, psychology and sociology. Generally, the same references to this subject were found on each database. However, the main differences were in the theoretical discussions about the nature of right and wrong. These discussions (whilst invaluable in formulating new research and discussing the previous research) were considered to be beyond the scope of the present review, especially as this discussion was largely opinion-based. That is, it did not involve systematic observations or interactions with

children. Therefore, for the purposes of this chapter of the submission, only empirical studies (i.e., those involving systematic observations or interactions with children) will be used.

5.2 What constitutes 'distinguishing right from wrong'?

What constitutes right from wrong will depend on the perspective one takes. For example, a judge in Tehran, a factor worker in Sydney and a Buddhist priest in Tokyo may all have very different concepts of right and wrong. For the present purposes, right from wrong will be taken as based on western philosophical ideas of morality. More specifically, if a definition of criminal responsibility is used, then a clear set of criteria may be outlined. Normally, three criteria must be met if the person is to be held criminally responsible for a crime that he committed (Thompson & Watson, 1985). First, when that person was committing the act, he knew the act was punishable or wrong (the ***mens rea***). Second, that person was aware of what he was doing and did so voluntarily. Third, that person was aware of both the immediate and long-term consequences of his behaviour. Each aspect will be examined in turn.

5.3 When do children know that an act is punishable or wrong?

This question has been addressed in many ways over the past century. The studies basically fall into one of three main areas: emotions, behaviours or cognitions. This Socratarian split was due to three different schools of thought that were active at the beginning of this century. First was the Freudian or psychodynamic movement (e.g., Langford, 1995). Put simply, right and wrong were seen as best measured by the emotions of guilt and anxiety. Freud expected that it was the emotions of anxiety and guilt that allowed us to recognize good from bad and right from wrong. This was related to Freud's interest in the conscious and unconscious (especially what he termed the control of the 'superego'). He reasoned that we may not 'know' right or wrong, as these ideas may be unconscious, therefore our emotions may be the best guide to how our unconscious understands right and wrong. For example, by feeling guilt, a person recognizes that he has done something he (that is, his superego) considers is wrong. However, as psychodynamic models were not amenable to empirical research, little research has been conducted on these ideas (see Langford, 1995 for a discussion on the research that has been conducted on psychodynamic models).

The second aspect that was developed came from the behavioural movement. This was primarily concerned with moral ***behaviour***. Behaviour was seen as something that was learnt following various principles of reinforcement, punishment and modeling. The Character Education Inquiry (Hartshorne & May, 1928, 1929, 1930) was the first major study conducted that examined moral behaviour. They examined 'cooperative and charitable character', 'self-control', and 'deceit' in over 2,000 children. They put the children into a series of natural or contrived situations and noted how they behaved. For example, children were sent to a shop where the shopkeeper had been instructed to give the children too much change. If the children kept the change, this was used as a measure of stealing. The research showed that even their youngest children (nine-year olds) were able to demonstrate deceit. However, the main finding of this study was that none of their tests (and there was over a hundred of them) appeared to be correlated. That is, rather than there being an underlying 'good character', there appeared to be specific moral aspects that were not related.

The work of Hartshorne & May (1930) has been heavily criticized for the poor definitions of the various concepts they used. That is, they emphasized the specific elements in moral behaviour but then mistook these parts as the whole. For example, using the acceptance of too much change as a measure of stealing, and then equating this with a concept of overall honesty. However, Eysenck (1953) concluded that, 'although Hartshorne and May have failed to show that human conduct is completely specific, they have shown conclusively that it is far less general than we tend to imagine, and far more strongly determined by the specific situation in which it occurs.' As a result of Hartshorne & May's conclusion that there may be

no generic moral character, little research was conducted in America for a number of years following this publication. When research did begin again, the behavioural model had lost favour with researchers and so Hartshorne & May remains one of the largest studies ever conducted on children's moral behaviour.

The third, and perhaps most influential aspect, was the cognitive movement. The primary focus of the cognitive movement was on children's attitudes and judgements about right and wrong. Macaulay & Watkins (1925) were the first to examine what a child may understand to be wrong. They asked over 3,000 school children in England what was 'the most wicked things anyone could do'. Although this was a very simplistic attempt to examine how children understand the nature of wrong (or 'wickedness'), the children reported four main groups of offences: crimes against person and property, crimes against religion, crimes against parents or others and school offences. The general moral outlook of these seven to eighteen year-old children did not appear to differ from adults. However, Macaulay & Watkins did find a developmental pattern in children's responses. Up to the age of nine only minor offences against the child were mentioned. From nine to adolescence, the child reported that what is wrong is what she has been told is wrong. During adolescence, there was a rebellion against authority, although this diminished as the adolescent aged, until finally a more self-controlled view of morality emerged (that is, a more internalized set of moral codes appeared to be guiding the individual).

The next series of studies exploring moral attitudes were to spark most of the subsequent empirical research in children's understanding of right and wrong. This series of studies was conducted by Jean Piaget. Piaget (1932) was interested in the moral judgement of the child, at a time when he was also exploring his theories on a child's overall mental development. He first examined how Swiss children understood rules (using the game of marbles) and then examined how children made moral judgements. For example, he read children two stories:
Story A: 'A little boy [or a little girl] goes for a walk in the street and meets a big dog who frightens him very much. So then he goes home and tells his mother he has seen a dog that was as big as a cow.'
Story B: 'A child comes home from school and tells his mother that the teacher had given him good marks, but it was not rue; the teacher had given him no marks at all, either good or bad. Then his mother was very pleased and rewarded him.' (Piaget, 1932 / 1965, p. 142)

After hearing the stories, the children were asked which child was 'the naughtiest.' Based on the children's responses, Piaget concluded that two distinct styles of reasoning were used by children, with the transition from one to another taking place at around eight years of age. Children under the age of eight appeared to be what Piaget termed 'moral realists'. That is, the children focused their judgements on the obvious and objective aspects of the story. For example, the following is the response given by seven-year-old BURD to the aforementioned stories. 'The naughtiest is the one who saw a dog as big as a cow. It is naughtier because his mother knew [that it was false or impossible], whereas the other one, the mother didn't know. If you say something that mother doesn't know, it is less naughty because his mother might believe you. If the mother knows it isn't true then it is a bigger lie' (Piaget, 1932 / 1965 p 145).

Piaget suggested that children over the age of eight were more likely to demonstrate 'moral subjectivity', where beliefs and intentions to deceive were the basis for the older children's judgements. For example, ARL, aged ten responded, 'The naughtiest is the one who deceived his mother by saying that the teacher was pleased.' 'Why is he the naughtiest?' 'Because the mother knows quite well that there aren't any dogs as big as cows. But she believed the child who said that teacher was pleased.' (Piaget, 1932/1965 p 149). Further, as the child grew older, the child appeared to move from a reliance on the authority of another to establish what is right and wrong, to more internalisation (i.e., a child's judgement appeared independent of external definitions of right and wrong). Whilst these categories appeared to be stages, Piaget

stressed that young children did report intentions and older children did report considering the consequences, but there was a tendency for one style to predominate.

Many aspects of Piaget's work have been extensively criticized (e.g., see Bull, 1969) but his work created a legacy of similar studies examining and refining how children judge right and wrong (e.g., see Havinghust & Taba, 1949). For example, MacRae (1954) found that Piaget's category of 'moral realism' could more usefully be seen as a combination of four relatively independent factors. These were; sensitivity to intentions, concepts of punishment, ability to take another's perspective and deviating from the authority norms. Thus, by the 1960's, researchers were moving beyond mere judgements of right and wrong. In particular, Kohlberg wanted to examine how children reason about what is right and wrong.

Kohlberg conducted a large longitudinal study that followed 84 boys from three age groups (10, 13 and 16 years) for 20 years. Based on this data, Kohlberg developed six stages of moral reasoning (see Kohlberg, 1981 for a more detailed account of his stage theory). The first stage was focused on punishment and obedience. That is, what is right is seen as literal obedience to rules and authority. Approximately 27% of the ten-year-olds were reasoning at stage one, compared to 60% who were reasoning at stage two. The second stage focused on individualism and exchange. That is, what is right is seen as what best serves one's own interest and what's fair is an equal exchange or equal deal. The third stage focused on mutual interpersonal expectations and conformity. That is, what is right is being a 'good' person, who can be trusted, is loyal and respectful. Approximately 60% of sixteen-year-olds reasoned at this stage. The fourth stage focused on the social system and conscience. That is, what is right is doing one's duty in society and following the laws of the land. Approximately 49% of 24 year-olds reasoned at this stage, climbing to 62% of 36 year-olds. The fifth stage focused on social contract and individual rights. That is, what is right is upholding basic rights, values and legal contracts, even if they conflict with rules or laws. Approximately 7% of 25 to 36 year-olds reasoned at this stage. The sixth and final stage focused on universal ethical principles. That is, what is right is based on universal principles that all humanity should ultimately follow. No research participant ever appeared to reason at this stage. Thus, serious questions about its existence have been made. This stage is now no longer used as part of Kohlberg's model (e.g., Gibbs, Basinger & Fuller, 1992).

Nearly all present-day research into children's understanding of right and wrong will either refine (e.g., Gibbs et al, 1992; Puka, 1994) or refute (e.g., Turiel, 1997) Kohlberg's stage theory. All such studies discuss different methods of examining how children understand right from wrong. A final point to note, is that few studies find a clear relationship between moral judgement (or reasoning) and moral behaviour (see Saltzstein, 1994, for a discussion on possible reasons for this).

5.4 When are children aware of what they are doing?

Children's awareness of what they are doing can best be assessed using children's understanding of deception. In order for a young child to deceive, she must understand that she knows something others do not. Further, she must mask her true feelings, in order to convincingly deceive. Both of these aspects require a child to have a clear idea of what she is doing. Experimental studies have strongly debated the age at which a child can clearly demonstrate deception (e.g., see Wimmer and Perner, 1983; Chandler, Fritz and Hala, 1989). However, Newton (1994, as cited in Dunn, 1999) conducted a series of studies examining young children's use of deception in the family home. These studies found that three year olds could deceive equally as well as four year olds but did not do so as frequently. Further, deception occurred most commonly when the child was in conflict with parental authority, but could also occur to save face when being punished. In conclusion, it appears that a child's ability to deceive is specific to his social situation, as experimental studies of deception (e.g.,

Chandler *et al.*, 1989) find that children have less developed deception skills than naturalistic studies (e.g., Dunn, 1999).

5.5 When do children understand the short- and long-term consequences of their behaviour?

The previous section briefly outlined children's use of deception. This is also a good example of children's understanding of short-term consequences. A child (or adult, for that matter) is unlikely to use deceptive techniques unless she understands that as a consequence, her deception will be believed. Therefore, short-term consequences are usually understood by the age of three for events that children are familiar with (e.g., Inhelder & Piaget, 1958; Dunn, 1999).

However, while young children are apt at noticing causation (that is, that if they do one thing, something happens) and thus can rapidly learn about short-term consequences, long-term consequences are more difficult to understand. Piaget (1932) noted that children between the ages of 8 and 15 were able to infer what the long-term consequences of lying may be. It is now generally considered that, depending on the consequence in question, children usually reach adolescence before they have a clear appreciation of consequences (Case, 1992; Inhelder & Piaget, 1958). For example, a ten-year-old may 'know' that if you kill someone you go to jail. The child may not have thought beyond this obvious consequence to the impact that would have on the rest of her life, on her emotions, on her family reactions or the family of the person killed.

5.6 What constitutes 'more able'?

In order to show that a child today is more able to understand right from wrong than a child twenty years ago, one must repeat the exact study that was conducted twenty years earlier. To do this, one must use the same age children from the same cultural group (e.g., the same city), use the same task and use the same method for coding the answers. However, as outlined above, much of the research into moral development has come from different perspectives and hence different methodologies have been used. Further, those researchers who shared the same perspectives developed a range of techniques that evolved with each subsequent study. For example, Piaget used stories, whereas, years later, Kohlberg used different stories with a more structured interview and an elaborate method of coding the answers of the children. This makes direct comparison useless, for it is well known from even the earliest research that children will perform differently on different tasks (see Hartshorne & May, 1930).

Thus, to detect a change in children's understanding of right and wrong, one must use only those studies that have sort to directly repeat the original study. This constraint immediately narrows down the field of research to predominately the theories and methodologies of Piaget and Kohlberg. However, Kohlberg's longitudinal studies had not been published in full until 1983. Further, aspects of his theory have been criticized and extensively modified, such that, replications of Kohlberg's work today do not use his original coding categories and therefore, direct comparisons cannot be made.

As Piaget's work (began in 1927, published in 1932) was not published in English until 1965, most of the Piagetian replication studies were conducted some 30 – 40 years after the initial study. It is to these studies that we now turn.

5.7 What empirical studies have been replicated on children's ability to distinguish right from wrong?

Most of the research conducted into Piaget's model was done to establish whether his categories were accurate (see Lickona, 1976, for a review). There is no known study to date that has explicitly examined possible changes in children's reasoning about right and wrong

from one generation to the next. Hence the focus of the replication studies dramatically differ from that of the present paper. It is therefore not surprising that the results are mixed. Some studies (e.g., Loughran, 1967) show children's understanding developing at a slower rate than Piaget suggested nearly forty years earlier. For example, Loughran concluded that 'adolescents arrive at Piaget's level of mature autonomous judgement between 12 and 17 years, not between 11 and 12 as Piaget says' (Loughran, 1967, p 89).

Other replication studies of Piaget's work have found that children were using intentional aspects in their judgements at a younger age than Piaget had suggested. For example, Boehm (1962) found that children were rejecting 'moral realism' around the age of seven, not eight years of age as Piaget had suggested. This year difference in moral judgements was also consistently found by others (e.g., MacRae, 1954; Rotenberg, 1980). Two concerns regarding these results need to be highlighted. First, these studies were conducted on American children and used different (although similar) stories and questions to Piaget. Second, and more importantly, although they consistently found a year 'improvement' in young children's reasoning, they did so across a 26 year time span. That is, children's improvement does not appear to continue, but rather, a closer inspection of the information supplied by children indicates that Piaget may have been a year out in his estimate.

These results are suggestive of a greater complexity to children's moral reasoning than Piaget first suggested (this resulted in Piaget's model being abandoned in favour of the more complex Kohlbergian model). Indeed, recent research (e.g., Emler,1998) demonstrates that young children's understanding of right from wrong may be more complex than is currently thought and social situations may be strong predictors of that complexity (Emler, 1998). This may appear to imply a generational improvement in children's understanding of right and wrong. However, the cause is more likely to be the quality of the research. As better research techniques are developed, more can be understood of the intricacies and complexities of the way children understand right from wrong. For example, in 1927, Piaget presented children with two stories and asked about five questions about the stories. Kohlberg, in 1958 (when he began his doctoral dissertation), used moral dilemmas and needed the children to complete a complex structured interview. The amount of information was considerably larger in the latter's research, which would increase the degree of complexity that any one child could demonstrate.

However, a final point should be noted. Inhelder (Piaget's research colleague) did suggest that Piaget's staff appeared to find that Swiss children were developing more rapidly in moral reasoning (see Keasey, 1977). As tantalizing as this comment may be, there is no empirical support for this finding. The best way to establish an improvement over time in children's understanding of right and wrong would be to use Swiss children. This is because the original Piagetian studies were done with this population and therefore cultural factors would be properly controlled for. It is ironic that it was a member of Piaget's staff that suggested this may be occurring as it was his staff who were in the best position to test this idea by replicating his research. Yet, they did not.

5.8 What conclusions can be made?

First, there are no known empirical studies that directly examine if children today have a better understanding of right and wrong than children of previous generations. Second, it is now known that children's understanding of right and wrong is more complex than previously thought. It may be that children's thinking has developed greater complexity, but it is more likely that our understanding of children has merely improved. Third, and finally, more research is needed to establish exactly how children's understanding of right and wrong (emotional, behavioural and cognitive) develops.

PROPOSALS FOR LAW REFORM

The Criminal Law Division of the Attorney General's Department has invited comment on the specific issues raised in its Discussion Paper.

Issue 1: Is there any scientific or medical evidence to support the proposition that today's children are more able to distinguish right from wrong than their earlier counterparts?

As is clearly demonstrated above, there is no evidence to support the view that children are more able to make moral judgments now than they were in the past. This submission has already addressed the assertions that *doli incapax* is no longer appropriate for modern society, where children have greater access to education and information technology. Better education does not guarantee a greater ability in children to distinguish right from wrong. The current operation of the *doli incapax* presumption results in a system which allocates a flexible four year period during which moral culpability can be assessed. This is preferable to a system which assumes that by the age of twelve all children have reached the same level of moral culpability as an adult.

Issue 2: Should the common law on *doli incapax* be retained and enacted in the *Children (Criminal Responsibility) Act 1987*?

The Commission for Children and Young People strongly supports the retention of the *doli incapax* for 10-14 year olds. The principle provides the necessary leeway for a class of young people whose degree of maturity may vary not only among children of different ages, but also among children of the same age. The rebuttable presumption has helped to achieve a fair and objective assessment which ensures that only those who have been proved to possess sufficient maturity and capacity to appreciate that their criminal acts amount to serious wrongs would be held fully responsible and would face criminal sanction.

Removal of the rebuttable presumption of *doli incapax* would prejudice less developed and immature children. Preservation of the principle helps to prevent such unfairness. Removal of the presumption completely, or for 12-14 year olds, will mean that children in the age group for whom *doli incapax* no longer applies, will be treated in the same way as adults, and exposed to the full trauma of the prosecution process. This offends the basic tenet that the law should afford protection to the young.

'Whilst it is common sense to presume that most children know the difference between right and wrong in a general sense, we do not believe that this should automatically lead to the conclusion that they can be expected to assume the same degree of responsibility for their actions as an adult.'[133]

However, one should question what is the most effective way of ensuring that the principle is used consistently and to make sure that it performs the function intended, that of protecting vulnerable children in the criminal court process. Accordingly, the Commission strongly supports Recommendation 195 of the Human Rights and Equal Opportunity Commission/Australian Law Reform Commission Report, 'Seen and Heard – Priority for Children in the Legal Process': *Recommendation 195. The principle of* doli incapax *should be established by legislation in all jurisdictions to apply to children under 14.*

[133] House of Commons Standing Committee B (Pt. 7), 23 June 1998, <http://www.parliament.the-stationery-o…798/cmstand/b/st980512/pm/80512s04.htm>

Currently, in all jurisdictions other than New South Wales, Victoria South Australia and the ACT, *doli incapax* for 10-14 year olds is enshrined in legislation. Similar legislation in these remaining states would ensure a much more consistent application of the doctrine across all jurisdictions.

Accordingly, such legislation in NSW would bring the State into line with Queensland, Western Australia, Northern Territory and Tasmania, as well as New Zealand.

As stated above, the principle rarely arises in proceedings involving 10-14 year olds in regions outside of Sydney, Newcastle and Wollongong because these matters outside of these three cities are heard in local courts, and are run by solicitors who usually have little experience of proceedings in specialist Children's Courts. By giving statutory recognition to the principle, there would be greater awareness of the principle for practitioners, and lessen the likelihood of child defendants under 14 years in rural and regional areas having a lesser standard of justice than their urban counterparts.

Issue 3: Should the rebuttable presumption of doli incapax be altered to: (a) Shift the burden of proof to the accused?

This proposal involves a reversal of the onus of proof to require the child defendant to prove, on the balance of probabilities that he or she did not know that the act done was wrong. This proposal would make it easier for the prosecution to prove its case. It is reasonable to assume that a greater number of convictions against child defendants would ensue.

This proposal is rejected as it reverses the traditional obligation on the prosecution to prove all essential elements of the offence beyond reasonable doubt, in criminal matters. This is a fundamental tenet of our criminal justice system. In the case of 10-14 year olds, this means that the prosecution must establish an additional element, namely that the child was aware that their conduct was 'seriously wrong'.

Significantly, it will require the defence to produce evidence to indicate that the child was not aware that their conduct was seriously wrong. This will involve the defence calling complex evidence in relation to the child's development, upbringing, education and maturity. This may involve calling specialist expert witnesses in the area of child development, as to issues of the child's knowledge. Accordingly, the financial cost to the defence of producing such evidence will be significant. In addition, a greater level of complexity and delay will be introduced into the hearing process.

Significantly, placing the burden on the defence also reverses the traditional privilege against self-incrimination for accused persons. Where a defendant suffers from an intellectual disability or a psychiatric illness, producing evidence of such disability or illness may serve to prejudice that defendant before a jury or a magistrate. This is also applicable for 10-14 year olds who suffer from intellectual disability or a psychiatric illness, which may affect their criminal capacity. Unfortunately, community understanding, awareness and tolerance of people with such disabilities are still somewhat lacking.

When the onus of proof shifts to the accused, it is then up to the accused person to establish that s/he was *doli incapax*. The danger of this alteration in the onus of proof for 10-14 year olds who have an intellectual disability or a psychiatric illness lies in part in their experience of their disability, and in part in the adversarial court process. Cross examination of defendants who have an intellectual disability can be problematic because of the person's inattention to detail, memory deficits, poor concentration, or a general willingness to please.

Yet cross examination is the main adversarial tool in the criminal justice process. It is often because of a person's disability that the defence relies on the prosecution to prove their case against the accused, as the defence is less inclined to call a person with an intellectual disability or psychiatric illness to give evidence.

Should the rebuttable presumption of doli incapax be altered to: (b) Lower the standard of proof to the balance of probabilities?

This proposal would make it easier for the prosecution to rebut the *doli incapax* presumption, by allowing them to prove that the defendant knew that what s/he was doing was seriously wrong, to the civil standard of proof, namely the balance of probabilities. Currently, the prosecution is required to rebut *doli incapax* to the criminal standard of proof, which is 'beyond reasonable doubt'. Presumably, this would result in more convictions against child defendants where *doli incapax* is an issue.

This proposal is rejected as it is irregular and confusing that the prosecution is required to prove all other elements of the offence to a criminal standard of proof (i.e. beyond reasonable doubt) but to rebut the *doli incapax* presumption, it need only prove requisite knowledge to a civil standard (i.e. balance of probabilities). As stated, for 10-14 year olds, the prosecution must rebut *doli incapax* to establish adequate criminal mental intent (i.e. *mens rea*). For anyone over the age of 14, the prosecution must establish criminal mental intent to the criminal standard of proof (i.e. beyond reasonable doubt). It is therefore anomalous and prejudicial to 10-14 year olds to create a situation where to establish criminal mental intent for 10-14 year olds, it need prove an essential element of that criminal mental intent (namely rebuttal of *doli incapax*) to a lesser standard, namely the balance of probabilities.

As was pointed out above, the currently required evidential burden on the prosecution to rebut the presumption is not onerous, and is often successfully rebutted by production of evidence such as the child's age, education, previous criminal history, previous contact and conversations with police, and the nature and circumstances surrounding the commission of the offence.

Should the rebuttable presumption of doli incapax be altered to: (c) Place the evidential burden on the accused?

This proposal would place the evidential burden on the accused to raise the issue of *doli incapax,* whereupon the prosecution would be required to rebut the presumption in the usual way. Currently, the prosecution is required to rebut the presumption *of doli incapax* in every case involving a child aged 10-14.

This proposal is rejected as it does not deal with the situation canvassed earlier, where defendants in rural and regional areas are often represented by practitioners who do not possess sufficient specialty and expertise in Children's Court matters, and have no knowledge of the application of the *doli incapax* principle. Placing the burden on the accused to raise *doli incapax* as an issue may well place such child defendants who are represented by such practitioners at a disadvantage.

The HREOC/ALRC Report, Seen and Heard: Priority for Children in the Legal Process acknowledged that often the operation of the *doli incapax* principle may be problematic as, in order to rebut the presumption, the prosecution has sometimes been permitted to lead prejudicial evidence that would ordinarily be admissible.[134] This proposal would allow the

[134] HREOC/ALRC Report No. 84, Seen and Heard: Priority for Children in the Legal Process, Paragraph 18.19.

defence the choice as to whether it would be advantageous for the principle of *doli incapax* to be raised.

Should the rebuttable presumption of doli incapax be altered to: (d) Restrict the offences to which it applies to those which are dealt with according to law?

Currently the presumption applies to all offences, irrespective of the Court where the offence is heard. If this proposal was accepted, *doli incapax* would not be available to those offences heard in the Children's Courts.

This proposal is rejected as it would be a complicated exercise whereby inconsistent results could be the outcome. It is incongruous that different courts have different tests of criminal responsibility and criminal mental intent for children aged 10-14. Indeed, the test of ascertaining criminal mental intent and requisite knowledge should not differ merely because of the nature of the offence charged, the venue of the hearing or the different sentencing options available. As demonstrated above, in reality, the issue of *doli incapax* is relevant to no more than 10% of matters involving 10-14 year olds in the NSW Children's Court, and is solely responsible for acquittal in even fewer matters. Accordingly, restricting the availability of the principle to matters in the higher courts will not have a material effect on the rate of conviction in the NSW Children's Court.

Should the rebuttable presumption of doli incapax be altered to: (a) Shift the burden of proof to the accused? (e) Lower the age to which it applies to between 10 and 12 years?

The Senior Children's Magistrate, Mr. Stephen Scarlett, has stated that the age of 12 is a more suitable cut-off for the doctrine of doli incapax than the age of 14, as it equates to the age of transition from primary school to high school, and it acknowledges that children are more sophisticated and mature today, by virtue of their greater access to education and information technology.

This proposal is rejected for reasons already stated in this paper. To reiterate, the ***doli incapax*** principle is a practical vehicle by which it is acknowledged that for the age group of 10-14 in particular, children have wide ranging rates of intellectual and emotional development and differing levels of understanding. Importantly, it recognises that the rate of development cannot be standardised across this particular age group. It takes account that even children nearing the age of 14, can lack the developmental capacity and maturity of their peers, and accordingly, should not be regarded as having the moral culpability of an adult.

Indeed, intellectually disabled and developmentally delayed children in the 12-14 age group need to have the protection of the principle in order to safeguard against wrongful conviction based on adult criminal intent. No amount of access to education and information technology for the generation or age group as a whole, can make up for the lack of moral development and maturity of the developmentally delayed or intellectually disabled 12-14 year old.

In addition, lowering the upper age limit to 12 will place New South Wales at odds with every other jurisdiction in Australia. It is incongruous that a 13 year old child may be held criminally responsible and culpable in NSW, but not elsewhere in Australia. Also, by making the age of 12 the entry point into full adult criminal responsibility, New South Wales will be out of step with most industrialised countries in Europe and Asia.

CONCLUSION

The protection of vulnerable children in our society has always been a tenet of the Australian criminal justice system. The system has acknowledged the need for a legal transitional period

between childhood and adulthood. The common law presumption of *doli incapax* has played one small part of this legal transitional period.

Arguments which point to the increased sophistication and other advantages enjoyed by children of today, compared to previous times, to support a lowering of the upper age limit to which this presumption applies, ignore the fact that not all children in the 10-14 age group benefit from the increased access to information and education. There are also conflicting views as to whether such greater access to information and education results in a higher rate of development of moral awareness and culpability.

Significantly, all Australian jurisdictions acknowledge that the *doli incapax* principle is relevant up to the age of 14 (15 in Queensland), with four jurisdictions recognising application of the principle for 10-14 year olds (15 year olds in Queensland) in legislation. It is recommended that New South Wales do likewise.

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission in their extensive 1997 inquiry into children and the legal process, regarded the principle of *doli incapax* as a practical way of acknowledging young people's developing capacities, allowing for a gradual transition to full criminal responsibility.[135] It noted that, as a principle, it forced police, prosecutors and the judiciary '…to stop and think, however briefly in some cases, about the degree of responsibility of each individual child'.[136]

Accordingly, the Commission strongly supports maintaining the application of the presumption of the *doli incapax* principle in all criminal matters involving children aged 10-14, and that to facilitate a greater level of consistency in application of the principle, that it be given legislative recognition by appropriately amending the *Children's Criminal Proceedings Act 1987*.

INTERNATIONAL COMPARISONS OF THE STATUTORY AGE OF CRIMINAL RESPONSIBILITY

COUNTRIES & TERRITORIES	**AGE OF CRIMINAL RESPONSIBILITY**	**COUNTRIES & TERRITORIES**	**AGE OF CRIMINAL RESPONSIBILITY**
Cyprus	7	Austria	14
Ireland	7	China & Taiwan	14
Liechtenstein	7	Romania	14
Switzerland	7	Slovenia	14
India	7	Latvia	14
Singapore	7	Lithuania	14
Scotland	8	Czech Republic	15
Northern Ireland	8	Denmark	15
Malta	9	Estonia	15
England & Wales	10	Finland	15
Malaysia	10	Iceland	15
Greece	12	Norway	15
Canada	12	Slovakia	15

[135] HREOC/ALRC Report No. 84, Seen and Heard: Priority for Children in the Legal Process, Paragraph 18.20.
[136] P Cavadino, 'Goodbye doli, must we leave you?'(1997) 9 Child and Family Law Quarterly 165 at 170.

San Marino	12	Sweden	15
Turkey	12	Japan	16
Netherlands	12	Andorra	16
France	13	Poland	16
Bulgaria	14	Portugal	16
Germany	14	Spain	16
Hungary	14	Belgium	18
Italy	14	Luxembourg	18

[137]

[137] The Law Reform Commission of Hong Kong Consultation Paper on The Age of Criminal Responsibility, 1998.

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Boehm investigates moral development and is in agreement with Piaget in that cognition plays a role in a child's conscience development. Further, this paper discusses the impact of age, culture and socioeconomic class on the development of conscience.

Bull N. J. (1969). *Moral judgement from childhood to adolescence.* London; Routledge and Kegan Paul.
This book provides an overview of the issues concerning moral development and of Piaget's works. It then continues to discuss Bull's study of moral development with children of seven to seventeen years of age. It thoroughly details the tests used and the statistical analysis conducted. Bull also looks at the influence of factors like religion, socio-economic status, and sex on moral judgements.

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This book is a collection of papers discussing children's cognitive, emotional, social and motor development. It looks at issues related to theory of mind and children's understanding of intentions.

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Chapter 14

The mental element of the offence IV

Report of *CC (Minor) v Director of Public Prosecutions* [1996] 1 Cr App R

(The following reproduces the actual report, giving page numbers etc)

C.C. (A MINOR) v. DIRECTOR OF PUBLICp PROSECUTIONS
QUEEN'S BENCH (DIVISIONAL COURT) (Lord Justice McCowan and Mr Justice Mitchell): May 15, 1995

CHILDREN

Doli incapax

Children aged between 10 and 14 -Presumption of doli incapax - Prosecution required to prove normality of child.

The appellant was convicted by justices of one offence under section 3 and a further offence under section 4 of the Public Order Act 1986. The appellant was aged 11 years and 11 months at the date of the incident from which the offences arose. The appellant and another youth named John attacked a 12 year old boy. John pulled the boy from a bicycle and held him around the neck. While he was doing that, the appellant took a six inch lock-knife from his pocket and handed it to John who placed it across the victim's throat. Prior to the victim's release the appellant said: "Cut his nose to make quite sure", referring to the victim bringing money to school for them the next day. The appellant declined to answer questions put to him by the police. At the conclusion of the prosecution evidence, a submission of no case to answer was made on the basis that the prosecution had failed to rebut the presumption of *doli incapax.* The justices rejected the submission, finding that it was almost inconceivable that a boy of the appellant's age would not know that it was seriously wrong to place a knife on somebody's throat and demand money.

Held, allowing the appeal, that (1) before the justices were entitled to convict the appellant they had to be sure that the prosecution had rebutted the presumption of *doli incapax,* and that the appellant knew that what he did was seriously wrong and went beyond mere naughtiness or childish mischief. In determining that question, the tribunal of fact must avoid the trap of applying a presumption of normality. (2) The prosecution is required to prove that a defendant is mentally normal. Very little evidence is needed but it must be adduced as part of the prosecution case. *C. (A Minor) v. Director of Public Prosecutions* [1995] 2 Cr.App.R. 166, applied. (3) In the instant case, the prosecution had failed to adduce any evidence to rebut the presumption of *doli incapax.*

[For criminal capacity of children between 10 and 14 years, see *Archbold* (1995), paras. 1—96, 97.]

Case stated by Middlesex Commission Area Justices sitting at Brentford, acting as a youth court.

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(1) On June 15, 1993, an information was preferred against the appellant that he did:

A

"On Tuesday, March 9, 1993, at the Beavers Estate, with a view to gain for yourself or another, or with intent to cause loss to another, you did make an unwarranted demand with menaces, namely with another held a bladed knife to the victim's throat demanding nine pounds in cash, contrary to section 21(1) Theft Act 1968".

B The appellant pleaded "not guilty" and a trial was fixed for hearing on August 10, 1993 before the Hounslow Youth Court On the day of the trial the original information under the Theft Act was withdrawn and two further informations laid in its place as follows:

(1) On Tuesday, March 9, 1993, you did use or threaten to use unlawful violence towards another arid your conduct was such as

C would cause a person of reasonable firmness present at the scene to fear for his personal safety, contrary to section 3 Public Order Act 1986.

(2) On Tuesday, March 9, 1993, you did use towards another person, threatening abusive or insulting words or behaviour with intent to cause that person to believe that immediate unlawful violence would be used against him or another by any person or to provoke

D the immediate use of unlawful violence by that person to another or whereby that person was likely to believe that such violence would he used or it is likely that such violence would he provoked, contrary to section 4 Public Order Act 1986.

(2) The defence had been "put on notice" previously regarding the two new informations and as a result the trial took place immediately. The

E Crown Prosecution Service was represented by Miss Judge and the appellant by Mr Snow (solicitor).

The justices heard evidence from three prosecution witnesses and a submission of no case to answer from the defence who called no evidence.

(3) On hearing the evidence they found the following facts:

(a) On March 9, 1993, Dale Harris, a schoolboy aged 12, was riding his

F pedal cycle through a large housing estate in Hounslow. He was approached by a group of youths which included the appellant who was at that time aged 11, his date of birth being April 11, 1981, also in the group was another youth named John Paul. These two youths were known to the victim vaguely from school.

(b) The youth known as John Paul pulled the victim from his cycle and held him around the neck. Whilst he did so the appellant took a six

G inch lock-knife from his pocket and handed it to John Paul who placed it across the throat of the victim, and asked him how much money he had. When it was ascertained that he had no money he was asked if he had any at home, to which he replied, nine pounds.

He was told that he should bring it to school the next day or he would be beaten up.

(c) The appellant was present and assisting throughout the entire incident. Whilst the victim was being held and prior to his release the appellant said "Cut his nose, make quite sure".

(d) Upon release the appellant took the victim's pedal cycle and rode it around until it was crashed into a fence where it was abandoned. As the victim ran from the scene John Paul was heard to shout out "It is only a joke". This was the only time it was ever suggested that it was a joke. We were satisfied this was not the case as the mood was one of aggression rather than joviality.

(e) It was contended by the defence that:

The prosecution had failed to rebut the presumption of *doli incapax*, in that they had failed to adduce evidence to show the appellant knew that what he was doing was seriously wrong. They said the mere facts were insufficient, there had to be some evidence other than the actus.

(4) It was contended by the prosecution that:

The facts were such that the presumption was rebutted. We were advised by our clerk in open court that design and ferocity could in certain circumstances be sufficient.

(5) They were referred to the following cases: *Owen* (1830)4 C. & P.236; *J.M.* (*a Minor*) *v. Runeckles* (1984) 79 Cr.App.R. 255; *I.P.H. v. Chief Constable of South Wales* [1997]Crim.L.R. 42; *Vamplew* (1862) 3F.&F *Halsbury's Laws of England* (4th ed. Re-issue), para. 34.

(6) The justices were of the opinion that the presumption in favour of the defendant had been rebutted and our reasons are as follows: The appellant did not answer any questions put to him by the police, either at the enquiry stage or after arrest. He did not give evidence, and no rebuttal evidence was called by the prosecution. They were left with the bare facts of the case which were in the main uncontested. They looked at those facts to see if they, on their own, would show that the appellant knew what he was doing was seriously wrong.

The justices' first impression was that this had to be the case as they felt it almost inconceivable that a boy of almost 12 years of age in this day and age of mass communication, would not know that it was seriously wrong to place a knife on somebody's throat and demand money.

Their clerk advised them that this was not the correct approach and that they had to look at the evidence to see if this particular boy knew what he was doing was wrong. They re-examined the evidence with this in mind.

The justices had no knowledge of his education, level of understanding, or previous behaviour. They took the view that he came from a reasonable home, we noted that his mother was present in court supporting him, and had taken the trouble to instruct solicitors at a very early stage when police enquiries were, in their infancy. They noted that he attended the police

station at the enquiry stage and declined to comment on the advice of his solicitor. They did not however feel that any of these matters were such as to be of much probative value. We therefore concentrated on the offence itself. They were concerned at the manner in which it was committed and were advised that design, concealment, or unusual ferocity could themselves rebut the presumption.

The appellant had a knife in his possession and took an active part in the incident. They felt that the demand, the holding of the youth around the neck, and the placing of the knife on the throat, were not sufficient to show this particular boy knew he was doing wrong, they were certainly persuasive but did not rebut the presumption. What took the matter further was the threat which followed when the appellant said to the accomplice, "Cut his nose to make sure". This they felt showed a remarkable degree of criminality. To urge someone to inflict personal injury so as to effect a common purpose took the matter much further. It showed them a design and ferocity which in itself satisfied us beyond reasonable doubt the appellant knew what he was doing was seriously wrong.

(7) Having considered and rejected a submission of "No case to answer", the chairman announced that the presumption had not been rebutted. This was a slip of the tongue and corrected. When challenged their clerk immediately said in open court that his advice had always been on the basis that the prosecution had to rebut the presumption which was always in favour of the defence- In fact all the arguments put to them prior to and during our retirement were on this basis.

(8) At the very start of the hearing the prosecution advised the justices that they viewed the charges as alternatives. They were satisfied that both infomations were proved and when we announced their decision did so by saying, on both charges, the defendant was guilty. Had there been an expressed request not to adjudicate on the second matter we would not have done so. It has always been their understanding that a proper course is to find on both, which preserves the position should there be an appeal *(D.P.P. v. Cane* [1991] J.P. 846), and impose no separate penalty on the lesser offence. In the event this is exactly what was done. Having convicted the appellant the justices adjourned for pre-sentence reports.

(9) On August 31, 1993, the appellant was sentenced to an attendance centre for 12 hours for the offence contrary to section 3 of the Public Order Act 1986. His parents were additionally ordered to pay compensation of £20 to the victim and bound over in the sum of £40 for a period of 12 months. No separate penalty was imposed on the section 4 matter. The appellant now appealed.

(10) The questions for the opinion of the High Court were:

(1) Were we right to convict the defendant of both the charges of affray and threatening behaviour which he faced, when those charges were opened by the prosecution on the basis that they were alternatives?

(2) Were we correct to find there was evidence to rebut the presumption of *doli incapax* when the only evidence to establish that the defendant had knowledge that he knew what he was doing was seriously wrong was the *actus* itself?
(3) Did the justices apply the wrong standard in considering the question of *doli incapax*?

G. Rees for the appellant.
I. Stern for the respondent.

McCOWAN L.J.: I will ask Mitchell J. to give the first judgment.

MITCHELL J.: This is an appeal by way of case stated in respect of adjudication on August 10, 1995 by Justices for the Petty Sessional Area of Hounslow, sitting as a youth court. On that occasion the justices convicted the appellant of one offence under section 3 and a further offence under section 4 of the Public Order Act 1986. The allegations were founded upon a single incident which had occurred on March 9, 1993 when the appellant was aged 11 years and 11 months. The appellant neither gave evidence, nor was evidence called on his behalf.

The facts as found were these: on that date a young 12 year old schoolboy called Dale was riding his bicycle through a housing estate in Hounslow. He was approached by a group of youths, which included the appellant and another one named John. Each of those two was known to the victim, but only vaguely. All three attended the same school. John pulled Dale, the victim, from his cycle and held him round the neck. While he was doing that the appellant took a six inch lock-knife from his pocket and handed it to John, who placed it across the throat of the victim. He asked him how much money he had. When it was clear that Dale had no money on him he was asked if he had any at home. He told them he had nine pounds. He was then instructed to bring it to school the next day or he would be beaten up. The justices found that the appellant was present and assisting throughout the entire incident. Indeed, whilst the victim was being held, and prior to his release, the appellant had said, “Cut his nose to make quite sure”. Having been released, the victim went off and the appellant took his bicycle, that is the victim’s bicycle, and rode it around until it crashed into a fence where it was abandoned. As the victim ran off John was heard to shout out, “It’s only a joke”: That was the only occasion when it was claimed that the conduct of John, and the appellant, towards Dale, was intended only as a joke.

Thereafter, the appellant chose not to answer questions put to him by the police, both prior to and following his arrest. At the conclusion of the prosecution evidence a submission of no case to answer was made on behalf of the appellant. It was a simple submission. The prosecution had failed to rebut the presumption of *doli incapax*, the appellant at the material time having been a boy aged 11 years and 11 months. That submission, in effect has been repeated before us. If it is correct then the appeal must

succeed. Unlike the justices, we have the advantage of having available to us the recent decision of the House of Lords in the case of *C. (A Minor) v. Director of Public Prosecutions* [1995]2 Cr.App.R. 166, [1995]2 W.L.R. 383. At common law there is what has been called the benevolent but rebuttable presumption that a child aged between 10 and 14 does not know the difference between right and wrong and is, therefore, incapable of committing a crime. It may have performed or participated in the act which constituted the *actus reus* of the offence, but the presumption operates, in effect, to negative the existence of the necessary mental element, namely that appropriate to the offence coupled with knowledge of what he was doing was seriously wrong, which if proved, would establish guilt.

Having heard the evidence, which was confined to the circumstances of the offence and its investigation, the justices came to the conclusion that the presumption had been rebutted. The justices approached the questions and this is clearly set out in the case, as an exercise in common sense and as such it is difficult to fault. They said this:

"We were left with the bare facts of the case which were in the main uncontested. We looked at those facts to see if they, on their own, would show that the appellant knew what he was doing was seriously wrong.

Our first impression was that this had to be the case as we felt it almost inconceivable that a boy of almost 12 years of age in this day and age of mass communication, would not know that it was seriously wrong to place a knife on somebody's throat and demand money.

Our clerk advised us that this was not the correct approach and that we had to look at the evidence to see if this particular boy knew what he was doing was wrong. We re-examined the evidence with this in mind.

We had no knowledge of his education, level of understanding, or previous behaviour. We took the view that he came from a reasonable home, we noted that his mother was present hi court supporting him, and had taken the trouble to instruct solicitors at a very early stage when police enquiries were in their infancy. We noted that he attended the police station at the enquiry stage and declined to comment on the advice of his solicitor. We do not however feel that any of these matters such as to be of much probative value. We therefore concentrated on the offence itself. We were concerned at the manner in which it was committed and were advised that design, concealment, or unusual ferocity could themselves rebut the presumption. The appellant had a knife in his possession and took an active part in the incident. We felt that the demand, the holding of the youth around the neck, and the placing of the knife on the throat, were not sufficient to show this particular boy knew he was doing wrong, they were certainly persuasive but did not rebut the presumption.

What took the matter further was the threat which followed when the appellant said to the accomplice, 'Cut his nose to make sure'. This we felt showed a remarkable degree of criminality. To urge someone to inflict personal injury so as to effect a common purpose took the matter much further. It showed us a design and ferocity which in itself satisfied us beyond reasonable doubt the appellant knew what he was doing was seriously wrong."

Before the justices were entitled to convict the appellant they had to be sure that the prosecution had rebutted the presumption. They had to be sure, in other words, that the appellant knew that what he was doing when participating in the incident, as he had, was seriously wrong and went beyond mere naughtiness or childish mischief.

In determining that question, the tribunal of fact must avoid the trap Of applying another presumption, one which has been termed the "presumption of normality". That presumption is to this effect: any normal boy of his age in society, as it is today, must have known that what he was doing was seriously wrong. Such an approach as that reverses the relevant presumption of *doli incapax*.

The leading speech in *C. (A Minor*) is that of Lord Lowry. At pp. 181, 182 and p. 397 of the respective reports his Lordship dealt with the apparent illogicality of the relevant presumption. He said this:

"The rule is said to be illogical because the presumption can be rebuffed by proof that the child was of normal mental capacity *for his age*; this leads to the conclusion that every child is initially presumed not to be of normal mental capacity for his age, which is absurd. This argument involves a point which I must deal with when considering the second part of the certified question (how to prove the child is *doli incapax*), but at this stage I will focus on the illogicality. We start with the benevolent presumption of *doli incapax*, the purpose of which was to protect children between seven (now by statute 10) and 14 years from the full rigour of the criminal law. The fact that the presumption was rebuttable has led the courts to recognise that the older the child (see *B. v. R.* (1958) 44 Cr.App.R. 1, 3) and the more obviously heinous the offence, the easier it is to rebut the presumption. Proof of mental normality has in practice (understandably but perhaps not always logically) been largely accepted as proof that the child can distinguish right from wrong and form a criminal intent. The presumption itself is not, and never has been, completely logical; it provides a benevolent safeguard which evidence can remove. Very little evidence is needed but it must be adduced as part of the prosecution's case, or else there will be no base to answer."

There remains this question: what is the nature of the evidence which is capable of rebutting the presumption? At p. 187 and p. 401H of the respective reports Lord Lowry observed:

"The second clearly established proposition is that evidence to prove the defendant's guilty knowledge, as defined above, must not be the mere proof of doing the act charged, however horrifying or obviously wrong that act may be."

As authority for that proposition, Lord Lowry cited two cases, that of *Sidney Smith* (1845)1 Cox C.C.260 and that of Kershaw (1902) 18 T.L.R. 357, 358. Lord Lowry continued:

"The cases seem to show, logically enough, that the older the defendant is and the more obviously wrong the act, the easier it will generally be to prove guilty knowledge. The surrounding circumstances are, of course, relevant and what the defendant said or did before or after the act may go to prove his guilty mind. Running away is usually equivocal, as Laws J. rightly said in the present case, because flight from the scene can as easily follow a naughty action as a wicked one. There must, however, be a few cases where running away would, indicate guilty knowledge, where an act is either wrong or innocent and there is no room for mere naughtiness. An example might be selling drugs at a street corner and fleeing at the sight of the policeman.

The Divisional Court here, assuming that the presumption applied, would have reversed the Youth Court, rightly in my opinion, because there was no evidence, outside the commission of the 'offence' upon which one could find that the presumption had been rebutted.

In order to obtain that kind of evidence, apart from anything the defendant may have said or done, the prosecution has to rely on interviewing the suspect or having him psychiatrically examined (two methods which depend on receiving co-operation) or on evidence from someone who knows the defendant well, such as a teacher, the involvement of whom adversely to the child is unattractive. Under section 3(4) of the Criminal Justice and Public Order Act 1994 a child defendant's silence when questioned before a trial maybe the subject of comment if he fails to mention something which is later relied on in his defence and which he could reasonably have been expected to mention at an earlier stage, but I do not see how that provision could avail the prosecution on the issue of guilty knowledge. Counsel informed your Lordships that convictions or pleas of guilty occur in a high proportion of cases governed by the presumption. I cannot speak from experience, but perhaps one explanation may be that except in very serious cases the courts, lacking really cogent evidence, often treat the rebuttal of the presumption as a formality. Indeed its very existence was initially overlooked in ***R. v. Coulburn*** (1988) 87 Cr.App.R. 309, where the charge was one of murder. My speculation for it is nothing more, is strengthened by the reflection that courts have frequently accepted evidence of normal mental development as proof

of mature moral discernment, although the two are not true equivalents. My Lords, I have reached without difficulty the conclusion that both parts of the certified question should be answered 'Yes'."

The certified question in the case of C. was this:

"whether there continues to be a presumption that a child between the ages of 10 and 14 is *doli incapax* and if so whether that presumption can only be rebutted by clear positive evidence that he knew that his act was seriously wrong, such evidence not consisting merely in the evidence of the acts amounting to the offence".

On behalf of the respondent in the instant case, it has been argued that the prosecution is not required to call positive evidence that a child is normal for his age. It is said that that fact may be proved by evidence revealed in the case, though it is acknowledged that it cannot be inferred merely from the commission of the offence. In my judgment, having regard to the principles so clearly identified by Lord Lowry that for all practical purposes, is a distinction without a difference. The evidence relied upon here by the respondent is first the act of handing over the knife. It is said that if the appellant recognised that coercion was required he must have realised it was wrong. Further, it is said the certain realisation on the part of the appellant that any money handed over would not have been his must materially contribute to the rebuttal of the presumption. Further, it is said that the money in any event would not have been given over voluntarily and that he would have appreciated. The fourth point is that the instruction that the appellant gave to cut the victim's nose, was clearly a serious threat and the appellant must, therefore, have realised that what he was doing was seriously wrong, in particular, as that comment was made after the demand for money and, indeed, it was a comment which was appropriate to the demand. It is said that those features of the evidence, coupled with the justices' view that the appellant came from a reasonable home, noting as they did that his mother was in court supporting him, were capable of rebutting the presumption. The justices found rightly, it is said, that those features in combination did rebut the presumption to the required standard. Reliance, to some extent, was placed upon the authority of J.M. (*a Minor*) *v. Runeckles* (1984) 79 Cr.App.R. 255. I say reliance was placed upon that authority to some extent, because the facts there were very different if only because in that case what the justices relied upon in particular, to rebut the presumption was the content of the statement under caution which the child made during the investigative stage; what she said, how she said it, the way she expressed herself.

Applying the relevant principles, as I understand them to the justices' reasoning in this case for concluding that the prosecution had rebutted the presumption (had, in other words, made them sure that the appellant knew what he had done was seriously wrong), it is clear, in my judgment, that their conclusion was founded exclusively upon the evidence of the act

which founded the offences. The justices were, in effect, applying a presumption of normality, having said in terms that but for the appellant's remark, "Cut his nose to make sure", they would not have found the presumption to have been rebutted. Of that remark, they said this:

"This, we felt, showed a remarkable degree of criminality. To urge someone to inflict personal injury so as to effect a common purpose took the matter much further. It showed us a design and ferocity which in itself satisfied us beyond reasonable doubt that the appellant knew what he was doing was seriously wrong."

What the justices appear to have been confusing is evidence which is capable of rebutting the presumption (such evidence was not before them) and evidence which was before them as to age and conduct which in combination would determine how readily the presumption was rebuttable by other evidence. Lord Lowry observed in the passage I have already cited that the fact that presumption was rebuttable has led courts to recognise that the older the child and more obviously heinous the offence, the easier it is to rebut the presumption. Proof of mental normality has in practice, been largely accepted as proof that the child can distinguish right from wrong and form a criminal intent and it will be recalled that Lord Lowry concluded this passage with these words:

"Very little evidence is needed but it must be adduced as part of the prosecution's case, or else there will be no case to answer."

In my judgment, although very little evidence was needed here to rebut the presumption, the appellant was after all nearly 12 and the conduct he so actively participated in was both vicious and cruel, nonetheless no such evidence was adduced by the prosecution. The submission of no case ought, accordingly, in my judgment, to have been allowed. These convictions, it must follow, must therefore be quashed.

In those circumstances it is unnecessary for me to consider the further question raised in the case stated which relates to the propriety of the justices having convicted of each of the two informations, the prosecution having opened the case on the basis that they were to be treated as alternatives.

Appeal allowed.
Conviction quashed.

Solicitors: Farrell Mathews & Weir, for the appellant. Crown Prosecution Service, Harrow.

Chapter 15

When should inter-child sex be supported?

The Home Office Review

To understand clause 14 of the Sexual Offences Bill [section 13] we need to consider a Home Office consultation paper entitled *Setting the Boundaries*, which was published in July 2000. It was the report of a body called the Sex Offences Review set up by Jack Straw (who was then Home Secretary) on 25 January 1999[138]. Its terms of reference were-

> To review the sex offences in the common and statute law of England and Wales, and make recommendations that will:
> - provide coherent and clear sex offences which protect individuals, especially children and the more vulnerable, from abuse and exploitation;
> - enable abusers to be appropriately punished; and
> - be fair and non-discriminatory in accordance with the ECHR and Human Rights Act.

Chapter 3 of *Setting the Boundaries I* is entitled 'Children'. It needs close examination, for it provides the core of the thinking behind clause 14. First however I shall consider the nature of the membership of the Sex Offences Review, because that is crucial to the nature of its recommendations.

In the Sex Offences Review there were three Home Office officials acting respectively as Chair, Secretary and Administrative Support. Then there was a Steering Group and an External Reference Group. The Steering Group consisted of twelve Civil Servants, eight lawyers, four members of NGOs working with problem children, two police officers, one Anglican clergyman and one unattached individual (a Ugandan Asian woman). The External Reference Group consisted of fifteen members of NGOs working with problem children, three religious representatives, two medical people, two academics, two social workers and one lawyer. Some members of the Review served for only part of the period for which it operated.[139]

The striking thing is how one-sided this membership was. We have officials, NGO members, lawyers, police officers, medical people and social workers. We do not have any ordinary members of the public (except for the solitary Ugandan Asian woman). Above all, we do not have any children or young people. The report says that at a fairly late stage in the review they had discussions with some Year 10 and Year 11 pupils aged 14-16 *at one school*, adding 'Sadly lack of time meant we could not undertake a wider consultation'.[140] That might be called scandalous.

Aims of the Review

The terms of reference 'gave us our three key themes', namely protection, fairness and justice.[141] Nothing about the duties of ethical understanding, ethical action, sex-acceptance, sex-respect and sex-fulfilment, which are discussed at length in my book on secular sexual

[138] The paper was published in two volumes, respectively containing the main report and the supporting evidence.
[139] The information about membership is taken from *Setting the Boundaries I*, Annex One.
[140] *Setting the Boundaries I*, 3.3.9.
[141] Ibid, 1.1.8-1.1.11.

ethics.[142] Nothing about the positive side of human sexuality, because the professional experiences of these people were mostly steeped in the bad side of sex. They were used to dealing with sad, abused children, not the healthy, happy children of which the child population largely consists. Yet it is both kinds who are made criminals by clause 14.

There are some enlightened comments in *Setting the Boundaries.* For example-

> 'Many people, including members of the review, have questioned the need for a criminal offence of sex between minors, arguing that there is no public interest in prosecuting sexual experimentation between mutually agreeing adolescents, giving them a criminal record for behaviour which they and many others do not regard as criminally culpable. They also argue that fear of being criminalised may deter young people from seeking help and advice, and possibly also raise questions about agencies offering it. Where children are sexually active, it is important for them to feel confident enough to seek help and advice . . . To ensure this, children must be very clear that by seeking such guidance, neither they nor their advisers would be breaking the law.'[143]

Then in the very next paragraph they spoil this by saying 'we want to discourage under-age sex'. Why should they want to do that *in all cases*? It is sex-negative, whereas sex should be treated positively. In the next and final chapter of this Briefing I reproduce some passages from my book *The Sex Code* which show at length why this should be so. Meanwhile I end this chapter with a look at *Children and young people as abusers: An agenda for action*[144]. Because this booklet mainly consists of a paper by Dr Arnon Bentovim, formerly of the Hospital for Sick Children, Great Ormond Street London, I shall refer to it as 'Bentovim'.

When inter-child sex should be supported

At first sight, Bentovim seems to be one more study that regards all inter-child sexual behaviour as reprehensible and looks for ways to stop it. A closer look reveals however that, while it is mostly concerned with abusive or otherwise inappropriate sexual behaviour by one child towards another, it does allow room for the possibility that such interaction may in some cases be harmless or even beneficent.

> 'Information from professionals confirms that many of the children who display inappropriate behaviour towards other children will themselves have been the victims of some kind of abuse; probably, but not exclusively, sexual abuse, and where treatment and therapeutic facilities for children who have been abused are still limited, this fusion of victim and victimiser in the same child poses massive problems of response. Added to this there is the definition of abuse. Can a child as young as three or four years be said to have the necessary intent to "abuse"? In whose judgement is an act abusive? Where do we draw the line between experimentation and abuse? And where do we draw lines about age-appropriate behaviour?'[145]

This is helpful, but we should pause at that suggestion that the line is always to be drawn between 'experimentation' (allowable) and 'abuse' (not allowable). What about the child who is simply enjoying himself or herself and satisfying natural sexual needs? Here I quote from my book on secular sexual ethics.

> 'A frequent cop-out by adults is to say that adolescents are "finding out" about sex, when what is really meant is that they are engaging in activities directed solely to

[142] *The Sex Code: Morals for Moderns* (Weidenfeld & Nicolson 1991).
[143] I. 3.9.4.
[144] National Children's Bureau, 1991.
[145] Pp 2-3 (Anne Hollows).

> sexual *fulfilment*. It is not a matter of "finding out" but of doing. Our society stubbornly refuses to accept that young adolescents, even children, are sexual creatures with a need for some form of sexual fulfilment. The very thought is shocking.'[146]

In search of a definition of child sexual abuse, Dr Bentovim cites Schecter and Roberge.[147] They suggest such abuse is '. . . the involvement of dependent, developmentally immature children and adolescents in sexual activities they do not truly comprehend, to which they are unable to give informed consent and which violate the social taboos of family roles.'[148] This relates to abuse of children and young persons by adults. Is sexual congress between childish age-mates to be treated any differently? Dr Bentovim says: 'A gap of five years is usually accepted as the age difference which defines abusive behaviour'.[149] In relation to clause 14 we are considering an age range of 10-15, so we may take it that all the children within our field are age mates whose sexual conduct to one another would not, on Dr Bentivim's terms, be considered abusive.

This goes too far in the liberal direction, and I suggest we should change it to a rebuttable presumption that conduct by children who are both within the age range 10-15 is not abusive. Certainly when the conduct is consensual it may be said not to be abusive. Even here however I am suggesting, to be on the safe side, that consensual conduct within our age range of 10-15 should be treated as abusive if it causes injury or disease or results in pregnancy.

Schecter and Roberge reference to violating 'the social taboos of family roles'. This is reminiscent of what the self-appointed Longford Committee on Obscenity called 'outrage to contemporary standards of decency or humanity accepted by the public at large'.[150] In attempting to define obscenity Mr W R Rees-Davis MP referred to 'contemporary community standards of decency'[151] Appeals to this sort of criterion meet the objection that no one can know what it really means in a particular case. It is far too vague for practical use in a criminal context, where the law needs to be certain. Nevertheless it is obvious that the law must not get too far out of line with public opinion. However it can in some cases, of which this is one, *lead* public opinion towards more enlightened attitudes.

A group work programme

Bentovim gives details of a group work programme carried out at the Hospital for Sick Children, Great Ormond Street.[152] Although this programme was designed for young sexual abusers its details throw a helpful light on the question we are examining, namely when inter-child sex should be supported. I will therefore give an account of this programme.

The group of reported male sex abusers was in the age range 13-15. There was extensive use of questionnaires and paper and pencil tests since they seemed an excellent way to engage young people in work tasks rather than discussion alone. Experience previously was that, unless there are specific tasks, restlessness and defensive behaviour take over. There was no coercion to attend, but at preliminary meetings it was made clear that if a person was abusing at their age there was a possibility of becoming a convicted sex offender. The theme of

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[146] Bennion, above, n 142, p 100.
[147] Ibid p 6.
[148] M D Schecter and L Roberge, 'Sexual Exploitation' in R Helfer and C H Kemp (eds), *Child Abuse and Neglect: the Family in the Community*: Ballinger, Cambridge Massachusetts 1976.
[149] Ibid.
[150] See Bennion, above n 142, p 224.
[151] *The Times*, 20 March 1976.
[152] Ibid, pp 49-52. Full details of the programme are given in M Cardoza and M Hamblion, *A Group for Adolescent Offenders*, 1990.

needing to avoid becoming such an offender was a powerful one which was maintained in the front of people's minds. This had an impact throughout the life of the group.

> 'One of the young people who had been abused was alleged to have abused extensively. Although initially he did not accept responsibility for his abusive actions he was prepared to attend because of the "alleged" offences he had committed. After a number of sessions he was able to take responsibility for his abuse saying that if others could he could.'[153]

Although a number in the group were victims it was decided that it was important to deal with perpetration patterns first, so that young people could be confronted with the fact that they could not use their own victimisation as an excuse.

Language etc It was important to establish at the outset a non-sexist common sexual vocabulary to be used during the sessions. 'The young people were taken seriously and were treated and expected to treat others with respect. It was important for workers to support each other, appreciate gender issues and give group members hope, information and space.'[154]

Sessions It was found ideal for a group to hold around fifteen sessions of 1¼ hours each. Boys who were group members were normally accompanied by parents, carers, residential workers, social workers etc. This was to ensure attendance and deal with stressful responses by group members.

Session 1 Introductions, establishing rules, hopes and fears for the group. Development of sexual language using body maps. Developing an agreed sexual language for the group.

Session 2 Group exercise ranking different sexual acts, using cards stating appropriate and inappropriate acts named by group members and leaders. This exercise brings familiarity with, and ease of talking about, various inappropriate acts. It reduces the intense anxiety surrounding one's own acts, fantasies and experiences and initiates the processing of such material cognitively.

Session 3 Group exercise going through the ***normal*** dating cycle. No less than 28 steps were identified by the boys or leaders.

Sessions 4-6 Each boy works out his own cycle of offending in considerable detail. By now group members are more confident in each other. They are also more articulate, having found the appropriate language to describe their cycles.

Sessions 7-9 Analysis of victims' responses: anger, fear, feelings of worthlessness, only being valuable for sex, a body reacting sexually even though its owner was hating it, worries about homosexuality in same-sex cases, having flash-backs at uncontrolled times, worries about damage to sex organs or about having children in the future.

Session 10 Personal issues raised by members of the group or from outside the group.

Session 11 Showing videos of public TV programmes dealing with the topic. Beginning the process of linking perpetration with victimisation.

Sessions 12 and 13 Sex education, including contraception.

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[153] Ibid.
[154] Ibid.

Sessions 14 and 15 Strategies to prevent reoffending, including what will happen if you do. Introducing principles of blocking and cognitive structuring towards more appropriate masturbation fantasies.

Session 16 Celebration and advice for the future.

Conclusion

The type of group just described is intended for boys aged 13-15 who are sex abusers. I suggest a suitably modified version would be useful for boys in that age group who do not have a history of abusing. It would be a form of sex education which faced the reality of pubescent male sexuality and acknowledged it as not a matter for shame, but for open recognition and acceptance. Guilt would be banished, provided the boy behaved properly with due recognition of the rights of others. Differently modified versions with the same object could be used for younger children, and for girls.

Chapter 16

Joint Committee on Human Rights

In its Twelfth Report Parliament's Joint Committee on Human Rights (JCHR) considered the Sexual Offences Bill 2003. The JCHR wrote to the Minister on 13 March 2003 asking about the human rights implications of four aspects of the Bill. One of these was the proposal to make all sexual touching, including consensual kissing, of children under 13 a criminal offence, regardless of the age of the other person and the consent of the child (clause 6). The Government responded in a memorandum from the Home Office. Relevant extracts from this follow next.

Home Office Memorandum

The JCHR asked the following questions-

- Does the Government consider that making children under 13 potentially criminally liable for consensual kissing, under clause 6 of the Bill, would serve a legitimate aim under ECHR Article 8.2? If so, what is the aim?

- Does the Government consider that imposing criminal liability on children under 13 in such circumstances would address a pressing social need, and would be proportionate to the aim pursued? If so, what is the pressing social need, and why is criminalizing children thought to be a proportionate response to it?

- Does the Government consider that imposing a potential criminal liability on children aged 13 for kissing children aged 12 or under with the consent of the latter would serve a legitimate aim, and be a proportionate response to a pressing social need? If so, why?

The Home Office Memorandum contained the following paragraphs.

2. We should like as a background to our response to draw the Committee's attention to the fact that the Government is not changing the law by including consensual sexual kissing between two 12 year olds within the scope of the criminal law. Both would currently commit an offence of indecent assault (sections 14 and 15 of the Sexual Offences Act 1956 (the 1956 Act)), since a child under 16 cannot consent to an indecent assault. The Government is not, however, aware of any prosecutions concerning consensual sexual kissing by 12 year olds.

3. The legitimate aim under Article 8.2 served by clause 6 of the Bill is principally the protection of the rights and freedoms of others. The Government considers that children under 13 have the right to be protected from all forms of sexual activity. Arguably, clause 6 also serves the legitimate aim of protecting morality, but the Government's principal concern is child protection. It may be that some children close to the age of 13 have the maturity to understand the nature of sexual activity but there will be many other children who do not, and the Government considers that the balance is correctly struck by protecting the vulnerable. This applies irrespective of the age of the other participant - research indicates that adolescent sex offenders probably account for up to a third of all sex crime and many of these will offend against others of a similar age.

4. In addition, by removing the need to prove lack of consent, clause 6 serves the purpose of protecting children under 13 from cross-examination about sexual issues. Without clause 6, the prosecution would have to prove lack of consent in a case concerning the non-consensual

sexual assault of a child under 13. The evidence is that children of this age who face cross-examination about consent inevitably involving cross-examination about their sexual knowledge and experience can be severely damaged as a result.

5. Of course, any age limit is to some extent arbitrary, but the Government considers that the age of 13 is the right place to draw the line and notes that it is well-precedented as a threshold in sex offence legislation. The offence of sexual intercourse with a girl under 13 (section 5 of the 1956 Act) carries a maximum penalty of life imprisonment whereas the offence of sexual intercourse with a girl between 13 and 16 (section 6 of the 1956 Act) carries a maximum penalty of two years' imprisonment. Although the age of the onset of puberty is variable, *Setting the Boundaries* commented that the thirteenth birthday was recognised by society as the entry to teenage years and is therefore a key milestone in the child's passage towards adolescence and eventual adulthood.

6. The Government considers the discretion of the prosecutor is key to ensuring that clause 6 is used proportionately and the Government intends to make this clear during the passage of the Bill in Parliament. In exercising his discretion as to whether or not to prosecute under clause 6, the prosecutor must always consider whether there is a public interest in prosecuting and must also, by virtue of the Human Rights Act 1998, consider whether a prosecution would be compatible with Article 8. Even where the sexual activity in question is abusive, the Government considers that a prosecution will in many cases fail these tests since providing the offender with support and care through social services may well be more appropriate. This was the line taken in *Setting the Boundaries* and it received wide agreement on all sides. Where the sexual activity is genuinely consensual, is low level sexual activity and involves two children close to the age of 13 and of a similar age to each other, the Government expects that, even where this comes to the attention of the authorities, it is almost inconceivable that it will be in the public interest to bring a prosecution.

7. In looking at the proportionality of its proposals, the Government considered whether to try to make exceptions to the prohibitions, or to formulate the law in a more targeted way. It took the view that in dealing with an area of law concerning children as potential victims of abuse, their protection (including their rights under the ECHR) should be seen as paramount. Any approach to dividing the law in this area brought anomalies and could leave gaps, weakening the present protections afforded to children. It could also be over complex and lose the simplicity necessary for the law to be understood and workable. For example, if it is acceptable in law for two 12 year olds to kiss sexually, what about a 16 year old with a 12 year old? Where should the line be drawn in defining acceptable activities? If sexual kissing is acceptable, what about masturbation? Should there be a distinction according to whether the masturbation is or is not through clothing? All such activity could be potentially abusive even if ostensibly consensual and even if done between children of similar age. The Government therefore believes the right course is to maintain the existing prohibitions, offering maximum protection to children, but with prosecutorial discretion allowed and indeed expected.

8. The Government considers that everything said above applies equally to the situation where a child of 13 engages in consensual sexual kissing with a child of 12.

The JCHR report

The JCHR's report in the light of the Home Office Memorandum contained the following paragraphs.

2.3 Imposing or threatening criminal sanctions on people who kiss consensually is an interference with their right to respect for their private lives under ECHR Article 8.1. It requires justification under Article 8.2, which requires any interference with the right to be in

accordance with the law, and necessary in a democratic society for one of the legitimate aims listed in Article 8.2. To be 'necessary in a democratic society', an interference must be a proportionate response to a pressing social need. We accept that the interference would be adequately in accordance with the law. The questions are (a) whether the interference serves a legitimate aim, (b) whether there is a pressing social need for the interference, and (c) whether the interference is proportionate to the aim pursued.

2.4 *Legitimate aim.* The Government says that its primary concern is child protection. (It also mentions the protection of morals as a subsidiary objective, but in our view it is unlikely to justify the provisions if they are not justified by child protection considerations.) Children under 13 have the right to be protected from all forms of sexual activity, regardless of the age of the other party. Removing the need to prove lack of consent also protects children under 13 from being cross-examined about their sexual conduct. While age limits are to some extent arbitrary, there are both statutory precedents and social acceptance for treating the age of 13, when a child enters teenage years, as an appropriate dividing point.

2.5 Protecting the rights of others is a legitimate aim under Article 8.2, and we accept that so far as children are specially vulnerable to sexual abuse their rights may be protected by special provision about sexual touching.

2.6 *Pressing social need.* The Government does not deal expressly with this issue, but we consider that there is a pressing social need to protect children against sexual touching in some circumstances, even if measures to provide this protection interfere to some extent with the right to respect for private life.

2.7 *Proportionality.* The next question is whether this particular provision is proportionate to the pressing social need. Interference with a right may be disproportionate if, for example, it applies to more cases than necessary, or it interferes more than necessary in those cases to which it properly applies, or it deprives people of the very essence of the right. By its nature, an assessment of proportionality calls for judgment about the best way to balance competing interests: it calls for common sense, an understanding of the impact of the measures in different situations, and an idea of the relative importance of different matters.

2.8 The Government's view is that a total prohibition on all sexual touching, including kissing, of or by under-13s is justified because:

> — many children lack the maturity to understand the nature of sexual activity, and these vulnerable children need to be protected;
> — they need to be protected against young people as against old: research (which the memorandum does not identify) is said to indicate that 'adolescent sex offenders *probably* account for *up to* a third of all sex crime and many of these will offend against others of a similar age';
> — the prosecutor would have a discretion, and that is the key to ensuring that clause 6 would be used proportionately, as the prosecutor would have to consider whether there is a public interest in prosecuting, and consider whether prosecution would be compatible with Article 8. It will often not be appropriate to prosecute if provision of support and care through social services would be a more satisfactory way of proceeding;
> — in a field where the protection of children should be the paramount consideration, attempting to formulate the law in a more targeted way could produce gaps and anomalies, as well as losing simplicity.

2.9 The Government's position has the merit of convenience, and facilitates simple drafting of the Bill. It avoids leaving gaps in the protection offered to vulnerable children through under-inclusive legislation.

2.10 On the other hand, we find it unpersuasive as an argument on proportionality. Proposition (a) in paragraph 17 above is unexceptionable, but it does not follow, as suggested in proposition (d), that a blanket ban on all sexual touching is justified. It is of the essence of Article 8.2 that one should attempt to target legislation so that it reflects a proper balance between the rights and interests affected by it. The Government does not suggest that it would be impossible to do this, but it prefers not to try, in case the legislation fails to cover every conceivable case in which one might want to prosecute. Instead of striking a proper balance, this approach in effect refuses to take on the task, leaving it to the discretion of prosecutors to make sure that the legislation does not systematically violate people's rights. As we have frequently said in earlier reports, official discretion should not in general be regarded as offering satisfactory protection against violation of rights.

2.11 This is particularly important in the context of the creation of criminal liability. It is a fundamental principle of the uncodified constitution, as well as of human rights law, that in a free society legislation imposing criminal liability must be justifiable, and that criminal offences must so far as possible be framed in such a way as to impose liability only when doing so is justifiable. That allows people to depend on the rule of law, with its emphasis on the legal enforceability of legal protections for rights, to safeguard them against unjustified imposition of criminal liability. Creating catch-all offences, and then relying on the prosecutor's discretion to sort things out satisfactorily, undermines this. It leaves prosecutors to do the job that Parliament should be doing, and gives them discretion to prosecute (or not to prosecute) people who ought never to have been within the scope of criminal liability in the first place.

2.12 Even if we trust prosecutors to approach the use of their discretion properly, it would not adequately protect people against infringements of their rights resulting from the application of the legislation. Children may be arrested for fairly trivial offences. They may be subjected to reprimands and final warnings under the provisions of sections 65 and 66 of the Crime and Disorder Act 1998 (as amended by section 56 of the Criminal Justice and Court Services Act 2000). If they receive a final warning for a sexual offence, they are automatically required to register under the Sex Offenders Act 1997. That could blight their lives. All this can happen in cases which do not lead to a prosecution. The discretion of the prosecutor does not offer any protection against rights being violated as a consequence of the application of sexual offences legislation. There are reported examples of cases in which relatively minor forms of indecent behaviour have produced these consequences for children.[*Footnote 13:* See, e.g., R. (U.) v. Commissioner of Police of the Metropolis; R. (R.) v. Durham Constabulary [2002] EWHC Admin 2486, [2003] 1 WLR 897, DC.] The position would be far more dangerous under clause 6, which contains no requirement for the touching to have been indecent and takes no account of the consent of the parties.

2.13 So far as proposition (b) in paragraph 17 above is relevant to the question of proportionality, it is so vague and speculative that it seems to us to add little, if any, weight to the Government's contentions. The Government does not give details about the research on which it relies. This makes it difficult for us to assess its significance for the proportionality of the proposed measures.

2.14 Finally, the Government claims that the Bill would not be imposing any new criminal liability. The Government first asserts that it is not changing the law: it claims that two 12-year-olds consensually kissing each other would currently commit the offence of indecent assault,[*Footnote 15:* Sexual Offences Act 1956 ss 14 & 15.] because a child under the age of 16 cannot consent to an indecent assault. We disagree, for three distinct but related reasons.

2.15 First, to constitute indecent assault, conduct must be both indecent and an assault. Touching which does not cause injury is not an assault if it is consensual, and a child can consent to touching of that kind, as she can (from a relatively early age) to certain kinds of

medical treatment. Even if kissing could be regarded as indecent, and as capable of amounting to an assault, it is not be an assault if the child genuinely consents.

2.16 Secondly, kissing is not in itself generally indecent. Kissing may become indecent for legal purposes in some circumstances, for example if it is combined with a suggestion of sexual intercourse,[*Footnote 17:* R. v. Leeson (1968) 52 Cr. App. R. 185 (kissing on face and shoulders with suggestion of sexual intercourse)] or perhaps if it is carried out to gratify some indecent urge or perversion.[*Footnote 18:* R. v. Court [1989] AC 28, HL, where however the act was not consensual kissing, but non-consensual smacking to gratify the defendant's buttock-fetish; cp R. v. George [1956] Crim. LR 52, where theft of a shoe to gratify a shoe-fetish was held not to make the theft into indecent assault.] But simple kissing, even if it constituted an assault (for example, because there was no consent), would not be indecent assault.

2.17 Thirdly, the definition of assault for the purpose of the offence of indecent assault may be limited to hostile or coercive acts. There were suggestions in the House of Lords in ***R. v. Brown (Anthony)***[1994] 1 AC 212 that, in the context of the offence of indecent assault under sections 14 and 15 of the Sexual Offences Act 1956, an act does not amount to an assault unless it involves some element of hostility. This is not universally accepted, and the late Professor Sir John Smith QC claimed that the House of Lords went on to treat so many activities as hostile that it deprived the word of any meaning.[*Footnote 20:* Smith and Hogan's Criminal Law 10th ed., pp. 411-2, 484] Nevertheless, if, under sections 14 and 15 of the 1956 Act, there 'must be some compulsion, hostile act, threat or threatening gesture to constitute an assault', and the child must be reluctant to accept it,[*Footnote 21:* Perry Hill and Karen Fletcher-Rogers, Sexually Related Offences (London: Sweet & Maxwell, 1997), pp. 171-2, paras. 6-25-6-26, citing DPP v. Rogers [1953] Crim. LR 644 and Williams v. Gibbs [1958] Crim LR 127. Cp. the different view of the later Professor Sir John Smith QC, Smith and Hogan's Criminal Law 10th ed. (London: Butterworths, 2002), pp. 411, 412, 484] consensual kissing would never constitute an assault, and so could never amount to an indecent assault however indecent were the surrounding circumstances.

2.18 For all these reasons, but particularly on the first two grounds, we consider that the Government is wrong to suggest that consensual kissing between people under the age of 16 is currently a criminal offence. This could explain why, as the Government says, there is no recorded case of sections 14 and 15 being used in respect of 12-year-olds consensually kissing.

2.19 Even if the Government's view of the current law is correct, and the Bill would not alter the criminal liability of children, it would be important to subject clause 6 to the same level of human rights scrutiny as other provisions. When the present law of indecent assault was enacted in 1956, the ECHR was in its infancy, and there was no case-law from the Strasbourg Court explaining its requirements. The Committee should seek to ensure that the new legislation will be Convention-compliant, even if the previous legislation did not produce markedly narrower criminal liability.

2.20 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. We draw this matter to the attention of each House.

Chapter 17

Selected principles of *The Sex Code*[155]

ETHICS AND SEX

The concept of secular morality

1. Though non-believers cannot accept religion, they acknowledge right and wrong. They wish to make the best of themselves, and out of common sympathy also wish the best for their fellow humans. Without any supposed divine command or revelation, they accept that human acts are moral, immoral or morally neutral. They perceive that this indicates the existence, in some sense that is real, of an objective standard of ethics (referred to in this book as 'the ethical code') whose sole base is in human reason and the human conscience.

Secular sexual morality

2. In the sexual field we all have a duty to be good, that is to act morally. This is part of our general duty, laid down by the ethical code, to act morally in every area of our life. Because the ethical code requires us to strive at all times and in all ways to be virtuous, it follows that we should strive to be virtuous in our sexual life. Indeed, since sexual wickedness can cause untold harm and distress, the duty to be good is particularly strong in this area.

The duty of ethical understanding

3. No one can be sure of acting morally in a given situation, or responding with moral correctness to the act of another, unless they know and understand what is called for by the ethical code. Therefore we should try to absorb its principles to the fullest extent of our capacity. This we may call the duty of ethical understanding.

The duty of ethical action

4. We should comply with the ethical code not only directly but indirectly. It guides our own sexual acts and also our response to the sexual acts of others. What we must not do ourselves, we must not countenance others doing. What it is our duty to do, it is our duty to help others do also. All this may be called the duty of ethical action.

The present Code

5. Because the ethical code cannot be known in precise detail its prescriptions may be unclear in particular cases, and cannot be free from dispute. The present text (referred to in this book as 'the Code') attempts to formulate the ethical code, so far as it relates specifically to human sexuality, in a form most likely to produce certainty and command agreement in the modern western secular culture.

Interpreting the Code

6. It is important to bear in mind when reading the Code that its effect is intended to be cumulative. Each precept is subject to limitations stated elsewhere in the Code, and also by

[155] Francis Bennion's book *The Sex Code: Morals for Moderns* was published by Weidenfeld & Nicolson in 1991. The extracts published here form part of the Code of 60 precepts which forms the main element in the book.

precepts of the ethical code not specific to sexual matters. The Code is concerned only with morality, and pays no regard to law or aesthetics. In the Code references to acts include omissions.

ACCEPTING OUR SEXUALITY

The duty of sex-acceptance

7. Since we are all sexual beings we should look upon our own or another's sexual organs, functions and desires positively, with welcoming acceptance that they exist and work (the duty of sex acceptance). We should never look on them negatively, with dislike, regret or contempt. This does not mean that remediable sexual disorders ought to be accepted as they are, or that immoral sexual behaviour should be tolerated.

Sex-guilt

8. Because of negative conditioning, guilt about the mere existence of sexuality (sex guilt) is endemic in western culture. Yet the duty of sex-acceptance means we should eschew this guilt in ourselves. Moreover we are under a duty not to implant or nurture guilt in another person, particularly a child, because of their sexual organs, functions or desires, or because of their sexual acts where these are not immoral. When we encounter such guilt we should where possible help to alleviate it.

. . . . .

Nudity and exhibitionism

10. The duty of sex-acceptance requires us to tolerate the sight of the nude human body, even where because of the subject's advanced age or other factors it seems to us aesthetically unpleasing. We should refuse to countenance prudishness about the body or its functions, which can be harmful psychologically. On the other hand we need to recognise the effects of past negative conditioning, and not knowingly outrage another person by the sight or sound of any extreme sexual activity or display.

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RESPECTING OUR SEXUALITY

The duty of sex-respect

12. Since sexuality is the source of all human life, and is of profound emotional concern to all human beings in the living of their lives, we should treat our own or another's sexual organs, functions and desires with respect, even reverence (the duty of sex-respect). We should therefore not commit any act that degrades or trivialises them.

The right to sexual privacy

13. It is immoral, as contravening the right to privacy and the duty of sex-respect, for anyone, without the consent of the person in question, to gaze at or listen to the sexual activity of another person, whether directly or by means of a recording or listening device.

Sex with animals

14. It is contrary to the duty of sex-respect for a human being to have sex with an animal.

FULFILLING OUR SEXUAL NATURES

The duty of sex-fulfilment

15. Because sexuality is an essential and vital part of the human constitution, we should develop and fulfil our sexual nature throughout life (the duty of sex-fulfilment). This does not mean that remediable sexual disorders ought to be accepted as they are, or that immoral sexual behaviour should be tolerated. However it does follow that we should help and encourage others, particularly the young, to achieve fulfilment in the sexual field as in any other area of life. Equally we should not deny old people sexual fulfilment or denigrate their pursuit of it. We should not condemn any sexual relationship on the ground of a disparity in the ages of the partners.

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Celibacy and chastity

17. Because they contravene the duty of sex-fulfilment, enduring celibacy and chastity are undesirable in the way that any other failure to fulfil one's human potential is undesirable. This does not mean that young persons should be hurried into sexual experience before they are physically or emotionally ready.

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SEXUAL ACTS

Types of sexual act

21. Since the primary purpose of our sexual organs, functions and desires is reproduction of the species, contraceptive - free vaginal intercourse between a fertile male and female may be regarded as the primary sexual act. However healthy sexuality goes much wider than this, and no type of sexual act is to be condemned on the ground that it departs from the primary act.

Consent to sexual acts

22. We ought not to touch another person sexually without their consent, whether explicit or reasonably inferred. Nor should we do any other act towards a person sexually (such as showing them a pornographic picture or exposing their nakedness) which is out of scale with any indication they have given regarding their willingness for this. Special considerations apply where the person is too young, or is otherwise unable, to give informed consent.

Sexual harassment

23. We should not make sexual overtures to any person beyond a point where the recipient indicates refusal, disapproval or distress. If for any reason the other is or may feel coerced or otherwise subservient, we need to realise that the signs of rejection may be faint. That does not mean they are to be disregarded.

Solitary sex

24. A sexual act (such as masturbation) is not immoral because done in solitude. Since young people are often ready for sex before they are mature enough to enter a sexual relationship with another person, solitary sex may for them be the most suitable form of early sexual activity and should not be condemned or discouraged by parents or others in authority.

However, solitary sex may encourage narcissism, and lacks the richness that comes from a loving relationship with another. Where the subject is within a pair-bond, solitary sex may be immoral if it indicates a rejection of the partner.

. . . .

Harmful sexual acts

27.-(1) Where it is known or suspected by either party to a prospective sex-act that one or other is or may be infected with any sexually transmissible disease it is their duty to ensure that adequate precautions are taken against infection.

(2) If a person knows that an infected person is likely to contravene the previous rule (for example because they have themselves contracted disease from that person) it is their duty to help ensure that the infected person does not transmit the disease to others.

(3) It is immoral for a person who knows or suspects that they are infected with any sexually transmissible disease to have sex with another person without first informing them of the fact.

(4) It is immoral to have sex with another person by a method or technique that may cause either party physical or mental injury.

. . . .

THE YOUNG

Parents' duty to rear their child

47.-(1) The natural parents of a child should accept and discharge their responsibility to rear it unless circumstances render this impracticable.

(2) It is the duty of the persons rearing a child to give it a secure and loving upbringing till adulthood.

(3) If the child cannot be reared by its natural parents it is best that it be reared by a couple who are as near as possible in age and characteristics to the natural parents. To be reared by a lone parent, or by two persons of the same sex, may succeed. It is more likely however to be less than the best, since the child needs a close and extended view of rearers of both sexes in order to make sense of its world.

Sex education

48. It is the duty of the persons rearing a child to ensure that it undergoes whatever sex education may be necessary to enable it progressively to learn the facts about human sexuality, and eventually to carry out its duties of ethical understanding and ethical action. Subject to this, a child-rearer who has not been proved to lack a genuine intention to promote the welfare of the child has the right to decide what it is to be taught about sex.

Consent by young people to sexual acts

49. Apparent consent by a youngster to a sexual act with an older person is morally ineffective, and therefore counts as no consent, where the youngster is too immature to understand the nature and quality of the act, that is its physiological, emotional and ethical significance. Apparent consent by a youngster to a sexual act with an age-mate is however to be treated as morally effective. A test for whether a youngster who apparently consents to a

sexual act really understands its nature and quality is whether, when maturity is attained, he or she would be likely to regret having committed the act.

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Chapter 18

Extracts from Report of Commons Report Stage

3 Nov 2003 : Column 544

Sexual Offences Bill [Lords]

As amended in the Standing Committee, considered.

* * *

Column 614

Mrs. Brooke: I beg to move amendment No. 187, in page 3, line 15 [Clause 4], at end insert—

'(c) a person aged below 18 years at the time of the offence shall be assessed by a multidisciplinary team and be eligible for treatment, even if he does not subsequently become subject to notification requirements.'.

Mr. Speaker: With this it will be convenient to discuss the following:
Amendment No. 116, in page 5, line 34 [Clause 13], leave out '9' and insert '10'.
Amendment No. 144, in page 5, line 34 [Clause 13], leave out '9 to' and insert '11 and'.
Amendment No. 117, in page 5, line 34 [Clause 13], at end insert—
) A person under 18 (A) commits an offence if—

(a) he intentionally touches another person B,

(b) the touching is sexual,

(c) B is under 13 or B is over 13 but does not consent to the activity and A does not reasonably believe that B consents.'.
3 Nov 2003 : Column 615
Amendment No. 145, in page 5, line 34 [Clause 13], at end insert—

'(1A) A person under 18 commits an offence if he does anything which would be an offence under sections 9 and 10 if he were aged 18 save that conduct by a person (A) with another person (B) which would otherwise be an offence under this section shall not be an offence if:

(a) B is aged between 13 and 16 and A is no more than 2 years older than B,

(b) B has the capacity to consent to that conduct,

(c) B does consent to that conduct,

(d) The conduct does not involve penetration,

(1B) B will be regarded as having the capacity to consent to conduct by A only if B is capable of understanding the nature and implications and reasonably foreseeable consequences of such conduct.'.
Amendment No. 192, in page 5, line 34 [Clause 13], at end insert—

'( ) A person under the age of 18 does not commit an offence if the sexual activity is

consensual and with someone of similar age and is initiated by the participating parties. Exempted sexual activity does not include penetration of the vagina, of the anus or of the mouth by a penis.'.
Amendment No. 193, in page 5, line 39 [Clause 13], at end insert—

'(3) In respect of consensual sexual activity any decision about prosecution would be based upon consideration of the best interests of any child involved.'.
Amendment No. 196, in page 5, line 39 [Clause 13], at end insert—

'(3) Any decision about prosecution would be based upon consideration of the best interests of any child involved.'.

Mrs. Brooke: In Committee, I welcomed the amendments tabled by the Government to the effect that young people under 18 who had committed what might be regarded as more minor offences would not necessarily be put on the sexual offenders register. However, the Minister commented in Committee that as a result not all individuals would be eligible for a multi-agency assessment and subsequent treatment. On Second Reading, I mentioned a case in my constituency of a boy who committed an offence at the age of 14 and received a fine of £10 but no treatment. At the age of 19, he committed a serious offence and 13 years later he is still in prison. I feel passionately that we must ensure that young offenders, even those who receive only a caution, receive assessment and treatment. That is when it is most needed. I know that the Minister does not want such a provision in the Bill, but I am very concerned that it will slip through the net unless we make the point to him over and over again. I hope that the Government will appreciate that I do so with the greatest sincerity and from my experience of the tragedy experienced not only by the victim and their family, but by the family of the offender.
I come to the most important issue that we will discuss tonight. It was unresolved in Committee, even though we all tried to find a solution. At this late stage we still have a responsibility to try to reach that solution. This is a 21st century Bill, but it must be a matter for great concern that it will criminalise normal teenage behaviour. My colleagues and I do not propose that the age of consent should be lowered and we made that clear in Committee; however we have to find a solution to this issue.
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We need co-operation from the Department of Health and the Department for Education and Skills on the guidelines for the Bill. We need to introduce information about relationships between young people to sex and relationship education—including at parenting classes. It is vital to get this right. A young teacher asked me at the weekend whether the Bill would mean that teachers should stop 12 and 13-year-olds kissing at school discos. I do not make that point lightly. If the Bill criminalises that sort of activity, what are teachers supposed to do, given the positions that they hold? That comment gave me a good reason for carrying on with the amendment.
8.30 pm
Our amendments resulted from a great deal of thought, if not a great deal of legal input—in fact, none since we simply reflected on all that had been said in Committee. As all our complex arguments, complicated amendments and even common-sense amendments—more of which we offer now—were turned down, it seemed that we should try to achieve the bare minimum tonight. It was clear in Committee that we needed to detach clause 9 from clause 13—they were clauses 10 and 14 in Committee, but I shall stick now to the new numbers. I thought that I would try to go no further than that this evening, even though I am pretty concerned about some of the Bill's criminalisation of normal activities. In that way, I thought, I might at least tackle this basic problem about kissing and affection.
Amendment No. 116 would simply detach clause 9 from the all-embracing clause 13. Having done that, I then seek to add to clause 13 to provide for child protection—a point I ask Members to consider closely. If the amendment were accepted by itself, it would require follow-up work on clause 9, which would then not be compatible with clause 13. It would be

possible to make the two clauses compatible simply by adding a fourth point to the effect that A would have to be more than two years older than B. I was reluctant to do that because I do not find offensive the idea that a 17-year-old and a 14-year-old should kiss. However, making the difference three years would trigger the need for consequential amendments to clause 9, and that, as I am neither a lawyer nor a draftsman, is not my job.

The basic approach of detaching clause 9 from clause 13 and putting all possible safeguards into the Bill—more could be added in the way that I have suggested, for example, A could be more than two years older than B or more than three years older; or more could be added on the test for consent—offers a solution to our problem, although I cannot pretend that it is a perfect one. It took me hours of thought and determination to reach that point, although the House may not think so given my rather ragged amendment. I hope that the amendment will not simply be knocked out of court because it is not complete. I can see a way through that problem.

I will be minded to press for a vote on the amendment if the Minister does not say something that addresses the problem. I should be happy to support other amendments, but I am convinced that we must show the world and young people that we care about them and do not want to criminalise them for normal behaviour.

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Mrs. Curtis-Thomas: I appreciate what the hon. Lady is saying, but according to the police, one reason why there are so few prosecutions in this area is that the law simply is not specific or clear. I have gained the impression that the hon. Lady seeks to introduce a series of caveats to clauses that seem to me to be very straightforward. That would not bring any progress or any more convictions than occur at present because of the lack of clarity.

Mrs. Brooke: That was an important intervention, allowing me to say categorically that I am here because I do not want 14-year-olds or 15-year-olds to be convicted for kissing. I have not attempted to remove from the Bill anything involving penetration or any of the other things that obviously go on, given what we hear about the number of teenagers who engage in sexual activity. I have not attempted anything as ambitious as that, but I feel that we need to tackle the problem in clause 13, which really is most offensive. It has been brilliant working on the Bill, but I have a huge commitment to trying to obtain something sensible on this point and to give a better message to young people. They receive enough bad messages from us, and this one will buzz around all sorts of youth groups—"Now they are doing this to us". That is the message that is being sent out, and we need to send a better message and to put common sense back into the Bill in this area, alongside all the good proposals that it contains elsewhere.

I am minded to push for a vote on amendment No. 116 to establish the principle that the Government, with all the expertise at their disposal, should do all that they can to come up with a technical answer.

Mr. Dawson: I sympathise with the case made by the hon. Member for Mid-Dorset and North Poole (Mrs. Brooke). I want to speak only to amendment No. 196. I beg the forgiveness of the House if there has been any confusion—amendment No. 193 was a mistake. I handed in the wrong piece of paper—mea culpa.

Amendment No. 196 would add to clause 13 the provision:

"Any decision about prosecution would be based upon consideration of the best interests of any child involved."

I agree that the clause is the most unsatisfactory provision in what is, on the whole, an extremely fine Bill. The clause is appropriately named, but if it is not amended I foresee the day when youth groups throughout the country will produce shock-horror videos about it.

I do not believe that clause 13 will lead to young people being prosecuted or being put into youth custody for kissing or touching each other. The Government have assured us that that will not happen and that the regulations will operate in such a way as to prevent it. I accept their good intentions.

I also accept and share the Government's concern to protect children from sexual offences committed by other children. It is an extraordinary and disturbing fact that as many as 40 per

cent. of offences against children are committed by their peers. I share, too, the Government's commitment to an equalised age of consent at 16 and to the principle, reinforced throughout the Bill, that a child aged under 13 is not capable of giving legally significant consent. Those are

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vital, protective measures that will help children to resist peer pressure to take part in sexual activity before they feel that they are ready.

I share all the Government's intentions for the protection of children, and my main concern about clause 13 is that it will undermine those efforts. Young people have already greeted with complete incredulity the fact that we could even consider such provisions. I have spoken to young people from the UK Youth Parliament and from my constituency and they feel that politicians who could even consider implementing such a clause are wholly out of touch and are certainly out of sympathy with the lives of young people.

All our positive efforts in the Bill will be dismissed if we do not amend the clause. All the messages that the Government are trying to get over and all the positive work that they are doing to try to help young people will be dismissed out of hand and forgotten. The clause will undermine all that work.

We are told that a third of all men and a quarter of all women claim to have had sexual intercourse before the age of 16. The bald statements in the clause will undermine the serious efforts that are being made to address teenage pregnancy and sexually transmitted diseases. Clause 13 sends out conflicting messages to young people who need good information and responsible help.

The clause could compound the problems of a young person who is being pressured into a sexual relationship. They could be told that, after all, they consented, or that they, as well as the person who is pressurising them, could be put into custody. That is the sort of message that could be given to young people and it will undermine the rest of the Bill.

At present, clause 13 is a hostage to fortune—or to the misfortune of vulnerable young people. It leaves the Government in the position of saying, "Yes that is what the Bill says, but it is not what we really mean". That cannot be right; it cannot be an appropriate message to give young people.

Clause 13 offers nothing to young people who have actually committed serious sexual offences. Their problems would be compounded by a period in custody, yet their dangerous and damaging behaviour could be addressed by appropriate treatment.

Amendment No. 196 is the most modest amendment of all. It would introduce no radical new principle, but it would incorporate the paramount principle of the Children Act 1989. It would not preclude the consideration of other factors, such as the public interest, in deciding whether to prosecute, but it would give appropriate prominence to the best interests of the child. In addressing itself to the best interests of any child involved, it would allow an opportunity to consider the merits of treatment for those who have committed offences before, or possibly in preference to the case for prosecution. I hope that it would reinforce the message that although we do not condone sexual activity between under-16s, we do not prefer condemnation to sympathy, understanding and care.

I have had the opportunity to have a preview of what my hon. Friend the Minister might possibly say in response to amendment No. 196, because he wrote to me last Thursday in response to letter in which I raised the issue. I am grateful to have this opportunity to get my

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retaliation in first. The purpose of the amendment is to be sceptical about the merits of prosecution, but it would not reduce the protection afforded to young people. In fact, as I have argued, it could increase that protection.

Amendment No. 196 would in no way weaken the age of consent or introduce any element of decriminalisation. Despite the fact that, so far, there has been no consensus about the ways in which clause 13 could be changed, there would be a consensus about the desirability of incorporating the paramount and well-accepted principle of the Children Act 1989.

This issue is extremely difficult and the Government have an extremely difficult balancing act to perform. In giving way to the best interests of the child, amendment No. 196 would achieve a better balance—a balance more in keeping with the commitment in the long title of the Bill to protect children from harm than with clause 13, and I hope that amendment No. 196 will be supported.

Lynne Jones (Birmingham, Selly Oak): I very much share the sentiments expressed by the hon. Member for Mid-Dorset and North Poole (Mrs. Brooke) and my hon. Friend the Member for Lancaster and Wyre (Mr. Dawson). Although I wish to speak to amendment No. 192, which I tabled, I realise that since it was devised the hon. Lady has tabled amendments that are more clearly drafted and suit the purpose of dealing with teenage sexual activity more effectively.

Members of the parliamentary Labour party have received a briefing note on the Bill today that states:

"The age of consent for all sexual activity is 16. This is well known, well respected and well understood".

Well, I disagree. I think that most people believe that the age of consent relates to penetrative sexual activity, not to the sort of thing that many young people get up to as part of their normal activity—the sort of kissing and cuddling or even heavy petting in which young people engage, and in which I suspect many hon. Members engaged when they were younger. Many people would be shocked to discover that we are introducing laws that will criminalise such activity.

The Minister told me in a letter that "under the existing law, children are not prosecuted for engaging in harmless sexual activity and" the Government "do not expect this Bill to make any difference".

He added that the Government would introduce guidance to ensure that that was the case. Of course, he repeated those assurances in Committee. Although the Government state that their aim is not to criminalise young people, that is exactly what the Bill will do. The reason why nothing serious happens at the moment is that, as I have said, the law is not understood or is ignored.

I am very concerned that the new offence replaces old terms, such as "indecency", with the much broader and more easily proved term, "sexual activity". As other Members have said, these measures will do nothing to enhance the reputation of parliamentarians with young people, who will be alarmed that we are considering criminalising the sort of activity that many of us will have engaged in when we were young. Even if the

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guidance makes criminal charges unlikely, a new law sends strong messages even when not enforced—the obvious example is section 28, which had a blighting effect on education about homosexuality for a whole generation of children.

8.45 pm

Finally, will my hon. Friend tell me how complaints to police using the literal wording of the legislation will be avoided? Is he not concerned that third parties could easily bring forward complaints under this legislation as it stands, causing distress to young people involved and wasting police time? I hope that the Government will consider introducing amendments that have the effect of ensuring that young people are safeguarded from inappropriate sexual advances, while at the same time not criminalising normal sexual activity in which young people engage, in the way that the Bill currently proposes.

Mr. Grieve: I have a great deal of sympathy with the points made on both sides of the House about the problems that this part of the Bill has presented. On Second Reading, I said to the Home Secretary, in response to his challenge, that I hoped that one of us—I hoped that it might be me—might obtain the magnum of champagne that he had promised to anyone who solved the conundrum of how to deal with providing protection for those aged between 13 and 16 while not overtly criminalising activities that everybody regards as perfectly normal. Amendment No. 145 is my last attempt at doing that. It is similar to the proposal of the hon. Member for Birmingham, Selly Oak (Lynne Jones), and seeks, with an age difference of two

years, to permit sexual touching that does not involve penetration. It is a simple amendment, and if it were accepted by the Government, it would meet that problem.
I cannot escape the fact that, as we debated this matter in Committee, it became clear to me that if my amendment were accepted, it would decriminalise activities between a 16-year-old and a 14-year-old or a 17-year-old and a 15-year-old that many might regard as extremely undesirable. The question that I asked the Minister in Committee was: notwithstanding that, might it be proper to say that however undesirable it was, it was not a matter on which the criminal law should be invoked if it were to happen? Other sanctions might have to be applied—or other disciplinary regulations imposed—if it were in a school setting where it should not take place.
I accept that this is a big problem. I can see that the Minister has a point, which he made perfectly properly in Committee. There will be occasions when the nature of the relationship, and the anxiety about the relative absence of proper consent because of a dominance by one party over the other, gives cause for serious concern.
I must therefore say reluctantly that the Minister has persuaded me at least to the extent that I am not willing to press my amendment to a vote this evening if it does not meet with the Government's approval. I am not saying that I am happy with the situation: I remain as concerned about the matter as I was when I first raised it on Second Reading. Having said that, I accept that the Government's approach to this matter has been

reasonable and measured, even though the end result remains unsatisfactory. I suspect that the Minister shares that view, but sometimes I fear that Parliament may simply be left with unsatisfactory consequences of perfectly acceptable legislation.
Paul Goggins: I am grateful to the hon. Gentleman for his remarks. I will deal with clause 13 and the amendments to it in a moment.
On amendment No. 187, I fully understand the desire to ensure that young offenders who are at risk and in need of care receive appropriate advice and protection. However, for the reasons that I outlined in Committee and that I would explain again now if we had longer, I remain unconvinced that imposing a statutory requirement would add anything to the current arrangements. I want to encourage the statutory services and voluntary organisations to continue to develop those arrangements.
Many of the amendments exemplify an issue that has focused my mind for the best part of the past six months. Since Second Reading, in Committee and through the summer, I have sought with officials, colleagues and others to try to find a solution to the problem that we face. I wish to place on record my appreciation to all those who participated in that—whether they were politicians, non-governmental organisations, officials or whoever. A genuine attempt was made to try to find a solution, but I have concluded that the solution that people were looking for is simply not available.
The Bill tries to balance concerns about innocent, consensual sexual activity between under-16s with the need to provide protection for children. My hon. Friend the Member for Lancaster and Wyre (Mr. Dawson) was right to point out the level of sexual assaults carried out on children by other children. In that context, I visited the Haven project in London, one of the sexual assault referral centres—*[Interruption.]* I am advised that it is in the constituency of my right hon. and learned Friend the Solicitor-General. Such is the level of concern, the centre has found it necessary to develop a specialist service for children.
I want to re-emphasise that my aim is not to criminalise children and young people, but to protect them and ensure that we do not have confusion but clarity in the law. I know that hon. Members on both sides have tried to find different ways of resolving the problem. The first was by reference to age, but we immediately hit the problem that age is not a proxy for maturity. Children and young people of a similar age may have very different levels of maturity.
The amendment of my hon. Friend the Member for Birmingham, Selly Oak (Lynne Jones) refers to people of a "similar age", but there is no definition of what we mean by "similar". Does it mean a difference of one or two years? Such issues are extraordinarily difficult.

Amendment No. 117 refers to children under 13 and to children over 13, but it does not tell us what we would do with children who actually are 13. Many difficulties arise from trying to resolve the issue by reference to age.
Others have tried to resolve the problem by reference to type of activity, drawing a distinction between penetrative and non-penetrative sexual activity.
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However, there are many forms of non-penetrative sexual activity which, when undertaken by children, would be extremely serious. We cannot, as Members of the House, ignore their seriousness.
My hon. Friend the Member for Lancaster and Wyre tried to resolve the problem by referring to the welfare of the children, but whose welfare does that mean? What happens if issues of welfare conflict between the two children involved? There is also a public interest in such decisions.
Mr. Dawson: I do not find my hon. Friend's argument at all conclusive. Balancing the interests and welfare of the children concerned will be a prime consideration in any case.
Paul Goggins: It will be a consideration in relation to deciding whether to prosecute. The interests of children are taken account of at all stages in the criminal justice system. Nothing is added by my hon. Friend's amendment. The interests, welfare and background of those who commit offences when they are children are always taken into account in decisions about whether to prosecute and in the outcome in court if they are found guilty.
Lynne Jones: Would it not therefore be appropriate to enshrine such a provision in the Bill so that it sends out a clear message to young people?
Paul Goggins: I understand my hon. Friend's point but a clear message will be sent out via the guidance that will go to the prosecution service. That will make it absolutely clear that a whole series of considerations about circumstances and the children involved should be taken into account. Such guidelines currently exist for situations when sexual activity between children is illegal and there have not been prosecutions. I believe strongly that there will not be prosecutions in future.
I hope that hon. Members have observed from the Government amendments that the Government listened carefully in Committee and beyond to the many points that have been made, and we have listened just as avidly to points made today. My overall conclusion is that all the options that have been offered would have driven a hole through the age of consent. It is important for the House to send out a clear message—not least to young people—that the age of consent counts for something. Children should not feel under any pressure from the age of consent in any sense or feel that if they do consent to sex under the age of 16, there is something wrong with them.
There are no convictions at present. The guidance will be strong and I do not think that there will be prosecutions in the future for less serious consensual sexual activity between children. On that basis, and having listened carefully and agonised over the issues, I hope that hon. Members will not press their amendments to a Division because I shall certainly resist them.
Mrs. Brooke: I thank the Minister for his words and given the lateness of the hour, I shall not press amendment No. 187 to a Division. However, I shall press amendment No. 116 at the appropriate time. That
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is not because I want to weaken child protection in any way but because I want to register in the strongest terms my opinion that the issue should have been addressed. At the very least, we must send the strongest possible message that the guidelines must be comprehensive. I beg to ask leave to withdraw the amendment.
Amendment, by leave, withdrawn.
Clause 8
Causing or Inciting a Child under 13 to Engage in Sexual Activity

Amendments made: No. 1, in page 4, line 7, leave out from 'section,' to 'if' in line 11.—*[Ms Harman.]*
No. 2, in page 4, line 16, at end insert is liable, on conviction on indictment, to imprisonment

for life.
( ) Unless subsection (2) applies, 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 to a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.'.—*[Mr. Heppell.]*
Clause 9
Sexual Activity with a Child

Amendments made: No. 3, in page 4, line 26, after 'section', insert

', if the touching involved—

(a) penetration of B's anus or vagina with a part of A's body or anything else,

(b) penetration of B's mouth with A's penis,

(c) penetration of A's anus or vagina with a part of B's body, or

(d) penetration of A's mouth with B's penis,'.
No. 4, in page 4, line 27, at end insert—

'( ) Unless subsection (2) applies, 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 to a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.'.—*[Mr. Heppell.]*
Clause 10
Causing or Inciting a Child to Engage in Sexual Activity

Amendments made: No. 5, in page 4, line 37, after 'section', insert

', if the activity caused or incited involved—

(a) penetration of B's anus or vagina,

(b) penetration of B's mouth with a person's penis,

(c) penetration of a person's anus or vagina with a part of B's body or by B with anything else, or

(d) penetration of a person's mouth with B's penis,'.
No. 6, in page 4, line 38, at end insert—

'( ) Unless subsection (2) applies, a person guilty of an offence under this section is liable—
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(a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.'.—*[Mr. Heppell.]*

Clause 13
Child Sex Offences Committed by Children or Young Persons

Amendment proposed: No. 116, in page 5, line 34, leave out '9' and insert '10'.—*[Mrs. Brooke.]*
Question put, That the amendment be made:—
The House divided: Ayes 40, Noes 278.
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It being after Nine o'clock, Mr. Deputy Speaker *put forthwith the Questions necessary for the disposal of proceedings to be concluded at that hour, pursuant to Order [15 July].*
Remaining Government amendments agreed to.
Order for Third Reading read.

Chapter 19

Extracts from Report of Commons Third Reading

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The Secretary of State for the Home Department (Mr. David Blunkett): I beg to move, That the Bill be now read the Third time.

I am in a unique position this evening because, thanks to the work of hon. Members from all parties, Members of the House of Lords and many outside organisations, we not only have a better Bill but one that is built on consensus. I thank my right hon. and learned Friend the Solicitor-General, who has done a good job tonight, and two former Home Office Ministers who helped with the Bill—the Secretaries of State for Constitutional Affairs and for International Development. As hon. Members can see, people get promotion by being involved with the Bill. Above all, I thank my good friend, the Under-Secretary of State for the Home Department, the Member for Wythenshawe and Sale, East (Paul Goggins)—I almost called him Sir Paul—for his work in Committee. In all seriousness, we are grateful for the **Column 627** work of Committee members, the way in which the Opposition have responded and the spirit of consensus that developed from Second Reading onwards. That is an exemplar for Parliament as a whole, and embodies the way in which the Chamber and politics generally should operate.

It was with trepidation that we drew up the Bill, and dealt with the balance between offenders and offences. For the past 50 years, from 1956 onwards, people have been reluctant to change the law or engage vigorously with difficult issues because of the dangers of taking them out of context. This Parliament has engaged with those issues, and one Committee member even described the measure as a "model Bill". We owe everyone from all parts of the House who has led and participated in debate on the Bill a deep debt of gratitude. I am more of a politician than a parliamentarian, but I think that it has been is an example of Parliament at its best.

The tone that was adopted when the Bill was introduced, and continued in Committee and on Report, showed that we wanted to deal with some of the most difficult problems as well as issues that required sensitive handling in their presentation to the public. On Second Reading, we reflected on comments made in the House of Lords, some amusing, some which made us grimace, and some things that we would rather forget. However, in the House and in Committee those issues have been dealt with in a way that has led to consensus, and I am grateful to everybody for that. Of course, different points of view have been expressed. I am not often outdone by Parliament on the sentences that should be imposed on people who commit crime, but on the issue of grooming we accepted the additional penalty that the Committee and the House suggested. We have been able to close loopholes that were drawn to our attention by the media, making it an offence, for example, to undress a child without the previous interference that would have warranted immediate action and a court case.

We have had genuine differences, which have arisen again today, on issues such as anonymity, where for once it was not the Government who wanted to legislate; I know that we in the Home Office sometimes go for legislation first and think of other solutions afterwards.

Simon Hughes : An unusual paradox.

Mr. Blunkett: This is not the former Liberal Democrat spokesman's swansong. I could not miss the voice, the manner or the heckling. Nevertheless, his contribution is welcome because he has seen the Bill through with us.

On anonymity, I hope that the Association of Chief Police Officers and the media, as well as the way in which we can toughen the guidance, will make a difference. I am certain that, if they do not do not make a difference, the attitude that has emerged in this House and the

House of Lords will ensure that further steps are taken. That is both a clarification and a warning to those who have engaged with the issue.
Implementation will be vital. As was mentioned on Second Reading and in the statement on domestic violence, unless action is forthcoming from good words, there is no point in our spending time deliberating in Committee and in the House. The inter-ministerial

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group on sexual offenders and the taskforce on child protection on the internet are crucial in carrying forward Members' work and ensuring that we have solutions that work.
As I said, modernising the law on sexual offences has been a bed of nails for a very long time. We needed to modernise the law in the 21st century not simply because of equality or fairness, or simply because it was right to do so, but because it was essential to get the law right to tackle acts that all of us would agree are heinous crimes. It was therefore important to ensure that we were not engaged in a past agenda concerning private behaviour and how people live their lives—an agenda that occupied people in the 20th century for far too long.
As someone who is known in Labour circles as a bit of an authoritarian, it has been a particular pleasure and pride for me to be the Home Secretary who has introduced this legislation in 2003. I do not want to be compared with Richard Nixon, but it took him to recognise the Republic of China, so there is hope for me in the future—although not, it must be said, in recording people's phone calls.
Mr. Barry Gardiner (Brent, North): We've got the tapes.
Mr. Blunkett: You've got the tapes; you've got the message.
Finally, I thank the non-governmental organisations that have campaigned, advised and, on occasion, supported us. The venture has been collaborative and a genuine model for how we should proceed. It has been an example of how Parliament can make a difference. It is a great pity that because of consensus rather than controversy, very little of what has occurred will be recorded in the news media tomorrow morning.
9.18 pm
Mr. Grieve: I am grateful to the Home Secretary for his words and the spirit in which the legislation has been introduced. The subject is not easy—I certainly did not find it so, and I am sure that that is true of all those who served in Committee. There was a common determination that we should not approach the Bill in a partisan way, and I hope and believe that we have created legislation that will stand the test of time.
A great deal of credit goes to the Government. When the Bill started out in the House of Lords, there may well have been a temptation, particularly when the key areas relating to rape were placed under scrutiny, for the Government to cease the consensual approach and feel that they were being threatened. It is greatly to the Home Secretary's credit that he listened carefully to what was being said and accepted amendments that I believe have in no way detracted from what he was trying to achieve in changing the law in relation to rape, but have provided essential safeguards that will guarantee that a fair trial can take place. The Government are to be commended for what they have done in that respect.
When we have approached the Bill here, it has been noteworthy that, because of the good work in another place, many areas of the Bill have gone through, I hope not on the nod—I hope that we have always scrutinised it sufficiently—but at any rate with no dispute whatever.

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On those matters where there have been anxieties, one has to look only at the number of amendments tabled by the Government on Report to acknowledge that they have taken on board most, if not all, of the anxieties that have been expressed. In every respect, the Bill leaves the House in a better state than that in which it arrived but it had already arrived in a good state because of the Government's attitude from the outset.
I thank—I echo what the Home Secretary said—the non-governmental organisations. I also thank the police, who have provided us throughout the Bill with much support and assistance in difficult areas, particularly many of those dealt with by my hon. Friend the Member for Mole Valley (Sir Paul Beresford). I thank him for organising some briefings that we received during the Bill's passage. I also thank the Government Whip exceptionally in respect of this

Bill and those who have whipped for the Opposition. We have succeeded in scrutinising in every aspect in Committee a Bill that was timetabled. I am sorry that we did not quite achieve it on Report but I do not blame the Government for that. Indeed, it would be churlish to blame Liberal Democrat Front Benchers. The blame certainly lies elsewhere.

The Bill is modernising and it is now gender neutral, and I am delighted about that. I am also delighted that it will clearly provide greater safeguards for children, which has been a great anxiety in the House. I hope very much that those work. I am pleased by the modernisation of some areas of law, which while understandable were archaic. I greatly welcome the Government's last-minute decision to accept that the marriage exception was irrelevant in the 21st century. While it may have been appropriate 100 years ago, it ceases to be so when we are living in a much more diverse society where there have to be ground rules about the way people behave.

I do not want to take up more of the House's time. It has been a pleasure and, indeed, a privilege to participate in the passage of the Bill. As for anonymity, the one outstanding matter, I am grateful to the Home Secretary for what he said. It is an area of deep anxiety. I hope that he can accept in that spirit the reason that we have kept on raising it, even though I accept that the Bill will not stand or fall by that particular clause. I hope that the Government can come away with constructive proposals by negotiation with the media, but if they cannot it is a matter that we will have to tackle, because otherwise the administration of justice will become very difficult.

I do not want to end on an unhappy note. The good note that I can end on is that I think that we have done—I hope that we have done—a good job. I thank all those who have participated in the Bill for making that possible.

Ms Munn: It is difficult to overstate the importance of the Bill. As has been said, this is an incredibly complex area. Legislating on it is not easy. Indeed, the more we look into it and examine the situation, the harder it is to come up with proposals that will work. Offences of this nature change over time. In particular, the introduction of such things as the internet have made such matters very complex.

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To be subjected to a sexual offence is devastating. It is not to overstate the case to say that, for many people, it can scar their whole lives, but that is not to take away from the people who come through that experience and, rightly, describe themselves as survivors. Many of those people have suffered for many years the frustration of seeing inadequate justice in place to deal with those offences. Their families and those who work in that sector, as I did for a number of years, have felt that our justice system was not up to dealing with such offences. Equally, it is important that future offending is prevented and the Bill, commendably, seeks to do that as well. I am encouraged by the seriousness about the offences and the lengths that the Bill goes to ensure the protection of the most vulnerable in our society.

The Bill seeks to offer protection not just to children but to adults with learning disabilities and mental disorders, and it recognises that part of the devastation that people experience when subject to such offences is the betrayal of trust. How can vulnerable adults and their families and children and their parents who have been subject to such an offence ever feel that they can trust people who are placed in positions of responsibility?

The Bill sends out a clear message to society in general as to what is acceptable and unacceptable and, beyond that, it takes seriously that that is not just a question of what happens in our country and tackles so-called "sex tourism." The Bill states that what is not acceptable for children in our country should not be acceptable for children in other countries. There are relatively few people in the Chamber, but we should not underestimate the importance of the Bill to many people. There will be people out there watching this on television and looking at what has been said. Following previous debates on this subject, I have received phone calls and letters from people throughout the country saying how important it has been to have these matters debated.

The Government have done a good job in tackling the issue and should be congratulated on that, as should Members on both sides of the House. It is a complex area, and the Bill needs to

be implemented and monitored. It is only through the process of implementation that we will learn whether the clauses we have agreed will achieve the aims that everybody wants to see. In monitoring that, we will come to understand whether we need further legislation to tackle these serious offences.

9.27 pm

Simon Hughes : I am pleased to have the opportunity of seeing the Bill through. The Home Secretary knows that there are two other Bills that we have to see through together before my current Home Office work load is passed on entirely to my colleagues.

It is a great pleasure to welcome a Bill that, as the Home Secretary said, had been sitting around as an idea. Some of us had been lobbying for a reform of this area of the law for a long time, and I pay tribute to the Government for bringing the Bill through a proper consultative process, a good review body that came up with a set of sensible suggestions and then a consultative Govt paper. Like the reform of coroners, a subject that has also been sitting on the shelves of the Home Office

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for a long time, this matter needed the attention of Ministers, who have produced what is substantially a very good Bill.

I pay unequivocal tribute to the Home Secretary and his Ministers for the way in which they have made sure that the Bill got on to the statute book. His colleagues past and present have co-operated with my colleagues and me, and with others, to make sure that we get the best possible agreement in all areas of the Bill. I pay tribute to the Under-Secretary of State for the Home Department, the hon. Member for Wythenshawe and Sale, East (Paul Goggins), to the Solicitor-General and to now-elevated colleagues who have gone before. As the Home Secretary said, we all hope that being on Home Office duty provides us with a launching platform for greater things. There may even be those on the Conservative Front Bench with the same hope, although they are not all here tonight to express it.

Mr. Bryant: They are not here at all.

Simon Hughes: They are well represented by the hon. Member for Beaconsfield (Mr. Grieve), although his elder and better is no doubt not far away.

I add tributes to four of my party colleagues in particular. My hon. Friends the Members for Mid-Dorset and North Poole (Mrs. Brooke) and for Romsey (Sandra Gidley) have borne the brunt of the effort in this place and have done their job extremely well, while my colleagues Baroness Walmsley and Lord Thomas of Gresford did the same in the other place. This was a Bill where one had to be pretty committed to do the work, and the work was done by my colleagues to their credit and to the benefit of the Bill. They worked well with colleagues from all parties. I add a tribute to Lord Alli, who tabled significant amendments that were supported across the House. Like many of my colleagues, he sought to improve some areas that were technically very difficult, and about which there had been much controversy. As a result we have produced a much better Bill, but not without considerable effort.

Finally in my thank you list, as well as thanking many voluntary bodies and the police in general, I pay particular tribute to the Metropolitan police, who briefed colleagues in all parts of the House effectively, competently and supportively.

This was none of my doing, but I appreciate the fact that, apart from the last three groups of amendments on Report, everything was dealt with within agreed times. That is certainly the best way to approach such legislation. We should not be passing laws about criminal offences without having time to debate them and ensure that we get them right.

I shall now single out the substantive issues. As the hon. Member for Sheffield, Heeley (Ms Munn) said, this Bill is hugely important outside this place. We have reformed the law on rape significantly and for the better. The struggles that the House of Lords went through to try to get that right are important. There was a moment when it looked as if it would be possible to convict someone of that most serious offence without their having understood what they were doing. At one stage in the Lords, there was the possibility that a defendant in a rape trial would no longer be able to argue that he believed that the alleged victim was consenting. That has

been changed in a way that does not, I believe, prejudice the victim, but does ensure that the person accused is given a fair trial. That is a hugely important factor in dealing with this most serious offence.
Various other areas of the law were improved in the House of Lords, with the result that on a whole set of issues the prosecution was indeed required to establish the burden of proof, which had not been clear at the beginning. Another small but important issue was raised in the Lords, and the Government agreed that people who give advice, such as the agony aunts of this world, should not be criminalised for the advice that they give.
It was also important to state in law that people who abuse positions of trust should be prosecuted, and minors are now much better protected, whether from grooming, from people abusing positions of trust or from other people in the family. I agree with the Minister that that protection also applies within the marriage relationship. We cannot allow young people to be abused and exploited as was possible under the previous law.
There are other tricky areas too, which are difficult to deal with, and which I am aware sometimes raise a laugh outside among the public. We did not get it right in the beginning, and people who walk round their homes with no clothes on, without doing anything else, could have been prosecuted just for that. The Government understood that the law needed to be drafted properly so that people who chose to do that did not unwittingly find themselves in court. Likewise, people who cause no offence and have no ill motive can be without clothes in parts of the country where that is permitted—such as on beaches in Dorset, as my hon. Friend the Member for Mid-Dorset and North Poole (Mrs. Brooke) explained, or elsewhere. We may not have got the difficult subject of sex in public places perfectly right. The Minister knows my views: we argued that that activity should be dealt with within a public order context rather than in sexual offences legislation. None the less, the Liberal Democrats, like all the other parties, are clear that it is important to understand that public conveniences are just that, and must not be abused by people in a way that prevents the public from using them as conveniences. I hope that message has come out loud and clear from all parts of the House.
Finally, I hope that it will be noted that we have also tidied up a few little things that would otherwise have been wrong and anomalous. For example, people who have committed offences that are no longer offences will not remain on the sex offenders register. Such matters are important. Their implications may be limited, but they are hugely important for the individuals involved.
I draw two messages from the Bill. One is that young people are now better protected by the law from people within their family, from other people whom they know, and from outsiders who seek to abuse them. Secondly, where that happens, we need to make sure that the police have the resources they need to follow up offences that will be on the statute book in the next few days. If we are to ensure, as we should, that those who groom young people into prospective crime are caught, we need to ensure that all the police authorities have the facilities and numbers to follow matters through.

As the hon. Member for Sheffield, Heeley (Ms Munn) said, this is good legislation—not perfect, but significantly better than before—that is fair to men and women and to different types of relationship. But the proof of the pudding will come when we discover whether it is used wisely and understood clearly, and whether those with the authority to implement it are given the resources to do so. We wish the Bill well, and I am pleased that my colleagues in particular have been able to contribute to improving substantially what is very important legislation.
Mr. Bryant : This is becoming a bit of a love-in, with all of us congratulating one another—
Mr. Blunkett: Only in the legal sense.
Mr. Bryant: Indeed. I, too, would like to congratulate the Home Office on being courageously bold in a quiet way, and on achieving what is, by all accounts, important legislation that will probably have a more direct effect on people's lives than much other legislation, even though it will barely be reported in tomorrow's newspapers and other media.

This has been a good process. The initial consultation did, indeed, set the boundaries, and Ministers' response to probing amendments in Committee was entirely helpful. Making sex and sexuality, which are so often profoundly divisive issues in society, matters of open consensus in the House is a remarkable achievement; if only we could provide the same advice to the Anglican Church.

This is an excellent Bill primarily because of the added protection that it gives to children. Many of my constituents have been very concerned in recent years about the seeming increase in the number of child abuse stories. They will be pleased to learn that we are moving with the times and providing stronger protection, at a time when people are able to travel more around the world. One of my constituents is a very close family relative of two young children who were abducted and murdered some 15 years ago. Still nobody has been convicted of those murders, and I know that my constituent passionately wants the double jeopardy rule to be reformed in the as the Government would like it to be. My constituent does not understand why the House of Lords still has not finished with the Criminal Justice Bill, and looks forward to its completing its legislative passage.

I should also like to congratulate the Home Secretary as a gay man, because one of the most extraordinary aspects of this Bill is that it is probably changing more laws on homosexuality than on many of the other issues facing us. We barely talked about that issue in Committee because there is general consensus on it, but it took some courage to introduce many of the amendments. Ironically, the law on homosexuality in this country has probably been more illiberal and discriminatory in the past 150 years than it has in the past 1,000. Indeed, every time a Bill has been introduced to try to improve matters in the past 50 years, we have tended to take two steps forward and one step back. Many people will be profoundly happy to see the end of

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the offences of solicitation, of gross indecency, of procuring others to commit homosexual acts, and of assault with intent to commit buggery.

The hon. Member for Southwark, North and Bermondsey (Simon Hughes) has referred to the Government's recent decision to include section 93 and schedule 4, which provide for those convicted of now abolished homosexual offences to come off the sex offenders register. That is good for those individuals because it allows them to get on with the rest of their lives. Equally importantly, it is good for the register, because people can now have absolute confidence that those on it are included for a very good reason.

Many congratulations, then, and further congratulations to the Home Secretary on the amendment tabled in the other place to the Criminal Justice Bill, which will make homophobic hate crimes illegal in the same way as racial hate crimes. That is a movement entirely in the right direction and should be welcomed.

I believe that this is a fine Bill. For once, we have not moved two steps forward and one step back. This is a resolute step forward and, as the hon. Member for Beaconsfield (Mr. Grieve) said earlier, it is a Bill that will stand the test of time.

9.40 pm

Dr. Evan Harris : This is indeed important legislation and I share the pleasure of the hon. Member for Rhondda (Mr. Bryant). I am pleased to see the abolition of existing discriminatory offences, particularly gross indecency and buggery, which were especially important in terms of their scope and the number of people whose lives were blighted by the threat of blackmail and shame for what were consenting offences. The changes made in that area of law are more important than other legal changes in respect of rights for gays and, more widely, for gays and lesbians.

The Government can rightly take pride in taking action, because it was not an easy process. It was clear from the outset that it would take a good deal of departmental time to have a review, a consultation and a White Paper and then a contentious Bill that would be difficult to whip, particularly in the other place. Gaining consensus in the House of Lords was particularly difficult.

I take particular pleasure in knowing that when the idea of having a review, which later became "Setting the Boundaries", was first mooted from the Dispatch Box in February 1999, it was partly in response to a new clause that I had proposed to the Sexual Offences (Amendment) Bill 1998—a Bill that was later blocked in the House of Lords and had to be pushed through under the Parliament Act. The amendment dealt with the privacy provision, which meant that even a consensual homosexual act could never be lawful if more than two people were present. A review was proposed in response to my new clause and I would like to take this opportunity to thank the Government for initiating it. I also thank the people who served on that review, which set out for the first time the need for gender-neutral and sexuality-neutral legislation.

I share the joy of the hon. Member for Rhondda at seeing both clause 93 and schedule 4 enacted. It is all the more laudable that the Government acted in that

respect—they can again take great pride—because it was not the Government's initial position that something needed to be done in this area. In the Committee considering the Bill to which I referred, the right hon. Member for Brent, South (Mr. Boateng), then a Home Office Minister, said to me:

"It is important that we get one thing crystal clear. I suggested that the hon. Gentleman was being cavalier in his apparent disregard of the public expenditure implications of the course that he is proposing. Is he seriously suggesting that police time should be spent going through the charge sheets of individuals who have pleaded guilty, been convicted or been cautioned for the offences in question, in order to determine into which of the three categories"—

consensual, non-consensual, private—

"they fall, and so whether his new clause will bite? Does he consider that to be a justifiable use of police time?"—[*Official Report, Standing Committee E*, 11 February 1999; c. 148.]

The Government have certainly now accepted that it is an appropriate use of Home Office time for that work to be done. We have had to wait a long time for those measures, which should have been introduced earlier.

In respect of the one substantive amendment—amendment No. 195—that was not agreed, I hope that there will be an informal time limit on the Home Office's determination of this matter. Even a month taken to act in respect of something that has always been consensual and should never have been registrable is a month too long.

It was a little churlish of the hon. Member for Beaconsfield (Mr. Grieve) to argue that 45 minutes for debating the issue of sex in public lavatories was too much, particularly when he himself made several pertinent interventions in that debate. As I said, singling out public lavatories for a lower standard of complaint, a lower standard of proof and a lower number of available defences than for sex in parks, commons, heaths and other areas is a questionable path down which to go. That is my only negative point about the Bill.

Finally, it is important to note that the Government have only just started to deal with some issues, particularly trafficking and the exploitation of people—mainly women, and often, sadly, children—as sex workers. I am glad that, following the evaluation of pilot schemes, cross-European and international work, the Government have recognised that there is clearly more to do. On the question of prostitution, I am delighted that the Government have had the courage to initiate a review in that area also and I hope that it leads to legislation—

Mr. Deputy Speaker (Sir Alan Haselhurst): Order. I remind the hon. Gentleman that on Third Reading he should be talking about what is in the Bill, and not speculating about the future. Other hon. Members are waiting to speak on the Bill.

9.45 pm

Mr. Dawson : It was a privilege to serve on the Committee on this historic Bill. It is a fine Bill that will offer protection to many vulnerable people in this country and abroad for many years to come. It was a very positive experience being part of a Committee that had a genuine debate, with sincere and committed people on both sides doing their level best to try to improve the legislation.

Huge challenges lie ahead. We have improved the law on prostitution, on the protection of children who have been sexually abused, on young people who are themselves abusers and on trafficking. It is now essential that we improve the resources for, and availability of, treatment and support for offenders to ensure that the legal protection that we have put in place makes a real difference to people's lives. I have great hopes for further legislation that may stem from this Bill. We have laid down important structures in the Bill, including provision on the inability of young people under the age of 13 to consent to sexual relations. That will have profound implications for the age of criminal responsibility in the future.

The biggest challenge that will arise from the Bill will be faced not only by the Home Office, the Government and Ministers, but by all of us. The most important way in which we can protect children who are sexually abused in our society is by ensuring that we have a nationwide network of treatment centres for adult abusers. That heinous behaviour can and must be addressed properly, and it is a challenge for all of us whether we are prepared to accept such centres, whose fundamental role is to protect children, in the heart of our constituencies. These are huge issues for all communities. Sexual abuse is rife in our society and we must ensure that children are much better protected by putting such a network in place.

Mrs. Curtis-Thomas : Like all the other hon. Members who have spoken on Third Reading, I am profoundly grateful to the Government for introducing this Bill, especially the clauses that will protect young people with learning difficulties. I am the mother of a daughter with a learning difficulty, who will achieve the maturity age of a six-year-old. Like many other hon. Members, I have had parents of children with learning difficulties coming to my surgeries. Some of those children have been sexually abused, some of them in care homes. Unfortunately, achieving a prosecution has always been incredibly difficult because there have always been debates about whether or not such an individual is capable of consenting to sex.

The reality is that my daughter will never be in a fit position to consent, or otherwise, to sex. In fact, it would take very little to induce her into any form of behaviour. The prospect for many parents of children with such difficulties was that they could never be exposed to society. They would never have the opportunity to live in sheltered accommodation, because if they were exposed to some sort of sexual activity, it would be almost impossible to achieve redress. There would only have been a terrible assault and no actual justice for the individual. That remains the case until we prove that this legislation works.

I was unable to speak on the Bill earlier because it covers such a highly emotive area for me and for people and parents like me. The effectiveness of the Bill will be borne out only if there are successful prosecutions, as the Minister said. It will be so if my colleagues in Mencap tell me that it is working and that they feel that they have more rights and a greater chance of justice when acts are committed against them. It will be so if the police feel more disposed to take prosecutions to the

Crown Prosecution Service and when the CPS is confident enough to take those cases to court. Few cases get there now.

I welcome the Bill from that personal perspective and on behalf of many parents in a position similar to my own. I thank the Home Secretary for his reassurances on anonymity. The guidelines that will soon be issued to the press will, I hope, have the desired effect. I am deeply concerned about the publication of scandalous stories and their effects on innocent people and on the juries who are expected to reach judgment.

Vera Baird: I pay the greatest of respect to what has just been said by my hon. Friend the Member for Crosby (Mrs. Curtis-Thomas).

I shall return the mood to one of congratulation by complimenting the Government on the excellence of the Bill. It was a true pleasure to serve on the Committee, and I congratulate the Home Secretary and the Under-Secretary who has dealt so well, so amiably and so flexibly

with the Bill this evening. I also compliment the advisers who have worked extremely hard, sometimes running to stand still.

Clause 1 is of particular importance. It did not end as it started and has been amended for the better. Its purpose has unflinchingly remained the same throughout. For women, it is a progressive and symbolic provision. It has taken since 1975 to find a Home Office sufficiently understanding to reverse the rule in Morgan *v.* the Director of Public Prosecutions. That rule said that it is a complete defence to rape for a man, whatever the woman says or does, to say that he believed that she was consenting. Because of the emphasis placed by the clause on the actions carried out by the defendant to check the complainant's state of mind, it will also be much less possible for previous sexual history to be used to say that that was what persuaded a man that a woman was, in fact, consenting.

Finally, I appeal to the Government to hold the fort on anonymity. Clause 1 brings twin changes of great benefit to women in the continued fight for sexual rights. I congratulate the Home Secretary.

Question put and agreed to.

Bill accordingly read the Third time, and passed.

Chapter 20

Letter from Minister

Letter dated 30 October 2003 from Paul Goggins MP, Parliamentary Under Secretary Of State Home Office to Francis Bennion.

Dear Mr Bennion

Thank you for your letter of 12 September 2003 and for taking the time to share with me your suggestions about the child sex offences

You have proposed that clause 13 should be struck out of the Bill and that clause 9 should be amended so that it applies regardless of the age of the defendant and so that no offence is committed if the alleged offender is aged under 16; the complainant is aged 13 or over but under 16; the activity is consensual; and the sexual act does not cause injury or disease to the complainant, or [where the complainant is female] lead to pregnancy. The other child sex offences should be amended in line.

One immediate problem is that you have not provided a definition of "injury". It is possible that any injury could be unintentional, for example as the result of inexperience and first time intercourse. Causing the transfer of disease or pregnancy could also be unintentional and the result of ignorance or inexperience. I cannot see the logic for using these factors as a justification for prosecution.

You have mentioned that the law provides for a defendant to avoid a rape charge if it is proved that the complainant consents and have suggested that if a defendant aged 13 or over can consent to rape, then surely he can consent to any lesser form of sex. This thinking would make the child sex offences unnecessary. You have suggested that, at the very least, the law should allow for consent where there is similarity in age.

I must take issue with you on these points. If someone consents, he is not consenting to the act of rape, which is an offence that is by its very nature non-consensual, but is consenting to sex. Thus the offence of rape is not made out at all. In relation to underage sex, the fact that any sexual activity is unlawful provides for someone to be at least found guilty of an unlawful act even if there is not sufficient evidence to support a guilty verdict for a non-consensual offence. In relation to victims under 16, providing both non-consensual and unlawful offences allows for the sentence to reflect the different nature of the defence.

I regret that, in my view, introducing the concept of consent into clause 13 would fundamentally undermine the age of consent, which currently applies to all sexual activity. We would lose the clarity in the law that stems from having an age of consent below which all sexual activity is unlawful

I feel that it is unrealistic to place the o4is on one child to decide whether or not another child has the capacity to consent. It is also not safe to assume that consent is a simple issue where children are involved. The law must allow for the fact that children can be bullied or pressurised into agreeing to engage in sexual activity.

You have argued that it is unrealistic to suggest that a child can commit the same offence as an adult because an offence contains both a physical and a mental component and a child can never have the same mental state as an adult. We agree that a child's mental state will be different from that of an adult. This is why, in relation to the child sex offences we have a lower penalty for a child offender who commits the same physical act as an adult The child's

mental state will be one of the factors to he taken into account when deciding whether to prosecute and their immaturity will be relevant thy sentencing purposes.

Our priority is to ensure that the law provides protection for children and enables the prosecution of anyone, whether an adult or another child, who coerces or exploits them into sexual activity. The child sex offences in the Bill give children additional protection in that they do not require the prosecution to prove lack of consent for the offence to be made out There may be circumstances where a child is pressured or bullied into agreeing to sexual activity but where a non-consensual offence would be difficult to prove. This might be because there is insufficient evidence that coercion took place - for example because the child will not testify to that effect because they continue to believe that the defendant genuinely cares for them. Alternatively, the defendant may not have reasonably believed that the child consented - for example where the child "agreed" to the act only because of the pressure being placed on them by the defendant.

Of course, adults do not have a monopoly on child abuse and children can be bullied or coerced into sexual activity by one of peers. One can envisage the scenario where a 16-year-old boy bullies a 14-year-old girl into engaging in sexual activity and it is essential that the law provides the same levels of protection for children regardless of the age of their sexual partner.

We also believe that the age of consent is welcomed by many young people, because it can help them to resist unwelcome sexual advances. There are enough pressures on young people today, in the media and elsewhere to be part of a perceived teenage sexual culture; we fear that decriminalising any type of sexual activity will place them under even more pressure to take part in sexual activity before they are ready to do so. Introducing the concept of consensual sexual activity below the age of consent could confuse young people and weaken the protection provided for them under the law.

The discretion exercised by the CPS in deciding whether or not prosecution is in the public interest where person under 16 engages in consensual sexual activity with another young person or child, has been discussed at some length, as has the question of the appropriate treatment for children who are convicted of sexual offences

This is a difficult and sensitive area in which the views of well-informed people of good intention 'are genuinely divided. Despite considerate efforts by a number of people - including yourself - there is no consensus about the way in which the Bill should be changed and I still believe that the approach we have adopted is the right one.

I remain confident that the requirement that any prosecution must be in the public interest will mean that where there is no evidence of coercion or exploitation, cases will not be brought before the courts. This is the position now and we can see no reason why it should change.

We believe that we have struck the right balance between acknowledging that sexual activity between young people does take place while at the same time protecting all children from sexual abuse.

You have also raised concerns about the definition of "sexual" in the Bill and have proposed amending it to read -

"For the purposes of this Part, penetration, touching, or any other activity by a person is sexual if carried out with a view to the gratification of that person's sexual appetites".

Your definition would exclude from prosecution any overtly sexual act, for example intercourse or masturbation, in cases where the prosecution was unable to prove that the act

was carried out by the defendant for the purposes of his own sexual gratification. Our policy is to have a definition that expressly includes all overtly sexual acts, regardless of the intentions of anyone involved in them We do not want a defendant to fall outside the scope of the definition by claiming that he carried out such an act for the sexual gratification of the victim and not himself, or as some sort of rite of passage within a religious group, or because he thought that it would ease the victim's tensions or anxiety, or because he was teaching the victim for their own benefit. Where overtly sexual activity is concerned, for example intercourse or oral sex, we do not consider it necessary or helpful for the prosecution to have to prove that the defendant performed the act for his own sexual gratification.

Where someone is getting sexual gratification from an obscure fetish and no harm or distress is caused to anyone involved in the activity, and any sexual gratification remains secret to the defendant we remain of the view that this will not come to the attention of anyone else and thus does not need to be captured by the criminal law on sexual offences. However, I am satisfied that your example of the "shoe fetishist" would be captured under our definition. Our test is based on the decision in the case of *Court*, which, as far as we know has been operating well for more than 20 years. We see no justification for changing it.

Thank you again for the considerable amount of lime you have clearly spent in drafting your suggestions and for the valuable contribution you have made to our own consideration of these important issues. I am copying this reply to Humfrey Malins, who has expressed an interest in your suggestions.
[Signed]

Paul Goggins

cc Humfrey Malins MP

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[i] R Burack, 'Teenage sexual behaviour: attitudes towards and declared sexual activity' ***British Journal of Family Planning***, vol 24, no 4, 1999, pp 145-148

[ii] House of Commons Health Committee ***Sexual Health, Third report of session 2003-2003.*** Stationery Office, 2003