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The *Sexual Offences (Amendment) Bill*: 'Age of consent' and abuse of a position of trust

Bill 55 of 1999-2000

This Bill is identical to the *Sexual Offences (Amendment) Bill* that was defeated last session by the House of Lords [HL Bill 28 of 1998-99].

Clause 1 implements the promise of the Home Secretary in July 1998 that legislation would be introduced to equalise the ages at which people can lawfully consent to homosexual and heterosexual sexual activity. The Bill would make this age 16 in England, Wales and Scotland, and 17 in Northern Ireland.

The Bill also includes measures intended to protect children of both sexes aged between 16 and 18 from adults who are in position of trust in relation to them.

This Paper revises and updates RP 99/4.

Arabella Thorp

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Summary of main points

The *Sexual Offences (Amendment) Bill* [Bill 55 of 1999-2000] is intended to fulfil the Government's undertaking to the European Court of Human Rights that it would bring forward legislation to equalise the age of consent for homosexual and heterosexual acts. This will be the third time in this Parliament that the issue has been debated – on the two previous occasions the House of Lords rejected the proposals. The Bill also contains provisions intended to protect children of both sexes aged between 16 and 18 from adults who are in position of trust in relation to them.

Clause 1 is designed to amend various existing provisions in order to equalise the age of consent for heterosexual and homosexual acts at 16 for England, Wales and Scotland, and 17 for Northern Ireland. Clause 2 provides that a person under the age of consent will no longer commit an offence themselves if they engage in homosexual acts with a person over the age of consent. Clauses 3 to 6 would create a new offence of abuse of a position of trust where a person aged 18 or over has sexual intercourse or engages in any other sexual activity with or directed towards a person under that age, if the person aged 18 or over is in a position of trust in relation to the younger person in circumstances specified in the Bill.

Part I of this paper summarises the existing laws relating to sexual offences, homosexual and heterosexual, involving children and young people. It then goes on to look at recent (unsuccessful) proposals to equalise the age of consent, before discussing the both general aspects of the *Sexual Offences (Amendment) Bill* and those provisions relating to the age of consent.

Part II looks at existing provisions, criminal and non-criminal, which aim to prevent people in a position of trust or authority from taking sexual advantage of children in their care. The suggestions of various reports and working groups on the creation of a possible offence in relation to young people over the age of consent are then set out. Finally the paper discusses the remaining clauses of the Bill, which deal with abuse of a position of trust.

This paper will use the terms 'homosexual' and 'gay' interchangeably. Strong views are often held on the terms used by those on both sides of the argument. It is not proposed to use the term preferred by radical gay activists of 'queer', nor is it intended to use the term MWHSWM (men who have sex with men) used by health workers to focus on sexual behaviour rather than sexual orientation.

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I Age of consent

A. The Present Law

1. Homosexuals

a. England and Wales

The law does not criminalise the state of being homosexual itself, but there are three offences which are the principal means through which the criminal law regulates homosexual behaviour:

- buggery;
- assault with intent to commit buggery; and
- gross indecency between men.

The offence of buggery is contained in section 12(1) of the *Sexual Offences Act 1956*,[1] and assault with intent to commit buggery is an offence under section 16 of the *1956 Act*. The offence of gross indecency is contained in section 13 of that Act and can only be committed by a man with another man. There is no statutory definition of 'gross indecency' as it is a matter of fact - in other words, it is for the jury to decide in any particular case whether the behaviour concerned is 'grossly indecent'. Case law suggests, however, that it covers such acts as mutual masturbation, and that the willing participation of two men is necessary.

Following the report of the Wolfenden Committee on the criminal law relating to prostitution and homosexuality,[2] section 1 of the *Sexual Offences Act 1967* was introduced to legalised homosexual acts (buggery and gross indecency with another man) in private where both parties consent to it and have reached 21 years of age. The *1967 Act* also introduced summary trial for the offence of gross indecency, but it did not change the position whereby buggery of a woman was an offence punishable by life imprisonment regardless of the consent of the parties or their age.

Sections 143-5 of the *Criminal Justice and Public Order Act 1994* then lowered the age at which a man could lawfully consent to homosexual acts in private from 21 to 18, and revised the penalties for buggery and indecency between men.[3] The *1994 Act* also decriminalised consensual buggery in private of a woman by a man where both parties are aged 18 or over (section 143), and for the first time made the charge of rape available where a man has had anal intercourse with another man or a woman, whatever their age, without their consent (section 142).

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1 as amended by the *Sexual Offences Act 1967* and the *Criminal Justice and Public Order Act 1994*
2 Cmnd 247, September 1957
3 see below for further discussion of the Bill which became the *1994 Act*

Section 12 (1B) of the *1956 Act* provides that an act of buggery or gross indecency between two men shall not be treated as having been in private if more than two people are present, or if it takes place in a public lavatory.[4] Whether an act in a particular place is otherwise considered to be 'in private' is a question of fact which would have to be decided in the light of the facts of the individual case. It is therefore not possible to set out a list of places which are considered to be 'private' for the purposes of this legislation. In a 1974 case the Court of Appeal approved the following direction on the question of what might constitute a 'private act':

> You look at all the circumstances, the time of night, the nature of the place including such matters as lighting and you consider further the likelihood of a third person coming upon the scene.[5]

In the circumstances where buggery or gross indecency stilldoes amount to an offence, either or both of the parties can be prosecuted. There is no equivalent to the offence of intercourse with an underage girl, where only the man can commit the offence and not the young girl (see below). Another perceived anomaly is that, unlike the position in Scotland set out below, there is no defence available of mistake as to the other party's age, and it is therefore for the prosecution to prove the age of the parties.[6]

Offences of buggery and attempted buggery are tried on indictment (ie. in the Crown Court) and the maximum punishment depends on the facts:

Facts	**Maximum Punishment**
With boy or girl under 16, or animal	Life
With person under 18 where defendant is 21 or over	5 years
Otherwise	2 years[7]

The maximum punishment for the offence of gross indecency depends on the court in which the defendant is tried. In a Crown Court the maximum punishment is five years' imprisonment where the offender was aged 21 or over and he committed the act with a man under 18. Otherwise it is two years' imprisonment. In a magistrates' court the maximum punishment is six months' imprisonment or a maximum fine of £5,000. The courts have tended not to impose sentences of imprisonment on people convicted of this offence for the first time.[8]

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4 No such particular provision exists for heterosexual buggery, nor are there any specific privacy restrictions at all on vaginal heterosexual intercourse.

5 *R v Reakes* [1974] Crim LR 614

6 *1967 Act*, section 1(6)

7 *Sexual Offences Act 1956*, Schedule 2 paragraph 3(a)

8 See, for example, *R v Morgan and Dockerty* [1979] Crim LR 60

Under section 8 of the *Sexual Offences Act 1967*, the consent of the Director of Public Prosecutions is required before any proceedings can be instituted against any man for the offences of buggery or gross indecency with another man, or for aiding, abetting, counselling, procuring or commanding the commission of such an offence, where either of the men were under the age of 21 at the time of the commission of the offence. This provision was not amended by the *1994 Act* when the age of consent was lowered from 21 to 18.

In addition to the above offences, although much less frequently charged, are the more general common law offences of conspiracy to corrupt public morals and outraging public decency; and also the offence of insulting words or behaviour contrary to sections 4 and 5 of the *Public Order Act 1986.* According to a Howard League report, the offence of ‘soliciting by men’ under section 32 of the *Sexual Offences Act 1956*[9] has been used exclusively against men seeking sex partners of the same sex.[10]

It is also an offence for a person (either a man or a woman) to commit an indecent assault on a man. However, there is an effective age of consent of 16 here, as it is a good defence to prove that both parties consented to the act in question as long as they are both over 16.[11]

b. Scotland

It is the common law offence of gross and shameless indecency for a male to commit a sexual act with another male. The common law offence of sodomy can only be committed by two men, and not by a man and a woman.

The decriminalisation in Scotland of consensual homosexual acts in private by men aged 21 or over was effected by section 80 of the *Criminal Justice (Scotland) Act 1980.* The relevant clause was introduced as a backbench amendment by Robin Cook.[12] This provision (as amended by section 145(2) of the *Criminal Justice and Public Order Act 1994* which lowered the age of consent to 18) is now contained in section 13 of the *Criminal Law (Consolidation) (Scotland) Act 1995*.

The Scottish legislation goes further than the English provisions, by providing for a defence to charges of homosexual acts of mistake as to age.[13] In order that the defence may apply, the defendant must himself be below the age of 24, have had no previous charges for similar offences and have reasonably believed the other person was 18 or over. This is the equivalent

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9 Under this provision, it is an offence for a man persistently to solicit or importune in a public place for immoral purposes. The solicitation does not have to be for the purposes of prostitution since ‘immoral purposes’ refers to any homosexual act, whether criminal or not (*R v Graham Ford* [1978] 1 All ER 1129).

10 Howard League for Penal Reform, *Unlawful sex: the report of a Howard League Working Party* (1985) para. 5.24

11 *Sexual Offences Act 1956* section 15

12 HC Deb 22 July 1980, vol 989 c283

13 *Criminal Law (Consolidation) (Scotland) Act 1995* section 13(8)

of the defence available for persons charged with unlawful sexual intercourse with a girl aged between 13 and 15 in England and Wales as well as in Scotland.

c. Northern Ireland

The law in Northern Ireland was aligned with that of the rest of the UK by the *Homosexual Offences (Northern Ireland) Order 1982*, following the judgment of the European Court of Human Rights against the UK in the case of *Dudgeon* (1981). In that case the UK was found to have breached Article 8 of the *European Convention on Human Rights* by not legalising homosexual behaviour in Northern Ireland. Article 8 provides that everyone has the right to respect for his private life and that there shall be no interference by a public authority with the exercise of this right except such as is necessary for, amongst other things, the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The facts giving rise to the *Dudgeon* case took place in 1976 and it was then that the Northern Ireland Secretary, Merlyn Rees, had announced that he would be reconsidering the laws on homosexuality by referring them to the Northern Ireland Standing Commission on Human Rights. Opinion in Northern Ireland was substantially divided, with great opposition in particular from religious organisations including the Roman Catholic bishops. The DUP led by Ian Paisley organised a petition to "Save Ulster from Sodomy" which collected nearly 70,000 signatures. In 1979 the Secretary of State for Northern Ireland announced that the Government did not intend to pursue the proposed reform. Following the *Dudgeon* case, however, the relevant legislation was passed.

d. Offences Abroad

Part II of the *Sex Offenders Act 1997* makes certain listed sexual offences committed abroad constitute a criminal offence punishable in this country. For all the listed offences, even homosexual ones, the Act does not apply where both parties were 16 or over at the time. According to Stonewall, the Home Office said it chose 16 'because it seems the most sensible age of all'.[14]

2. Prosecution Policy

It is interesting to note the remarks made by the European Court of Human Rights in relation to prosecution policy in the case of *Modinos v Cyprus* (7/1992/352/426). The judgment was delivered on 22 April 1993. In that case an action was brought against the Cypriot government for breach of Article 8 of the European Convention on Human Rights (the right to private life) in that Cypriot law prohibited male homosexual conduct in private between adults. The Cypriot Attorney-General defended the action on the basis that no prosecutions had been allowed or instituted in Cyprus since the ECHR ruling of 1981 in the *Dudgeon* case.

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[14] 'Age of consent only 16 abroad', *Stonewall newsletter* vol. 4, no. 4, October 1996

Mr Modinos argued that the policy of the Attorney General not to prosecute could change at any time and a member of the public could bring a private prosecution at any time, which meant that there was no guarantee that he would not be prosecuted. The ECHR found in Mr Modinos' favour by eight votes to one.

Prosecution policy in the UK is not a statement of or an adjustment of the legal position. It is merely a statement of policy that will normally be followed, and does not bind the Crown.

a. England and Wales

The Crown Prosecution Service is responsible for the conduct of most prosecutions in England and Wales. Criminal proceedings brought by any other public body, private organisation or individual are effectively private prosecutions. The police take the first steps in the criminal process in that they decide whether or not to charge a person in connection in a particular case. Then Crown Prosecutors decide whether to prosecute in a case referred to them by the police. There are two stages in the decision to prosecute: the evidential test (whether there is enough evidence) and the public interest test (whether the public interest requires a prosecution). Guidance on these sets of criteria is set out in the *Code for Crown Prosecutors.*[15] The section on the public interest test (pp 7-12) is set out below:

> In 1951, Lord Shawcross, who was Attorney General, made the classic statement on public interest, which has been supported by Attorneys General ever since: "It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution". (House of Commons Debates, volume 483, column 681, 29 January 1951.)
>
> The public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction. In cases of any seriousness, a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour. Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed.
>
> Crown Prosecutors must balance factors for and against prosecution carefully and fairly. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence or the circumstances of the offender. Some factors may increase the need to prosecute but others may suggest that another course of action would be better.
>
> The following lists of some common public interest factors, both for and against prosecution, are not exhaustive. The factors that apply will depend on the facts in each case.

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[15] Crown Prosecution Service, June 1996

Some common public interest factors in favour of prosecution:

The more serious the offence, the more likely it is that a prosecution will be needed in the public interest. A prosecution is likely to be needed if:

a a conviction is likely to result in a significant sentence;
b a weapon was used or violence was threatened during the commission of the offence;
c the offence was committed against a person serving the public (for example, a police or prison officer, or a nurse);
d the defendant was in a position of authority or trust;
e the evidence shows that the defendant was a ringleader or an organiser of the offence;
f there is evidence that the offence was premeditated;
g there is evidence that the offence was carried out by a group;
h the victim of the offence was vulnerable, has been put in considerable fear, or suffered personal attack, damage or disturbance;
i the offence was motivated by any form of discrimination against the victim's ethnic or national origin, sex, religious beliefs, political views or sexual preference;
j there is a marked difference between the actual or mental ages of the defendant and the victim, or if there is any element of corruption;
k the defendant's previous convictions or cautions are relevant to the present offence;
l the defendant is alleged to have committed the offence whilst under an order of the court;
m there are grounds for believing that the offence is likely to be continued or repeated, for example, by a history of recurring conduct; or
n the offence, although not serious in itself, is widespread in the area where it was committed.

Some common public interest factors against prosecution:

A prosecution is less likely to be needed if:

a the court is likely to impose a very small or nominal penalty;
b the offence was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence);
c the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by a misjudgment;
d there has been a long delay between the offence taking place and the date of the trial, unless:
- the offence is serious;
- the delay has been caused in part by the defendant;
- the offence has only recently come to light; or
- the complexity of the offence has meant that there has been a long investigation;

e a prosecution is likely to have a very bad effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence;

f the defendant is elderly or is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence is serious or there is a real possibility that it may be repeated. The Crown Prosecution Service, where necessary, applies Home Office guidelines about how to deal with mentally disordered offenders. Crown Prosecutors must balance the desirability of diverting a defendant who is suffering from significant mental or physical ill health with the need to safeguard the general public;

g the defendant has put right the loss or harm that was caused (but defendants must not avoid prosecution simply because they can pay compensation); or

h details may be made public that could harm sources of information, international relations or national security.

Deciding on the public interest is not simply a matter of adding up the number of factors on each side. Crown Prosecutors must decide how important each factor is in the circumstances of each case and go on to make an overall assessment.

The relationship between the victim and the public interest

The Crown Prosecution Service acts in the public interest, not just in the interests of any one individual. But Crown Prosecutors must always think very carefully about the interests of the victim, which are an important factor, when deciding where the public interest lies.

Youth offenders

Crown Prosecutors must consider the interests of a youth when deciding whether it is in the public interest to prosecute. The stigma of a conviction can cause very serious harm to the prospects of a youth offender or a young adult. Young offenders can sometimes be dealt with without going to court. But Crown Prosecutors should not avoid prosecuting simply because of the defendant's age. The seriousness of the offence or the offender's past behaviour may make prosecution necessary.

Police cautions

The police make the decision to caution an offender in accordance with Home Office guidelines. If the defendant admits the offence, cautioning is the most common alternative to a court appearance. Crown Prosecutors, where necessary, apply the same guidelines and should look at the alternatives to prosecution when they consider the public interest. Crown Prosecutors should tell the police if they think that a caution would be more suitable than a prosecution.

The previous edition of the Code had included a specific section on sex offences, but this was omitted from the current version. The Explanatory Memorandum issued at the same time as the new Code explained that this does not mean that the Crown Prosecution Service no longer

regards them as among the most serious offences that can be committed, simply that the pertinent issues were covered in the general list of relevant factors.[16]

Michael Howard said in a BBC Radio interview in February 1994 that the law on the new age of consent in England and Wales must be enforced in this matter, as it is in all other matters. Individual police officers would have discretion, based on guidance he would be issuing soon afterwards, which would include using cautions for first-time offenders. But there was speculation that the CPS would be unwilling to prosecute in consenting relationships.[17]

b. Scotland

On 28 November 1991 Crown Office Circular 2025 was issued to Procurators Fiscal by the Lord Advocate. The circular stated that the Lord Advocate considered that the public interest was not served by routinely prosecuting all persons who participated in those consensual homosexual acts which remain unlawful. The terms of the circular received extensive publicity and on 20 December 1991 a new Crown Office Circular No 2025/1 was issued to Procurators Fiscal. The Lord Advocate had taken the view that there was a public misapprehension that the earlier circular amounted to a unilateral change in the law. The new circular made reference to a continuing review of prosecution policy in this area and set out new directions. These directions were issued when the age of consent for homosexual acts was 21, and included the following directions:

> 1. Where both of the participants are over 18 years but one or both are under 21 years and the act has taken place in private and where there are circumstances pointing to exploitation, corruption, or breach of trust, prosecution would be appropriate. Where the Procurator Fiscal receives a report involving individuals in this age group and none of these circumstances is present, but the Procurator Fiscal considers there are other circumstances which would justify proceedings, a report should be made to Crown Office for consideration by Crown Counsel.
>
> 2. Where both of the participants are over 16 years but one or both are under 18 years and the act appears to have been consensual and in private, the Procurator Fiscal should report the case to Crown Office for consideration by Crown Counsel.
>
> 4. Where it appears that one of the parties has engaged in homosexual acts *before* the occasion under consideration and has acted as a prostitute, there is little justification in pursuing the client of such an individual, while ignoring his activity as a prostitute [......]

Following the 1994 vote on the age of consent, the Lord Advocate, Lord Roger, was put under pressure by Bill Walker to revoke this Crown Office circular.[18] He said he would

16 Crown Prosecution Service, June 1996, p. 16, para. 5.2

17 'Scots law officers urged to prosecute under-age gays', *The Scotsman*, 23 February 1994

18 HC Deb 22 February 1994 vol 238

review it once the new age of consent became law.[19] The Crown Office have confirmed that advice has now been issued stating that it is not considered in the public interest *routinely* to prosecute people who have consensual homosexual intercourse with those aged over sixteen.[20] The Lord Advocate has directed procurators fiscal to report to the Crown Office for Crown counsel's consideration cases of consensual homosexual acts in private where both of the participants are over 16 year but one or both are under 18 years.[21]

3. Lesbians

There are not, and never have been, specific offences relating to lesbianism in the United Kingdom. On 4 August 1921, Mr Macquisten had moved an amendment to the *Criminal Law Amendment Bill* which sought to criminalise lesbian behaviour.[22] The amendment was later defeated in the Lords on the grounds (first given in the Commons by Lt Col Moore-Brabazon) that it would draw attention to lesbians and 'do harm by introducing into the minds of perfectly innocent people the most revolting thoughts'.[23]

General offences such as indecent assault could be used to convict lesbian women for sexual activities. By section 14 of the *Sexual Offences Act 1956* it is an offence for a person (male or female) to make an indecent assault on a woman. Section 14(2) states that a girl under the age of 16 cannot in law give any consent which would prevent an act being an assault for these purposes. This gives an effective age of consent of 16 (the relevant age in Northern Ireland is 17). In 1984 the Criminal Law Revision Committee recommended that the age of consent for lesbian sexual acts should remain at 16.[24]

In Scotland, the additional protection afforded by the common law to girls under 12 from lewd, indecent or libidinous practice or behaviour by any person, male or female, has been extended by statute to girls between the ages of 12 and 16. The girl's consent does not provide a valid defence.[25]

4. Homosexuality in the Armed Forces[26]

The decriminalisation of homosexual acts undertaken in private between two consenting males over the age of 21, which was brought about by the *Sexual Offences Act 1967,* did not extend to members of the armed forces. Section 146 of the *Criminal Justice and Public Order Act 1994* then repealed those sections of the *1967 Act* which related only to members of the

[19] HC Deb 8 February 1994 vol 237 c180W, and 25 February 1994 vol 238 c488W,
[20] Information provided by the Policy Group of the Crown Office, 18 September 1997
[21] HC Deb 21 July 1997 vol 298 c419W
[22] HC Deb 4 August 1921 vol. 145 c1799-1800
[23] *ibid* c1806
[24] Criminal Law Revision Committee Fifteenth Report: *Sexual Offences*, Cmnd 9213, April 1984, para 11.4
[25] *Criminal Law (Consolidation) (Scotland) Act 1995* section 6
[26] Mark Oakes, International Affairs and Defence Section

armed services and the merchant navy. Therefore homosexual acts committed by such people will not in themselves be offences unless they are also offences under civilian criminal law.

However, the UK policy had been to administratively discharge Service personnel who were found to have committed a homosexual act or expressed a homosexual orientation. On 27 September 1999, the European Court of Human Rights (ECHR) declared unanimously that the ban on homosexuals serving in the UK armed forces was illegal under Article 8 of the European Convention on Human Rights, which safeguards an individual's right to privacy.[27] The challenge to the ban had been taken to the ECHR by three former Servicemen - ex-RAF administrator Graeme Grady, ex-Royal Navy Lieutenant-Commander Duncan Lustig-Prean, ex-naval rating John Beckett - and a former RAF nurse Jeanette Smith. This followed an earlier rejection of their case by the Appeal Court in London. The ECHR judgement stated:

> The Court considered the investigations, and in particular the interviews of the applicants to have been exceptionally intrusive, it noted that the administrative discharges had a profound effect on the applicant's careers and prospects and considered the absolute and general character of the policy, which admitted of no exception, to be striking. It therefore considered that the investigations conducted into the applicants' sexual orientation together with their discharge from the armed forces constituted especially grave interferences with their private lives. [28]

As to whether the Government had demonstrated 'particularly convincing and weighty reason' to justify those interferences the Court noted:

> the Government's core argument was that the presence of homosexuals in the armed forces would have a substantial and negative effect on morale and, consequently, on the fighting power and operational effectiveness of the armed forces. The Government relied, in this respect, on the Report of the Homosexual Policy Assessment Team (HPAT) published in February 1996. The Court found that, insofar as the views of armed forces' personnel outlined in the HPAT Report could be considered representative, those views were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation. It was noted that the Ministry of Defence policy was not based on a particular moral standpoint and the physical capability, courage, dependability and skills of homosexual personnel were not in question. Insofar as those negative views represented a predisposed bias on the part of heterosexuals, the Court considered that those negative attitudes could not, of themselves, justify the interferences in question any more than similar negative attitudes towards those of a different race, origin or colour.[29]

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27 The *Human Rights Act 1998*, which incorporates the European Convention on Human Rights into UK law, was given Royal Assent on 9 November 1998. From 2 October 2000 British judges will be able to apply provisions of the convention directly and will be required to interpret legislation, where possible, in a way compatible with the convention.

28 ECHR Judgements in the cases of *Lustig-Prean and Beckett v. the United Kingdom* and *Smith and Grady v. the United Kingdom*, ECHR web site at http://www.dhcour.coe.fr

29 *ibid*

Defence Secretary George Robertson commented on the judgement:

> This Government, like all Governments, has to accept the ruling of the European Court of Human Rights. The details of this complex judgement and its practical implications are being studied carefully. After consulting the Service Chiefs, Ministers will be making their recommendations in a timely manner. In the meantime, cases in the system will be put on hold.[30]

On 12 January 2000, the Secretary of State for Defence, Geoff Hoon, announced to the House the Government's new policy on homosexuals in the armed forces. He stated that the policy to bar homosexuals from the Armed Forces was not legally sustainable and had been replaced with a new policy which recognised sexual orientation as a private matter. He underlined that the new policy had been formulated with the full consultation and support of the three Service Chiefs and was firmly underpinned by a code of social conduct that applies to all regardless of their sexual orientation. He outlined the essence of the new code of conduct as follows:

> This code will apply across the forces, regardless of service, rank, gender or sexual orientation. It will provide a clear framework within which people in the services can live and work, and it will complement existing policies, such as zero tolerance towards harassment, discrimination and bullying. I would emphasise that we are not tightening the rules on heterosexual relationships.
>
> The Code is not an abstract legal document full of rules and regulations. It has been developed by service experts who understand fully the operational needs and day-to-day practicalites of the armed forces. Personal relationships do not ever lend themselves to precise prescription and the code recognises explicitly that:
>
> "It is not practicable to list every type of conduct which might constitute social misbehaviour".
>
> Therefore we have placed at the heart of the code what we call the service test, set out in the following terms:
>
> "Have the actions or behaviour of an individual adversely impacted or are they likely to impact on the efficiency or operational effectiveness of the Service?"
>
> In using the code, commanding officers will have to apply the service test through the exercise of their good judgement, discretion and common sense - the essence of command and effective management of people.[31]

He concluded by saying:

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[30] MOD Press Release, 27 September 1999.

[31] HC Deb 12 January 2000, cc287-289

> There will be those who would have preferred to continue to exclude homosexuals, but the law is the law. We cannot choose the decisions we implement. The status quo is simply not an option. This code centres on the paramount need to maintain the operational effectiveness of the armed forces. I have no doubt it is the best way forward.[32]

Mr Iain Duncan Smith, the Conservative Shadow defence spokesman, while expressing regret at the Court's decision, turned his attention principally to the possible practical difficulties in implementing the new policy:

> The code is all about sexual behaviour, as the Secretary of State made clear. I agree with him that, in this context, the only way to write a code such as this is to make it as broad as possible and not to be specific. However, despite the guidance and advice in the statement, the matter boils down to a two-line service test, which in essence comprises only one sentence. How that test is operated will be critical.[33]

Mr Duncan Smith suggested that a fundamental review of the effects of the policy on military effectiveness should be carried out at the earliest opportunity.

The Liberal Democrat defence spokesman, Paul Keetch, welcomed the Government's announcement but also expressed caution in how the policy should be implemented:

> The Secretary of State pointed out that the implementation of the new code of conduct will be a challenge for the leadership of our armed forces. He is right. Does he agree that great sensitivity to the concerns of gay and straight personnel will need to be exercised, if a cultural sea change is to be achieved without damaging the morale and efficiency of our armed forces?[34]

5. Heterosexuals

a. England and Wales

It is an offence for a man or boy to have (vaginal) sexual intercourse with a girl under the age of 16 in England and Wales.[35] It is important to note that an offence is committed even if the intercourse is consensual. This offence is punishable by a maximum of two years' imprisonment if convicted in the Crown Court, or six months' imprisonment and/or a fine not exceeding £5,000 if convicted in a magistrates' court.

However, it is not an offence if a man under the age of 24 has unlawful sexual intercourse with a girl aged between 13 and 15, if he has not previously been charged with a similar

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32 *ibid*
33 HC Deb 12 January 2000, c289
34 HC Deb 12 January 2000, cc292-293
35 *Sexual Offences Act 1956* section 6(1)

offence and he believes (and has reasonable grounds for believing) that the girl was 16 or over.[36]

Section 5 of the *Sexual Offences Act 1956* makes unlawful sexual intercourse with a girl under 13 an offence carrying a maximum punishment of life imprisonment.

Buggery of a woman is no longer an offence if both parties are over 18 and the act took place in private.[37] However, in the circumstances where buggery does amount to an offence, both parties can be prosecuted for committing this offence. The exceptions to what will be considered to be ‘in private’ as regards buggery between men (namely where more than two people are present or the act takes place in a public lavatory)[38] do not apply here. Whether an act in a particular place is considered to be 'in private' is therefore simply a question of fact which would have to be decided in the light of the facts of the individual case.

There are no specific privacy provisions relating to vaginal heterosexual intercourse, but the common law offences of conspiracy to corrupt public morals and outraging public decency may however be relevant; and in some circumstances group sex acts between heterosexuals might involve the commission of an offence under section 33 of the *1956 Act* of keeping or managing a brothel, as an element of reward is not necessarily required (*Kelly v Purvis* [1983] 1 All ER 525).

The law does not provide specifically for the protection of boys who are subject to sexual advances from older women, but such behaviour could be caught by a number of more general sexual offences such as indecent assault (for the purposes of which the effective age of consent for both boys and girls is sixteen).[39] If the child was under 14 the *Indecency with Children Act 1960* could apply even if the behaviour does not amount to indecent assault.

The history of the age of consent for girls shows that 16 is a relatively high age compared to that which applied in previous centuries. For over 700 years the criminal law has by statute prohibited men from having unlawful sexual intercourse with girls below a certain age. Originally, in 1275, the age was 12 and it was not changed until 1875 when the *Offences Against the Person Act*[40] raised it to 13. In 1885, scarcely ten years later, the *Criminal Law Amendment Act*[41] raised the age again - this time to the present age of 16. The 1885 legislation was enacted after a campaign aimed at eliminating child prostitution and the sexual exploitation of young girls. This legislation also introduced the offence of gross indecency between men.

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[36] *1956 Act* section 6(3)

[37] *1956 Act* section 12 (as amended by the *Criminal Justice and Public Order Act 1994* section 143)

[38] *1956 Act* section 12 (1B)

[39] *1956 Act* sections 14 and 15

[40] 38 and 39 Vict c94

[41] 48 and 49 Vict c69

The age of consent has been seen as something of a misnomer, as section 6 of the *1956 Act* does not mention consent. It is possible that a girl under 16 could give her consent to sexual intercourse but in law the man will still be guilty of an offence. If the girl had not consented then the charge would be rape. In the *Report on the Age of Consent in Relation to Sexual Offences*[42] the Home Office Policy Advisory Committee on Sexual Offences (PACSO) discussed whether the legal fiction of the age of consent should be replaced with a term more accurately representing the law. This had been advocated to PACSO by the Sexual Law Reform Society but was rejected on the grounds that the expression is convenient for describing the age below which the consent of a girl is no answer to a charge of having sexual intercourse with her.[43] The report however rejected the expression in relation to homosexuals preferring the term 'minimum age'. It noted that the Campaign for Homosexual Equality was critical of the use of this term on the grounds that it stigmatised homosexual relations and that it failed to make any new concept apparent. PACSO took the view, however, that it would be artificial to call ages as high as 18 and 21 'ages of consent'.[44]

b. Scotland

The law regarding heterosexual (vaginal) intercourse is substantially the same as for England and Wales. Under section 5(1) of the *Criminal Law (Consolidation)(Scotland) Act 1995* sexual intercourse with a girl who is not yet 13 is an offence punishable on conviction by indictment by life imprisonment. Sexual intercourse with a girl aged between 13 and 15 is an offence under section 5(3) of the *1995 Act.*

Sexual acts falling short of intercourse are also criminal if committed with a girl under the age of 16 (*1995 Act*, section 6). However, it is probably not an offence for a woman to engage in indecent practices towards a boy who has reached the age of puberty (which is taken as 14) and who consents, unless the conduct amounts to shameless indecency.

Nor is anal sexual intercourse between a man and a woman an offence in Scotland, as the offence of sodomy can only be committed by a man with another man.

c. Northern Ireland

The age of consent for heterosexuals in Northern Ireland is 17.[45] However, a person can marry at the age of 16, and so section 1 of the *Age of Marriage Act (NI) 1951* provides a defence for a husband who has sexual intercourse with his 16-year-old wife.

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[42] Cmnd 8216, April 1981

[43] para 6

[44] para 27

[45] *Criminal Law Amendment Act 1885* section 5 (as amended by the *Children and Young Persons (Northern Ireland) Act 1950*)

6. Other European countries

Most European countries have a common age of consent for heterosexual and homosexual sex. The following table shows the age of consent for European Union countries:

	Male/Female	Female/Female	Male/Male
Austria	14	14	14/18 (#1)
Belgium	16 (#2)	16 (#2)	16 (#2)
Denmark	15	15	15
Finland	15	15	15
France	15	15	15
Germany	16	16	16
Greece	17	-	17
Ireland	17	17	17
Italy	14/16 (#3)	14/16 (#3)	14/16 (#3)
Luxembourg	16	18	18
Netherlands	16 (#4)	16 (#4)	16 (#4)
Portugal	16/18 (#5)	16/18 (#5)	16/18 (#5)
Spain	12 (#6)	12 (#6)	12 (#6)
Sweden	15	15	15
United Kingdom	16 (#7)	16 (#7)	18

#1 - it is illegal for a male over 19 to commit homosexual acts with a male between 14 and 18
#2 - heavier penalties are levied against those in authority
#3 - if one of the participants is an older family member or guardian, the age of consent is 16
#4 - if a person between the ages of 12 and 16 commits a sexual act with another person between those ages, they will not be prosecuted unless there is a complaint from the other participant, a parent or a guardian. However, if a person over 16 commits a sexual act with a person under 16, they will be liable for prosecution regardless of whether or not a complaint has been made.
#5 - it is illegal for a person aged 18 or over to commit sexual acts with a person under 18
#6 - there is no statutory age of consent. In general, consensual sexual relations are not penalised from the age of 12, although a person aged over 16 who has sex with a person aged between 12 and 16 may be liable to prosecution
#7 - 17 in Northern Ireland

B. Proposals for reform

1. The *Criminal Justice and Public Order Act 1994*

On the Second Reading of the Bill which became the *Criminal Justice and Public Order Act 1994,* Edwina Currie announced that she would be tabling amendments at Committee stage which would seek to harmonise the age of consent for heterosexuals and homosexuals at 16.[46] The proposed new clause would apply only in England and Wales and Scotland. The debate on this amendment in Committee (taken on the floor of the House) on 21 February 1994[47]

[46] HC Deb 11 January 1994 vol 235 cc 67-69
[47] HC Deb 21 February 1994 vol 238 cc74-123

was the first time the issue had been debated in Parliament since the coming into force of the *Sexual Offences Act 1967.*

During this debate, Tony Blair, then Shadow Home Secretary, said:

> [The issue] is not at what age we wish young people to have sex. It is whether the criminal law should discriminate between heterosexual and homosexual sex. It is therefore not an issue of age, but of equality. By supporting equality, no one is advocating or urging gay sex at 16 any more that those who would maintain the age of consent for heterosexual sex advocate that girls or boys of 16 should have sex. It is simply a question of whether there are grounds for discrimination. At present, the law discriminates.
>
> … people are entitled to think that homosexuality is wrong, but they are not entitled to use the criminal law to force that view upon others … That is why, also, the so-called compromise of 18 is misguided. What is the rationale behind maintaining the stigma but at a different age?
>
> … it is wrong to treat a man as inferior because his sexuality is different. A society that has learned, over time, racial and sexual equality can surely come to terms with equality of sexuality. That is the moral case for change tonight. It is our chance to welcome people - I do not care whether there are 50,000, 500,000 or five million; it matters not a damn - into full membership of our society on equal terms. It is our chance to do good, and we should take it. [48]

Edwina Currie's amendment was defeated by 307 votes to 280. Included in those who voted for it were John Smith and Neil Kinnock, most of the senior Labour MPs, most Liberal Democrats, including Paddy Ashdown, and 43 Conservatives, including eleven Cabinet ministers and William Hague. Thirteen of the seventeen Ulster MPs, and 38 Labour MPs, including David Blunkett and Ann Taylor, voted against it.

However, this vote was followed immediately by one on Sir Anthony Durant's amendment, which aimed to lower the age of consent to 18. This amendment was passed by 427 votes to 162, and supporters included Michael Howard and John Major, and most of the rest of the then Cabinet. Two of Ulster's 17 MPs also voted for it. However, it was opposed by thirteen Labour MPs (five of them in a protest vote against the failure of the first amendment) and three of the Cabinet ministers who had also opposed Edwina Currie's amendment (John Redwood, Michael Heseltine and John Gummer). Altogether 154 MPs opposed both amendments: of these, 134 were Conservative, 6 Labour, 7 Ulster Unionists, one Ulster Popular Unionist Party, 3 Democratic Unionist Party, 2 SDLP, and 1 SNP.

The Lords accepted the amendment lowering the age of consent to 18 for homosexual acts, and it came into force on the passing of the Act on 3 November 1994.

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[48] HC Deb 21 February 1994 vol 238 cc97-100

An amendment tabled by Simon Hughes which was intended to equalise the age of consent for homosexuals and heterosexuals at 17 was not called. Nor was one tabled by Geoff Hoon which sought to place the burden of proof of whether there was consent on the older person in cases where an older person of either sex seduced a younger person.

2. The *Crime and Disorder Bill 1997-98*

a. Background

Following a complaint brought in June 1994 by Euan Sutherland, a young gay man, with the support of Stonewall,[49] the European Commission of Human Rights concluded that the United Kingdom had a case to answer for setting the homosexual age of consent at 18. The accepted ground for the complaint was breach of Articles 8 and 14 of the European Convention on Human Rights. Article 8 grants everyone the right to respect for his private and family life, his home and his correspondence, and Article 14 states that the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The government was asked to justify the continuing inequality in the treatment of gay men, and, in particular, the criminalisation of the young gay men involved. It replied that it was using the discretion allowed to it (under the doctrine of 'margin of appreciation' developed by the European Court of Human Rights) to allow young men time to consider their sexuality, and to prevent young gay men from setting themselves apart from society at too young an age.[50]

After hearing the arguments for both sides, the Commission ruled (by 14 votes to 4) that there had been a violation of Article 8 taken in conjunction with Article 14, and that the case was admissible.[51] Following this report, the Government announced, in a formal document lodged with the European Court on 21 October 1997, that it and the applicants had agreed to apply to the Court for this case and the parallel case of Morris to be deferred pending a vote in Parliament 'at the earliest opportunity'; and that if a majority of the House of Commons voted in favour of equalising the age of consent, the government would bring forward legislation to implement this before the end of the following Parliamentary session [ie. 1998-99].[52]

In the summer of 1997, the Government had rejected the suggestion that measures to lower the age of consent be contained in the forthcoming *Crime and Disorder Bill* which was first

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[49] Application no 25186/94

[50] 'Government argues in Europe to keep gay sex at 18', *Gay Times*, August 1995

[51] adopted on 1 July 1997

[52] 'Statement on age of consent following report by European Commission on Human Rights', *Home Office press notice 033/97*, 7 October 1997

introduced in the Lords. In a written answer to a Parliamentary Question on 18 July 1997, Alun Michael, Minister for Criminal Policy, stated:

> The Government have long held the view that setting the age of consent for homosexual acts is a matter for Parliament to decide, and that it should be the subject for a free vote at a suitable opportunity. It seems unlikely that the scope of the Crime and Disorder Bill will be wide enough to provide that opportunity.[53]

However, a backbench amendment to the Bill, tabled by Ann Keen with the support of Conservative, Liberal Democrat and Labour Members, provided an opportunity for consideration of this matter.[54] It was intended to lower the age of consent for buggery (both homosexual and heterosexual), as well as for acts of gross indecency between men, from 18 to 16 in England and Wales, and in Scotland. The proposed new age of consent for such acts in Northern Ireland was 17, which would have brought it into line with the heterosexual age of consent there and with the law in the Republic of Ireland.

Other amendments sought variously to increase the protection for 16- and 17-year-olds from those who abuse their position of trust or to increase the age of consent if one of the parties is more than 21, and to amend the definition of 'in private' for the purposes of homosexual activity. However, these were not accepted by the Commons and therefore did not go to the Lords for consideration.

When a division was called on Ann Keen's amendment, it was passed by a majority of 207 (336 votes to 129). Thirteen Labour Members, including the deputy chief whip, voted against the new clause, and seventeen Tory Members (including two shadow ministers) voted in favour of it. The Prime Minister and nine other Cabinet Ministers voted for the amendment, but both Paddy Ashdown and William Hague were absent from the Chamber.[55] Ann Taylor and David Blunkett (who had both voted against 16 in 1994) and eight other members of the Cabinet did not vote. The *Catholic Herald* on 26 June 1998 named 26 Catholic and practising Christian Members who had voted for Ann Keen's amendment, describing them as 'those who voted to allow your child to have gay sex' and accusing them of betraying the people's trust.[56] It described the 'bewilderment' of the Catholic community at the fact that not one Catholic Labour MP voted against the amendment.[57]

Baroness Young tabled a motion in the Lords designed to overturn the amendment passed by the Commons, which was debated on 22 July 1998.[58] She was particularly concerned that the proposals were rushed and did not give proper time for consideration; and that the

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[53] HC Deb 18 July 1997, vol 298 c347w

[54] HC Deb 22 June 1998, vol. 314 cc754-811,

[55] According to the press, Mr Ashdown was on the Kosovo border and Mr Hague had flu - 'MPs back gay sex at 16', *The Guardian*, 23 June 1998

[56] 'Catholic MPs use free vote to back school-age gay sex', *Catholic Herald* 26 June 1998

[57] The following week it apologised, stating that Geraldine Smith MP did in fact vote against the amendment.

[58] HL Deb 22 July 1998 vol. 592 cc936-76

Government had not introduced their own Bill to deal with these matters. On the division, Baroness Young's motion was agreed to by 290 votes to 122, the amendment was lost, and the matter therefore had to be referred back to the House of Commons.

The government was concerned that if the Commons rejected the Lords' position on this issue and sent the Bill back to the Lords, the Lords would reject it again which would mean that the Bill could not receive Royal Assent until the 'spill-over' session in October. Even then, there was not any guarantee that the amendment would be agreed to by the Lords; and the provisions of the Parliament Act could not be invoked as the Bill had begun in the Lords.

In the debate to discuss the Lords' reasons for disagreeing with the Commons amendments on the age of consent,[59] the Home Secretary asked the House not to insist on the amendment to which the Lords had disagreed. He announced to the House that legislation dealing with the age of consent would be introduced in the 1998-99 session in order to give effect to 'both the letter and the spirit' of the undertakings given the previous October. In order to allow the Parliament Act to be invoked if necessary, such a Bill would be introduced first in the House of Commons (cc182-3). Ann Keen, Stephen Twigg and the pressure group Stonewall were all reported as being satisfied with this arrangement;[60] and the Commons agreed to Mr Straw's motion without a division. The amendment was therefore dropped from the Bill, which went on to receive Royal Assent on 31 July 1998.

More detailed discussion of these debates is contained in Research Paper 99/4, pages 23 to 27.

C. The *Sexual Offences (Amendment) Bill* [Bill 10 of 1998-99]

The government's promise to introduce legislation on the age of consent, as well as on abuse of a position of trust was confirmed in the Queen's Speech on Tuesday 24 November 1998:

> Parliament will be given an opportunity to vote on the age of consent. The Bill will strengthen the protection of young people from abuse of trust.

The *Sexual Offences (Amendment) Bill* [Bill 10 of 1998-99] was introduced in the House of Commons on 16 December 1998 to deal with both of these issues. On the second reading debate on 25 January 1999 the leaders of the three main parties confirmed that there would be a free vote on the age of consent clause.[61]

Jack Straw stated that the legislation was not the thin end of the wedge, and would not lead to a reduction in the age of consent to 14, legalisation of homosexual marriages or adoption by

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[59] HC Deb 28 July 1998 vol. 317 cc176-211

[60] 'Lords win delay over lowering gay age of consent as measure dropped from crime bill', *The Guardian*, 28 July 1998

[61] HC Deb 25 January 1999 vol 324 c20 (Jack Straw), c30 (Sir Norman Fowler), c41 (A.J Beith)

homosexual couples.[62] Norman Fowler welcomed the opportunity for a full debate on the issues raised.[63]

The Bill was given a second reading in the House of Commons by 313 votes to 130. Voting was mainly along party lines although fifteen Labour MPS and three Liberal Democrats voted against it, and seven Conservatives voted in favour (in addition Shaun Woodward was a teller for the Ayes).

Clause 1 on the age of consent went to a Committee of the Whole House[64] while the other clauses went Upstairs to Standing Committee E for debate. Clause 1 was passed by 330 to 126 votes at this stage. Certain amendments were added at the Report stage (these are discussed below with the appropriate clauses of the current Bill), and on Third Reading the Bill was passed by 281 to 82 votes. In his winding-up speech, Paul Boateng said:

> The other place had better listen to the democratically elected chamber, because my Right Honourable Friend the Secretary of State has made it crystal clear that we do not intend for the will of Parliament to be thwarted again.[65]

The Bill went to the Lords as HL Bill 28 of 1998-99, where it was debated on second reading for seven-and-a-half hours on 13 April 1999.[66] Baroness Young tabled an amendment to block the Bill's second reading for six months, which was intended to delay the Bill beyond the current Session and effectively end its passage. She said she felt entitled to do so as the age of consent was not part of the Government's election manifesto. Lady Young based her arguments against the Bill on the need to protect children, and felt that the provisions on abuse of trust did not go far enough; whereas the Bill's supporters (such as the Labour peer Lord Alli) argued for equality of treatment. Once again health issues were raised on both sides of the argument, as was the question of public opinion.

Baroness Young's amendment was passed on a free vote, by 222 to 146 votes, and the Bill was therefore lost in that Session. 120 hereditary peers voted with Lady Young, and 41 for the Bill. Three out of the seven Bishops present voted to give the Bill a second reading.

On 23 July 1999 Jack Straw signalled his intention to re-introduce the Bill in session 1999-2000, and to use the Parliament Acts if necessary to secure its passage. He was given dispensation to announce the Government's intentions prior to the Queen's Speech because the European Court of Human Rights had to be assured that the Bill would be reintroduced.

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[62] *ibid* c22
[63] *ibid* c34
[64] HC Deb 10 February 1999 vol 325 cc331-383
[65] HC Deb 1 March 1999 vol 326 c807
[66] HL Deb 13 April 1999 vol 599 cc 647-761

Without such assurance it would not have granted the Government's application for a further extension in the stayed cases of *Sutherland* and *Morris* (see above, pp23-24).[67]

Under the procedures of the *Parliament Acts 1911 and 1949*, a Bill which has been passed by the Commons in two successive Parliamentary Sessions but rejected by the Lords in each of those Sessions can be presented for Royal Assent following its second rejection by the House of Lords. These procedures have been used only six times.

The issue of Scottish devolution had to be addressed in relation to the use of the Parliament Acts. The Bill to be reintroduced would have to be exactly the same as the one defeated by the Lords, and therefore it would be impossible to remove Scotland from the Bill's scope. However, it deals with an area within the Scottish Parliament's remit. The Scottish Executive therefore decided that the Bill should be considered unfinished Westminster business, but that the Scottish Parliament would debate the issue and could subsequently amend or repeal any provisions relating to Scotland once the Bill has become law.[68]

D. The *Sexual Offences (Amendment) Bill* [Bill 55 of 1999-2000]

1. General

The present *Sexual Offences (Amendment) Bill* [Bill 55 of 1999-2000] was introduced in the House of Commons on 28 January 2000, just over a year after the Commons second reading debate on last session's *Sexual Offences (Amendment) Bill*. The new Bill is exactly the same as the debated by the Lords in the last session – in other words it includes the Commons amendments outlined in this Paper. The Government's *Explanatory Notes* to the Bill (Bill 55-EN) provide some background and comment.

This part of the paper will discuss the general matters relating to the whole of the Bill, as well as Clause 1 of the Bill which relates to the age of consent; analysis of the remaining clauses is contained in part II.E below.

The Bill applies to Northern Ireland and Scotland as well as England and Wales. Clause 7(2) provides that for the purposes of the *Scotland Act 1998*, it should be treated as a 'pre-commencement enactment'. Section 53(3) of the *Scotland Act 1998* states that the definition of pre-commencement enactment includes:

> (a) an Act passed before or in the same session as this Act and any other enactment made before the passing of this Act, [and]
>
> (b) an enactment made, before the commencement of this section, under such an Act or such other enactment […]

[67] see 'Sexual Offences (Amendment) Bill will return to Parliament', *Home Office press notice 225/99*, 23 July 1999

[68] Scottish Parliament Official Report 9 June 1999 col 359

Section 53(2) of the *1998 Act* provides that functions conferred on a Minister of the Crown by any pre-commencement enactment shall be exercisable by the Scottish Ministers instead of by a Minister of the Crown. Therefore the power given to the Secretary of State in the present Bill to bring the Act into force would be carried out by Scottish Ministers in relation to Scotland. This raises the theoretical possibility of different commencement dates north and south of the border.

The government's assessment of the financial effects of the Bill are set out in the *Explanatory Notes* (paras 23-25), which also notes that the Bill is not expected to have any effects on public service manpower and only a negligible impact on business, charities or voluntary bodies (paras 26-27). The working party on abuse of trust had estimated that prosecutions under the new offence might result in costs to the criminal justice system of around £77,000 to £115,000 a year,[69] but the *Explanatory Notes* suggest that this might be approximately offset by savings from no longer taking action through the criminal justice system against those males engaged in homosexual activity with 16- and 17-year-olds, including 16- and 17-year-olds themselves.

The fact that provisions on both the age of consent and abuse of a position of trust are contained in one Bill has led to comments on a link between the two issues. The working group whose recommendations led to the proposals on breach of a position of trust had been asked by the government to give priority to this part of its work, in the light of the debates in Parliament linking the need to provide protection from abuse of trust with the equalisation of the age of consent, because the government was committed to giving Parliament the opportunity to consider equalising the age of consent in the 1998-99 session.[70] The proposals for a new offence were reported in the press as being intended to allay fears that lowering the age of consent for homosexuals would leave teenagers vulnerable to exploitation.[71]

However, concern was voiced in the gay press about linking these two issues, as it was felt that this sent a 'homophobic' message and that relationships between men would be the prime target of the new offence.[72] The pressure group Stonewall, amongst others, did however decide to back the Bill, as it felt it embodied the principles of equal treatment and equal protection for all young people. This followed a meeting with the Home Office Minister Paul Boateng, who is reported as having denied that the proposed new offence is simply a way of defusing opposition to an equal age of consent. He apparently promised that he will make absolutely certain that the two issues of age of consent and abuse of trust are treated as being entirely separate.[73]

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69 Interim report, 25 November 1998, Dep 98/1325, para. 33

70 *ibid* para. 1

71 for example 'Teacher-pupil love affairs to be outlawed', *The Times*, 22 June 1998

72 see for example '"Abuse of trust" law coming soon', *Gay Times*, November 1998

73 'Gay groups will not oppose "abuse of trust" law, *Gay Times*, January 1999. During the third reading debate on the Bill which became the *Crime and Disorder Act 1998*, Alun Michael (Paul Boateng predecessor as

2. Age of consent

The intended effect of **Clause 1** is to reduce the minimum age at which a person may lawfully consent to buggery/sodomy and certain homosexual acts, so that the age of consent for sexual activity would be the same for male homosexuals as for heterosexuals (ie. 16 in England, Wales and Scotland, and 17 in Northern Ireland). Consensual heterosexual buggery as well as homosexual buggery would be legal when both parties reach 16 (or 17 in Northern Ireland).[74] The *Explanatory Notes* to the Bill explain the proposed effects of Clause 1 in more detail (pp. 3-4), and set out the relevant extracts from existing legislation showing the changes which it would make (pp. 9-13).

Two further provisions would also be amended under clause 1 which are ancillary to the main issue. **Clause 1(1)(b)** seeks to amend the sentencing provisions contained in Schedule 2 to the *Sexual Offences Act 1956*, which state that a maximum penalty of five years' imprisonment (rather than two) is available where a man aged 21 or over is convicted on indictment of indecency offences with a man aged 18 or under.[75] The Bill seeks to change this so that the increased penalty would apply only where the younger man is aged 16 or under. However, it does not make any corresponding amendments to the sentencing of those convicted of buggery or attempted buggery although the age of 18 is also relevant in such cases.[76]

In addition, section 8 of the *Sexual Offences Act 1967* states that the consent of the Director of Public Prosecutions is required for prosecuting homosexual acts[77] where either of the men involved was under 21. This section was not amended when the age of consent was reduced to 18 by the *Criminal Justice and Public Order Act 1994*; **Clause 1(2)(b)** of the present Bill seeks to have the age of 16 substituted for that of 21.[78]

The Bill does not address a number of criminal law issues which have been seen as discriminating between homosexual and heterosexual activity. For instance, it does not seek to alter the position that homosexual acts, including buggery, are not considered to be in private if more than two people are present, whereas no such provision applies for heterosexual buggery.

It is possible that this and other issues will be addressed by the ongoing **review of sexual offences legislation**. This review was announced on 15 June 1998 by Alun Michael, who was

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Home Office Minister) had said that he saw these as two separate issues - HC Deb vol 314 c790, 22 June 1998.

74 Anal intercourse between a man and a woman is not a specific offence under Scots law, as sodomy can only be carried out by two men.

75 *Sexual Offences Act 1956*, Schedule 2 para. 16(a) and (b)

76 *Sexual Offences Act 1956*, Schedule 2 para. 3(a) and (b). Dr Evan Harris proposed an amendment to bring this into line in the Committee stage of last session's Bill – HC Deb 10 February 1999 c331

77 buggery with another male; gross indecency with another male; or aiding, abetting, counselling, procuring or commanding the commission of these offences

78 This was the subject of a separate amendment to the *Crime and Disorder Bill* tabled by Ann Keen, consequential to her main amendment, which was also withdrawn following defeat in the House of Lords.

Minister of State in the Home Department at the time.[79] He stated that this area of law was ripe for reform, and that the review would ensure that the framework of sexual offences and penalties is coherent and effective.[80] The Home Office leaflet giving details of the review states that:

> The terms of reference of the review are:
>
> To review the sex offences in the common and statute law in 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"
>
> The review will be looking at the law on rape and sexual assault, at the homosexual offences, at offences of sexual exploitation and 'flashing'.
>
> The review will **not** be looking at decriminalising prostitution or pornography, at reducing the age of consent below sixteen, or at procedural or evidential issues.

The review team conducted a consultation exercise last year, and its report is expected to be published before the summer.

The Bill does not seek to alter the situation of people who are currently subject to the registration requirements of the *Sex Offenders Act 1997* as a result of having committed consensual homosexual acts where one of the parties was under 18. Some Members would have liked to see this changed at the same time as the age of consent, so that people would not be required to continue registering in respect of acts which would no longer be offences once the age of consent was lowered.[81]

The Home Secretary had stated in July 1998 that 'further consideration' of this problem was necessary, and that 'we need to have discussed and resolved that issue before any Bill is brought forward'.[82] Paul Boateng pointed out the difficulties of removing the registration requirement for certain offenders and stated that this would only apply to at the most 78 people.[83] He pointed out that the registration requirement is not based on the age of consent, but undertook to refer the matter to the ongoing review of the *Sex Offenders Act 1997*.

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[79] HC Deb 15 June 1998 vol 314 c10

[80] see 'Sex offence laws to be reformed', *Home Office press notice 222/98*, 15 June 1998

[81] This was the subject of proposed amendments by Dr Evan Harris to both the *Crime and Disorder Bill 1998-99* and last session's *Sexual Offences (Amendment) Bill* – see Standing Committee E, 11 February 1999 cc141-52, and HC Deb 10 February 1999 cc346 ff

[82] HC Deb 28 July 1998 vol. 317 c209

[83] Standing Committee E, 11 February 1999 cc144-5

However, in a letter to A.J Beith, Jack Straw had stated that none of the changes to be proposed by this Review would be retrospective.[84]

Clause 2 is intended to decriminalise the younger party where consensual homosexual acts have occurred between a person under 16 and one aged 16 or over. This clause has its roots in amendments to last Session's Bill tabled by Dr Evan Harris, who was concerned that the situation for homosexuals was different from that for heterosexuals (a girl under 16 cannot be convicted of an offence when a man has unlawful sexual intercourse with her, but a boy currently can).[85] The amendments received support from both sides of the House, and Jack Straw stated that:

> There has been a general, although not universal, approbation in this debate for the principle behind the amendment … Most hon. Members who have spoken have found it unacceptable that the person under 16 who engages in a homosexual act or in an act of buggery, in which the older party is 16 or older, should end up being criminalised, instead of being regarded as the victim.
>
> I am glad to note the general view. I am also glad to have been informed that a number of children's charities are worried about the degree to which under-16-year-olds, if we leave the law as it is, will end up being considered to have committed a criminal offence, rather than being regarded as victims. I am told by my officials that the national for the Prevention of Cruelty to Children, Barnados and the Children's Society have all said – and have allowed me to say so in public – that they would support the decriminalisation of the younger party in those circumstances. [86]

He agreed to discuss the principle behind the amendment with any Members who were interested, to produce a wording that would be acceptable and technically competent to form the basis of a Government amendment on Report. The Government considered that, unlike some of the other anomalies in the sexual offences laws which were discussed, an amendment along these lines could be brought in without creating any new inconsistencies and would not therefore have to wait until the review of sexual offences was complete.

A new clause was therefore put forward by the Government on Report on 1 March 1999.[87] Some concerns were raised about the fact that the new clause would mean that where a fifteen-year-old was engaging in a homosexual act with another fifteen-year-old he would be committing an offence, but he would not if his partner was aged sixteen or over.[88] However, as Paul Boateng pointed out, the clause could not affect liability where both parties were under the age of sixteen as to do so would be to negate the age of consent entirely.[89] He

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84 see HC Deb 25 January 1999 vol 324 c43
85 See HC Deb 10 February 1999 vol 325 cc336 ff
86 *ibid* c345
87 HC Deb 1 March 1999 vol 326 cc754 ff
88 see for example Desmond Swayne at *ibid* c768
89 *ibid* c755

promoted the clause as a provision to protect children, not to promote equality.[90] The new clause was passed by 274 to 64 votes.

The pressure group Stonewall is not generally in favour of provisions which would simply replace ’18’ with ’16’ in the relevant legislation. Instead, in its pamphlet *The Case for equality: Arguments for an equal age of consent* [January 1998] it called for the repeal of the offences of gross indecency and buggery. It wanted to see two universal offences which applied regardless of sex or sexual orientation: one offence of having sex with a young person under the age of consent, and one of having sex in public and causing offence. (This proposal is similar to one recommended by the Criminal Law Revision Committee in 1984[91] which was never implemented.) Stonewall has nevertheless decided to back the Bill, as it feels it embodies the principles of equal treatment and equal protection for all young people. Other organisations and charities supporting the Bill include the NSPCC, Barnados, NCH Action for Children, the National Children’s Bureau, Save the Children, the Family Welfare Association, the Health Education Authority, the British Medical Association, the Family Planning Association, the National Association of Probation Officers, the British Association of Social Workers, the Royal College of Physicians and the Royal College of Nursing.[92]

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[90] *ibid* c771

[91] Fifteenth report on Sexual Offences, Cmnd 9213, April 1984, para 10.15

[92] Lord Williams of Mostyn - HL Deb 13 April 1999 vol 599 c648

II Abuse of a position of trust

A. Existing criminal offences

Some of the existing sexual offences relating to young people are set out above in Part I. However, a few points are worth noting in relation to offences where the difference in age between the parties or their relationship to each other is relevant.

It is not an offence in England and Wales if a man under the age of 24 has unlawful sexual intercourse with a girl under the age of 16, if he has not previously been charged with a similar offence and he believes (and has reasonable grounds for believing) that the girl was 16 or over.[93] By contrast, there is no such defence for homosexual acts in England and Wales (although there is in Scotland); and indeed where one of the parties to a homosexual act is under 18 he can be prosecuted as well as or instead of the older party.

There is no specific protection for boys who are subject to the sexual advances of older women, but in certain circumstances this may amount to indecent assault. In addition the provisions of the *Indecency with Children Act 1960*[94] give protection for children under 14 of both sexes from both men and women who commit a 'grossly indecent' act (which does not necessarily amount to indecent assault) against them. The possibility of a change to these provisions was suggested in the following PQ:

Children (Sex Abuse)

> **Helen Jones**: To ask the Secretary of State for the Home Department what plans he has to extend the Indecency with Children Act 1960 to protect those between the ages of 14 and 16 years.
>
> **Mr. Boateng**: The Government are concerned to ensure that children are protected from all kinds of sexual abuse. The law provides protection against sexual abuse of all kind. The Indecency with Children Act 1960 relates to gross indecency with or towards a child under the age of 14, or inciting a child to commit such an act; the maximum penalty for this offence has recently been increased to ten years.
>
> We recognise that the law on sexual offences contains many anomalies, and the differing ages at which children are protected from various kinds of unacceptable behaviour is one such anomaly. That is why we have said that we will be conducting a review of sex offences to consider all such offences, and this will be one issue we will consider. One of the principal aims of the review will be to ensure that the legal framework, as far as possible, protects children and deals effectively with those who use and abuse them.[95]

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[93] *Sexual Offences Act 1956* section 6(3),
[94] or the equivalent provisions in Northern Ireland
[95] HC Deb 9 November 1998 vol 319 cc49-50w. See p30 above for further discussion of this review.

Section 7 of the *Sexual Offences Act 1956* makes it an offence for a man to have unlawful sexual intercourse with a woman who is a defective. However, it is a defence for a man prosecuted for such an offence to prove that he did not know and had no reason to suspect that the woman was a defective. 'Defective' is defined by section 45 of the Act [as amended] to mean a person suffering from a state of arrested or incomplete development of mind which includes sever impairment of intelligence and social functioning. Similar acts committed by the male staff of hospitals etc. against females who are mentally disordered patients are offences under section 128 of the *Mental Health Act 1959*.

By virtue of section 1(3) of the *Sexual Offences Act 1967*, a man who is suffering from severe mental handicap cannot in law give any consent which would prevent a homosexual act from being an offence. The definition of 'severe mental handicap' is the same as that used for 'defective' in the *1956 Act*, and the equivalent defence applies.

Various specific offences can apply to people who use children for prostitution, in addition to those offences which relate to prostitution generally. However, in some circumstances the child will also be committing an offence. The Home Office has recently issued draft guidance for consultation relating to children involved in prostitution.[96] Its principal aim is to establish that the primary law enforcement effort must be against those who abuse children and coerce them into prostitution and that the child should be treated primarily as a victim of abuse. For the purposes of this draft guidance, a child is a girl or boy under the age of 18.

According to the *Code for Crown Prosecutors*,[97] prosecution for any offence is more likely if, for example, the defendant was in a position of authority or trust, the victim of the offence was vulnerable, or there is a marked difference between the actual or mental ages of the defendant and the victim. However, this is merely prosecution policy, and not a matter of law.

In Scotland, the common law offence of indecency towards a child below the age of puberty (12 for girls, 14 for boys) may be aggravated by being committed by a parent or teacher or other person who stands in a position of trust towards the child. This also applies by statute in relation to girls aged between 12 and 16.[98] In addition, in Scotland any person over the age of 16 who has sexual (ie. vaginal) intercourse with a child under the age of 16, and who is a member of the same household as that child and is in a position of trust or authority in relation to that child, commits an offence punishable on indictment with a maximum sentence of life imprisonment.[99]

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[96] See 'Child prostitutes to be treated as victims', *Home Office press notice 508/98*, 29 December 1998

[97] Crown Prosecution Service, June 1996

[98] *Criminal Law (Consolidation) (Scotland) Act 1995* section 6

[99] *Criminal Law (Consolidation) (Scotland) Act 1995* section 3

Many European countries have criminal laws which seek to protect children from sexual advances from people older than themselves or those who are in a position of trust in relation to them, for example:

Austria	It is illegal for a male over 19 to commit homosexual acts with a male between 14 and 18
Belgium	Heavier penalties are levied against those in authority
Italy	The age of consent is raised from 14 to 16 if one of the participants is an older family member or guardian
Netherlands	If a person between the ages of 12 and 16 commits a sexual act with another person between those ages, they will not be prosecuted unless there is a complaint from the other participant, a parent or a guardian. However, if a person over 16 commits a sexual act with a person under 16, they will be always liable for prosecution
Portugal	It is illegal for a person aged 18 or over to commit sexual acts with a person under 18.
Spain	If a person between the ages of 12 and 16 has committed a sexual act with a person over 16, the older person may be liable to prosecution if the younger person's parents complained
Switzerland	The Swiss Penal Code provides special protection for persons in situations of dependency

In addition, the example of Canada has been cited as a jurisdiction in which sexual exploitation of a young person by one who is in a position of trust is a specific offence. Article 153 of the Canadian Criminal Code describes the acts which shall be considered to be sexual exploitation when committed against a person between 14 and 17 years old by a person who is in a position of trust or authority towards, or in a relationship of dependency with, the young person.[100]

B. Existing non-criminal controls

1. Notification requirements for sex offenders

The *Sex Offenders Act 1997* imposes a requirement on those convicted or cautioned for certain sexual offences against children and other serious sexual offences to notify the police

[100] See *Unlawful Sex* (the report of the working party of the Howard League for Penal Reform), 1985, para. 8.28; and the Interim Report of the Working Group on preventing unsuitable people from working with children and abuse of trust - Dep 98/1325, 25 November 1998

of their name and address and any changes to these. This allows the police to monitor sex offenders in the community and to take action where appropriate to warn relevant groups, such as local authorities, schools, or potential employers, of any risk they might present. The Government have made it clear that such information must not just sit on a computer or gather dust on a file, and has said that the police and probation services have responded positively and responsibly, using this information for the protection of children and vulnerable adults.[101] However, Home Office guidance to the police states that information they hold as a result of the *1997 Act* should only be revealed where the risk to the public or to sections of the public outweigh the offender's right to privacy.[102]

Agencies are increasingly co-operating to pool the information they hold so that they can assess the risk presented by any individual sex offender and devise plans to monitor the offender's behaviour and reduce risk to the public. The Government are encouraging this multi-agency approach to both assessment and management in the community.[103]

2. Sex Offender Orders

Sex Offender Orders under the *Crime and Disorder Act 1998* have been available since 1 December 1998. They allow specific prohibitions to be placed on anyone with a previous conviction or caution for a sex offence in the UK or overseas, where it can be shown that an order is necessary to prevent the public (or a section of it) from serious harm from the defendant. Breach of an order is a criminal offence, even where the behaviour in question would not otherwise have been criminal.

3. Criminal records checks

Criminal record checks are available on people working in the statutory sector where they have substantial unsupervised access to children. They are also available on teachers in the private and voluntary sectors. In December 1998 the government announced its intention to implement Part V of the *Police Act 1997*.[104] This contains provisions which will widen access to criminal record checks, by allowing employers in England and Wales to ask prospective employees or volunteers to apply for a criminal record check and obtain their own certificates. Some employers would also be able to register with a new Criminal Records Bureau, set up to carry out criminal records checks and issue certificates for employment purposes, which would enable them to obtain certificates relating to an applicant (but only with his or her consent).[105] Under the provisions of the *Protection from Children Act 1999*, which has yet to be brought into force, the Criminal Records Bureau would work alongside

[101] HC Deb 4 June 1998 vol. 313 c304-5W
[102] Home Office Circular 39/1997, 8 August 1997, Appendix A
[103] HC Deb 4 June 1998 vol. 313 c304-5W
[104] 'Criminal records bureau to strengthen child protection safeguards', *Home Office press notice 494/98*, 14 December 1998
[105] for further detail see RP 97/23, which was prepared for the second reading in the House of Commons of the Bill which became the *Police Act 1997*

the Department of Health's 'Consultancy List' and the Department for Education and Employment's 'List 99', both of which are discussed below.

It will be some time before the new system is fully operational, but the government has stated that top priority will be given to the issue of certificates for those seeking positions which involve regularly caring for, training, supervising or being in sole charge of under-18s. The latest statement on implementation suggests that the Criminal Records Bureau will start issuing these higher-level certificates in July 2001, and that the scheme would be fully functional by July 2002.[106]

4. Social Services[107]

Most existing social services issues are devolved matters. Even before devolution, they were the subject of separate legislation in Scotland and Northern Ireland. Legislation has tended to treat England and Wales together and primary legislation will generally continue to do so although the Welsh Office issued separate guidance to Welsh local authorities and the Welsh Assembly is also able to issue guidance as well as having certain other powers, for example in relation to Regulations. Existing non-criminal controls have therefore tended to be treated together in England and Wales but separately in Scotland and Northern Ireland even where common approaches have been pursued.

There has been a good deal of concern about abuse of children in the UK, particularly the abuse of children in care, and there have been a number of measures in recent years designed to deal with this problem.[108] Abuse of trust has not been a feature of the discussions about abuse of children in care and has only relatively recently been a matter of official concern. At the moment, it is largely up to individual local authorities/employers to decide what action, if any, to take where someone in one of these situations abuses a position of trust.

However, although not the subject of much direct attention, abuse of trust might be covered by some of the more general measures designed to protect children. For example, the Department of Health maintains a Consultancy Index for England and Wales, which includes people that employers consider to be unsuitable to work with children. This might include someone who had abused a position of trust as defined in this Bill but only if the local authority/employer had considered that this rendered the person unsuitable to work with children. The List has no statutory basis and inclusion on the list does not necessarily rule out future employment with children. Employers are not required to consult it although there is evidence that it is well-used. Non-statutory lists are also maintained in Scotland and Northern Ireland although there are slight differences between each of these.

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[106] see 'Criminal Records Bureau – outcome of timetable review', *Home Office press notice 441/99*, 16 December 1999

[107] Jo Roll, Social Policy Section

[108] See, for example, Department of Health etc, *The Government's Response to the Children's Safeguards Review*, Cm 4105 (for England & Wales) and Scottish Office, *Response to the Children's Safeguards Review*, November 1998,

When the *Protection of Children Act 1999* comes into force, the Department of Health's Consultancy List will be reformed and put on a statutory footing. This will mean in effect that the Secretary of State will have power to ban unsuitable people from working with children in the health and social care fields. Statutory powers for the Secretary of State to ban unsuitable people from working in the education field already exist. The *1999 Act*, which does not specifically mention abuse of trust, contains various other measures designed to strengthen measures for preventing unsuitable people from working with children. It was one of the measures resulting from the recommendations of the *Interdepartmental Working Group on Preventing Unsuitable People from Working with Children and Abuse of Trust*.[109]

Although the Act applies mainly to England and Wales, together with a number of other measures proposed by the Working Group, it is part of the Government's overall strategy for child protection. The Government has said that similar schemes would be considered in Scotland and Northern Ireland with the aim of producing an interlocking framework of protection for the UK as a whole.[110] In fact part of the purpose of the Act would be to create a *one stop shop* so that employers could access the Department of Health's List and the list held by the Department for Education and Employment when they access criminal records through the Criminal Records Bureau. The last still has to be established under Part V of the Police Act 1997.

The guidance issued jointly by the Home Office, Department of Health and other departments in September 1999 on preventing abuse of trust would apply to those caring for young people or vulnerable adults in the social services, as well as other fields.[111] The guidance said that different individual codes would need to be worked out by organisations to suit individual circumstances. The code could be included in existing wider codes or principles governing the welfare and safety of young people or vulnerable adults or it could stand alone, but it should be specifically defined to cover relationships of trust.

Some existing organisations in the social services field do have relevant codes of practice, for example, the British Association of Social Workers and the Social Care Association. However, these organisations only cover a small proportion of those working in the social care field and it is not normally a job requirement for someone to be a member of either of these associations. Being refused or membership or struck off would not necessarily have any job implications.

The *Care Standards Bill [HL]*, currently in the House of Lords, would introduce a new regulatory system for a wide range of social care organisations. It would also establish

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[109] See, for example, Home Office, *Interdepartmental Working Group on Preventing Unsuitable People from Working with Children and Abuse of Trust: Update*, 11 August 1999

[110] See Home Office Interdepartmental Group Update referred to above

[111] Home Office, Dfee etc, *Caring for Young People and the Vulnerable? Guidance for preventing abuse of trust, 1999.* This was announced in 'Strengthening the Protection of Children', *Home Office Press Notice*, 17 September 1999

General Social Care Council for England and a Care Council for Wales for regulating social care staff, one of whose jobs would be to develop and promulgate codes of practice for social care work. The Bill also makes provision for the appropriate Minister to direct any local authority to take such steps as are reasonably practicable to ensure that social care workers employed by it comply with the codes. [112] The definition of social care worker in the Bill specifically includes someone employed at a children's home and also, more broadly, anyone engaged in work for the purposes of a local authority's social services functions or engaged in social work that is required in connection with any health, education or social services provided by any person. [113]

The Care Standards Bill relates only to England and Wales, but during the debates in the House of Lords the Government said that all four countries were committed to alignment where that was possible and that standards of conduct and practice would a priority for collaboration.[114] In December 1999, the Scottish Executive issued a consultation paper entitled *Regulating Care and the Social Services Workforce*, which discusses the creation of a Scottish Social Services Council. The deadline for response is 10 March 2000.

5. Hospitals, nursing homes and mental nursing homes[115]

Under current provisions, consensual sexual relations between health professionals and patients aged between 16 and 18 would be dealt with by the relevant profession's code of conduct. The General Medical Council (GMC), for example, which regulates doctors throughout the UK, states categorically that 'you must not use your position to establish improper personal relationships with patients or their close relatives',[116] and a doctor who did establish such 'improper relationship' would run the risk of being found guilty of serious professional misconduct. It should be noted that the GMC's concerns relate to *all* patients, not just those under the age of 18, but it seems likely that the GMC would regard allegations about relationships with patients under 18 particularly seriously. If a doctor is found guilty of serious professional misconduct, it is then open to the General Medical Council to remove their name from the medical Register, thus preventing them from practising as a doctor in the UK, either in the NHS or privately. Similar regulatory structures apply to the other health professions, such as nurses and professions supplementary to medicine. Individual employers, such as NHS trusts or private hospitals, would also be able to take any disciplinary steps they felt to be appropriate in the circumstances.

Guidance has also been issued on a number of occasions on precautions to be taken to prevent the abuse by staff members of children in hospitals or other health-related institutions. For example, the Department of Health document, *Welfare of children and young people in hospital*, recommends that there should be at least two registered children's nurses

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[112] This is Clause 59 of the Bill as amended in Committee in the House of Lords, HL Bill 18 of 1999-2000
[113] Clause 52 of the Bill, as above
[114] HL Deb 13 January 2000 c854-5
[115] Katharine Wright, Social Policy Section
[116] GMC, *Good medical practice*, 1998

on duty in hospital children's departments and wards at all times;[117] and this guidance was reinforced after the enquiry into how the nurse Beverley Allitt had been able to kill and injure children in hospital.[118] More recently, in 1999 the Welsh Office issued guidance on the treatment of children in residential psychiatric institutions, stating that 'staffing arrangements must be appropriate to safeguarding young patients during the day and at night'.[119]

6. Education[120]

a. England and Wales

Section 218 of the *Education Reform Act 1988*[121] empowers the Secretary of State for Education to make regulations to restrict or prohibit, on medical grounds, in cases of misconduct, and on educational grounds (for teachers), a person's employment as a teacher or in other work that brings a person regularly into contact with those under the age of 19 years.[122]

Under the *Education (Teachers) Regulations 1993*,[123] as amended, the Secretary of State may make a direction to:

- require an employer to suspend or terminate a person's employment;
- make continued employment subject to specified conditions;
- prohibit a person's subsequent appointment or employment in relevant employment, or impose specified conditions on a person's appointment or employment. [124]

Relevant employment is defined as follows:

> 7.(1) Any reference in this Part to relevant employment is [subject to paragraphs (2) and (3)], a reference to employment-
>
> > (a) by a local education authority, as teachers (whether or not at a school or further education institution) or as workers with children or young persons;
> > (b) by any other body, as teachers at a school or further education institution; or
> > (c) by the governing body of a school or further education institution as workers with children or young persons.

[117] Dept of Health, 1991, para 6.3
[118] Dept of Health circular EL(94)16
[119] Welsh Office circular WHC (99) 2, issued in response to the report by the Health Advisory Service 2000, *Child and adolescent mental health services residential units in Wales: a review of safeguards and standards of care*, 1999
[120] Christine Gillie, Social Policy Section
[121] as amended. Section 49 of the *Education Act 1997* extended the scope of the provisions.
[122] *Education Reform Act 1988*, section 218 (6)
[123] SI 1993/543
[124] Regulation 10

> (2) In [regulations 10 and 10A], any reference to relevant employment also includes employment-
>
> (a) by the proprietor of an independent school, as teachers or workers with children or young persons; and
>
> (b) at an independent school, as teachers or as workers with children or young persons.]
>
> [(3)For the purposes of this Part, employment includes the engagement of a person to provide his services as a teacher otherwise than under a contract of employment and references to employment or relevant employment shall be construed accordingly.][125]

Governing bodies of schools or further education institutions and the proprietors of independent schools must take such steps as are reasonably practical to prevent a person who is not employed by them but who has been barred by the Secretary of State, from providing services in relation to the school or institution. The restriction applies to services provided under contract or otherwise.[126]

Misconduct is not defined but the Regulations state that a direction will be made automatically in the case of any person who is found guilty or pleads guilty to a sexual offence which involves a child under 16 years of age. The specific offences are listed in the Regulations.[127] DfEE Circular 11/95[128] provides guidance on the Secretary of State's powers to bar people from teaching and other employment. The offences that lead to automatic barring include:

- rape
- buggery
- incest
- unlawful sexual intercourse
- indecent assault
- gross indecency
- taking or distributing indecent photographs[129]

In other cases, the power is discretionary. However, DfEE Circular 11/95 lists other kinds of misconduct, which are likely to lead to a bar or restriction, including a sexual, or otherwise inappropriate, relationship with a pupil regardless of whether the pupil is over the legal age of consent:

- Violent behaviour towards children or young people;

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125 Regulation 7 was substituted by the *Education (Teachers) (Amendment) Regulations 1994*, SI 1994/222, with effect from 1 March 1994. The words within square brackets in paras (1) and (2) were substituted, and para (3) was added, by S1 1998/1584 with effect from 1 August 1998.

126 Regulation 10A

127 Regulation 10 (9) and Schedule 4

128 DfEE Circular 11/95, *Misconduct of Teachers and Workers with Children and Young Persons*, October 1995

129 paragraph 7

- A sexual, or otherwise inappropriate, relationship with a pupil (regardless of whether the pupil is over the legal age of consent);
- a sexual offence against someone over the age of 16;
- any offence involving serious violence;
- drug trafficking and other drug related offences;
- stealing school property or monies;
- deception in relation to employment as a teacher or at a school, for example false claims about qualifications, or failure to disclose past convictions;
- any conviction which results in a sentence of more than 12 months imprisonment;
- repeated misconduct or multiple convictions unless of a very minor nature.[130]

The Circular emphasises that it is not possible to specify in detail everything that might constitute misconduct for the purpose of the Regulations. Some behaviour that an employer might legitimately regard as misconduct for disciplinary purposes might not be regarded as misconduct requiring consideration by the Secretary of State. The Circular identified in very broad terms the kind of behaviour that is regarded as misconduct requiring consideration by the Secretary of State:

- committing a criminal offence resulting in conviction;
- behaviour which could lead to prosecution for a criminal offence;
- behaviour which involves an abuse of a teacher's position of trust or a breach of the standards of propriety expected of the profession.[131] The Circular stated that a sexual relationship with a pupil over the age of consent would be behaviour that would be likely to be regarded as coming within this category.[132]

List 99 contains the details of people whose employment is barred or restricted. Copies are held by LEAs, further education corporations, and associations representing independent schools. Teachers who are barred from teaching in Scotland and Northern Ireland are included in Annexes to the List. Action under the barring regulations could be taken by the Secretary of State for Education if any of them apply for a post in England and Wales. There are around 2,000 names on List 99 - about 80% in the automatic category and 20% in the discretionary one.[133]

The *Protection of Children Act 1999*,[134] which has not yet been brought into force, provides the framework for a cross-sector vetting system - the 'one stop shop' - to identify people who are unsuitable to work with children. Among other things, the arrangements require changes to List 99. Under the Act employers would be compelled or allowed to access a single point for checking the names of people they propose to employ in a post involving the care of

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[130] paragraph 9
[131] paragraph 13
[132] paragraph 15
[133] *People Like Us, Report of the Review of Safeguards for Children Living Away from Home*, Department of Health, 1997, Chapter 14, paragraph 14.18
[134] Chapter 14

children. This will involve permitting checks against criminal records and the two lists of people considered unsuitable to work with children maintained respectively by the Department of Health and the DfEE. The checks will be made through the Criminal Records Bureau. The 1999 Act amends section 218 of the *Education Reform Act 1988* by substituting a new list of grounds for prohibiting or restricting employment by the Secretary of State. The present grounds are restated and two new grounds are added. The effect is to enable a distinction to be drawn in List 99 between people whose employment is barred or restricted because they are unsuitable to work with children and those who are barred or restricted for other reasons. The grounds for prohibiting or restricting employment are extended to cover persons included in the Department of Health list. The Act also makes provision for appeals to an independent Tribunal.

DfEE Circular 10/95 provides guidance to the education service on its role in helping to protect children from abuse. It includes guidance on the procedures that schools should have in place for handling allegations of abuse.[135]

All organisations working with young people and vulnerable adults are expected to develop codes of conduct to protect against sexual activity within relationships of trust, following the publication of guidance issued by the Government in September 1999.[136]

The General Teaching Council,[137] which will come into operation on 1 September 2000, will be empowered to take disciplinary action against teachers on grounds of unacceptable professional conduct or serious professional incompetence, but cases involving misconduct will continue to be decided by the Secretary of State.

b. Northern Ireland

The Department of Education for Northern Ireland (DENI) exercises similar powers as the Secretary of State for Education to prohibit or restrict a person's employment or further employment as a teacher. The relevant powers are contained in the *Teachers' (Eligibility) Regulations (Northern Ireland) 1997*.[138]

c. Scotland

The General Teaching Council (GTC) for Scotland, rather than the Secretary of State for Scotland, is responsible for considering alleged cases of misconduct and for determining under its powers whether a teacher should be removed from the Register of Teachers. The GTC for Scotland was established by the *Teaching Council (Scotland) Act 1965.* The main functions of the Council include establishing and keeping a Register of Teachers, and

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[135] DfEE Circular 10/95, *Protecting Children from Abuse: The Role of the Education Service*, October 1995

[136] *Caring for Young People and the Vulnerable, Guidance for Preventing Abuse of Trust*, Home Office, Dept. of Health, DfEE, Northern Ireland Office and National Assembly for Wales.

[137] Established under the *Teaching and Higher Education Act 1998*

[138] Statutory Rules of Northern Ireland 1997 No. 312

determining whether in any particular case registration should be refused or withdrawn. Cases of convictions or allegations of misconduct are dealt with by the Council's Investigating and Disciplinary Committees. Registration with the GTC for Scotland is a requirement for employment as a teacher in state schools but not in independent schools in Scotland, although independent schools may decide only to employ registered teachers.

On 14 July 1999, the Scottish Executive published a consultation document proposing changes to the GTC in Scotland.[139] The proposals are contained in the *Standards in Scotland's Schools etc. Bill,* which was introduced in the Scottish Parliament on 19 January 2000.[140]

Most teachers in independent schools in Scotland are registered with the GTC for Scotland. The GTC are currently in discussion with the Scottish Council for Independent Schools (SCIS) about the issues surrounding wider GTC registration in the independent sector. Ministers have asked the GTC and SCIS to propose a scheme for GTC registration of all teachers. Appropriate legislation - possibly as a Government amendment to the *Standards in Scotland's Schools etc. Bill* - may be introduced. There is no requirement for teachers in further education colleges in Scotland to be registered with the GTC for Scotland. This issue is currently under review by the Scottish Executive.[141]

d. Wales

At present, the regulations made under section 218 of the *Education Reform Act 1988* apply to teachers in Wales, and the powers relating to the prohibition or restriction of employment are exercised by the Secretary of State for Education. However, these powers could be devolved; future arrangements are currently under consideration.

C. Proposals for reform

1. Background

Most of the calls in this country for increased protection for older children from sexual advances by adults have focused on protecting boys from homosexual men. This has sometimes been because of the view that homosexual seduction at a young age might turn boys towards homosexual behaviour and prevent them from developing as a heterosexual. There does not appear to be any conclusive evidence that homosexuality and paedophilia are linked.[142]

In 1954 the Home Secretary set up a committee chaired by Sir John Wolfenden to examine the criminal law relating to homosexual offences and prostitution. The Committee published

[139] *Improving Our Schools: Consultation on the General Teaching Council for Scotland*
[140] SP Bill 6, Session 1 (2000)
[141] *Improving Our Schools: Consultation Response*, Scottish Executive
[142] Dennis Howitt, *Paedophiles and Sexual Offences Against Children* (1995)

its Report in 1957,[143] which suggested that the age of consent for homosexual acts might be lowered if legislation providing protection for children were extended to cover all those below that age:

> … whereas it would be difficult to regard a young man of nearly twenty-one charged with a homosexual offence as a suitable subject for "care or protection" under the provisions of the Children and Young Persons Acts, it would not be entirely inappropriate so to regard a youth under eighteen. If the age of adulthood for the purposes of our amendment were fixed at eighteen, and if the "care or protection" provisions were extended to cover young persons up to that age, there would be a means of dealing with homosexual behaviour by those under that age without invoking the penal sanctions of the criminal law. (p26)

However, it concluded that 21 should be the age of consent for homosexuals:

> not because we think that to fix the age at eighteen would result in any greater readiness on the part of young men between eighteen and twenty-one to lend themselves to homosexual practices than exists at present, but because to fix it at 18 would lay them open to attentions and pressures of an undesirable kind from which the adoption of a later age would help to protect them, and from which they ought, in view of their special vulnerability, to be protected. (p27)

In 1979, the Home Office Policy Advisory Committee's Working Party report *Age of Consent in relation to Sexual Offences*[144] considered the issue of the need to protect boys and young men:

> 50. In short, the age of majority is a most important factor to be taken into account in deciding what the minimum age for homosexual relations should be. Nevertheless, it is our task to make a recommendation on the merits, and this calls for us to consider to what extent young men need protection from consensual buggery and gross indecency, how effective criminal legislation is against such conduct in private and the attitude of society towards it.

The working party said that 'in this connection it is of the utmost importance to decide if possible the age by which a young man's sexual orientation usually becomes fixed, because of the risk that a homosexual seduction before that age might turn him towards heterosexual behaviour and prevent him from developing as a heterosexual'. (para. 51) The Wolfenden Committee had found, following unanimous medical evidence, that the main sexual pattern is laid down in the early years of life and was usually fixed, in the main outline, by the age of 16. The working party was, however, concerned about the minority of young men who have not achieved a settled orientation by the age of 16. Accordingly it recommended that the minimum age for homosexual relations should be 18. (para. 52)

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[143] Cmnd 247, September 1957

[144] HMSO, June 1979

A minority of the working party had been in favour of a reduction to 16 with the compromise that between the ages of 16-18 a young man should be protected by the criminal law against the advances of a man who was in a position of authority over him. The Criminal Law Revision Committee, when asked for its advice as to the practicability of introducing such a concept into English law, replied that any such offence would have to cover two categories - firstly where a man's status gives him an advantage over a young man (for example as his employer or teacher), and secondly where a man gains advantage over a young man by gifts or other material inducements. They pointed out that it would be impossible to produce a complete list of cases which should be covered by such an offence, and that the differences between the English legal system and those of other European countries meant that it would not be practicable to introduce special relationship laws comparable to theirs. As a result of this advice, both members of the working party who had been in favour of the introduction of such an offence decided instead to support a minimum age of 18 for homosexual relations. (para. 63-4)

The working party had earlier concluded that there should not be any extension of the criminal law to protect girls over 16 from certain men in positions of advantage over them. In its view, which it said accorded with that of the teaching associations, where a teacher has consensual sexual relations with his girl pupil above the age of consent this should be dealt with as a matter of professional discipline only; and similar considerations apply to the other 'special relationships' such as employers, foster parents and doctors. (para. 33) In 1981 the final Report of the Committee[145] reaffirmed that it considered the current criminal law in this area to be satisfactory, and that 'the threat of disciplinary proceedings should be sufficient to deter most (professional) men from abusing their position to take unfair advantage of girls aged 16 and 17'. (para. 23)

The fifteenth report of the Criminal Law Revision Committee, on sexual offences, was published in 1984.[146] It did not look specifically at the age of consent as this had been considered in the Home Office Policy Advisory Committee report, but considered the issue of abuse of trust or authority in relation to incest-like offences. It recommended that children under the age of 21 should have the protection of a separate offence, analogous to incest, covering sexual intercourse with a step-parent. However, it did not think that this offence should be extended to foster children, *de facto* adopted children or other children in respect of whom a person is in a position of trust or authority. Some of the members of the Committee believed that English criminal law would find words such as 'trust' and 'authority inappropriate as being too vague. (paras 8.25-8.35)

The Howard League for Penal Reform published its working party report on *Unlawful Sex i*n 1985, in which it sought to make recommendations for reform of the law on sexual offences to make the system 'more discriminating, more humane and, above all, more effective in protecting the public'. (para. 1.3) The report concluded that there seems to be no support for

[145] Cmnd 8216, April 1981

[146] Cmnd 9213, April 1984

the theory that boys can be easily 'converted' to homosexuality if they do not already have an inclination for it anyway:

> The possibility of homosexual seduction in childhood bringing about an adult homosexual orientation has been greatly exaggerated. Most adult males with an exclusively homosexual orientation who have had such experiences in childhood report that their homosexual interests and fantasies developed before they had any overt contact with an adult (Bell *et al,* 1981). In other words, a homosexual tendency is more likely a cause than an effect of the paedophilic incident. Moreover, heterosexual males very frequently recall having had sex contact with an older male when they were young without this having made any lasting impression upon their sexual preferences (Schofield, 1965, p. 58). Furthermore, studies of young males who have worked as homosexual prostitutes (Freund, 1974), and follow-up studies of boys known to have been at some time involved with older males (Doshay, 1943; Tindail, 1978; Toisma, 1957) show that these experiences do not suppress a basic heterosexual orientation. On the other hand, imprisoned homosexual paedophiles often claim to have been seduced as boys, but such testimony is suspect of being motivated by a need for self-exculpation.
>
> In October 1969 the Dutch Parliament, acting on the advice of a committee headed by a professor of social psychiatry (Speijer, 1969), abolished the law criminalising consensual behaviour with persons of the same sex aged between sixteen and twenty-one. The committee cited, among others, surveys by Giese (1964) and Gebhard *et al* (1965), showing that up to half of adult homosexuals questioned reported having had their first contacts by the age of fifteen, usually initiated by mutual agreement, often after a period of waiting for the opportunity. They concluded that by the sixteenth year the sexual propensity is developed to such an extent that a youngster who is heterosexual cannot be diverted by "seduction" into permanent homosexuality. [para. 4.17]

This Working Party did, however, acknowledge that the involvement of older homosexual men with young men could lead to some other sort of corruption of the younger person:

> A more realistic concern about homosexual liaisons between youths and more privileged older men is that they may be corrupting in a non-sexual way because they often involve financial and social patronage. The effect can be to seduce a young man away from regular work, to stimulate unrealistic material ambitions and to undermine his ability or determination to pursue a disciplined career of work and training. When the liaison comes to an end he may turn to frank prostitution or to crime. Girls who have been temporarily 'kept' by wealthier older men are in a somewhat similar position, but they have the possibility of solving their problem by marriage. [para. 4.18]

Although it accepted these problems, the Howard League finally recommended that the rules for heterosexual and homosexual behaviour should be the same. In making this recommendation it relied mainly on the evidence put to it that exposure to homosexuality would not 'convert' inherently heterosexual young men and that the criminal law did not succeed in its attempt to enforce chastity on homosexual men under the age of 21. Its recommendation was not, however, that the age of consent for all should be 16, but rather

that a whole new system be introduced. This would involve legal protection from sexual exploitation for both boys and girls under the age of 18, by introducing offences of unlawful indecency and unlawful sexual intercourse with young children under the age of 14 by a person over 14, or with young persons between 14 and 18 if the age gap between the participants was greater than two years and some trust has been abused or some undue influence has been exerted. [para. 10.14] It was suggested that

> the law might usefully here provide a presumption, in the absence of evidence to the contrary, that undue influence applies in the case of teachers, employers, youth workers, hostel wardens and so forth, or if the accused is 7 or more years older than the young person, or if the young person has been offered some material inducement, or has been kept away from home against the wishes of parents or guardians. [para. 8.27]

2. The *Crime and Disorder Bill 1997-98*

During the debates on Ann Keen's 'age of consent' amendment in both the House of Commons and the House of Lords, there was a great deal of discussion on the need for protecting vulnerable young people, both boys and girls, from abuse by those in a position of trust or authority in relation to them.

Joe Ashton and Crispin Blunt both tabled amendments to Ann Keen's proposed new clause at the Report stage on 22 June 1998[147] which aimed to introduce protections similar to those which exist in some continental countries (see pp35-36 above). Crispin Blunt's amendments sought to prohibit homosexual acts where one of the parties is over twenty-one and the other is between sixteen and eighteen, whereas Joe Ashton wanted to see the age of consent being kept at eighteen for buggery and gross indecency where one party is in a position of authority, influence or trust in relation to the other. Mr Ashton also proposed that it should be an offence for a person to have sexual intercourse with a girl under the age of eighteen where that person is in a position of authority, influence or trust in relation to the girl. However, no definition of a 'position of authority, influence or trust' was given.

Crispin Blunt acknowledged during the debate on report that his amendments would discriminate between homosexual and heterosexual behaviour, but justified this by reference to a similar law in Austria and to his belief that there is a much greater strand of homosexuality than of heterosexuality which depends for its gratification on the exploitation of youth. (cc792-5). Dr Evan Harris pointed out that Mr Blunt's amendments would make a legal relationship between a 17-year-old and a 20-year-old suddenly illegal and criminal on the older person's 21st birthday.

Joe Ashton said that his amendments were inspired by reading the Utting report on safeguards for children living away from home,[148] which showed that the current system is

147 HC Deb 22 June 1998 vol. 314 cc754-811
148 'People Like Us', Sir William Utting *et al*, November 1997

not working to protect children. (cc764-9) Although a new offence along these lines was not suggested in the Utting report, Mr Ashton said that Sir William Utting was very much in favour of his amendments. (c783)

Sir Norman Fowler's sympathy for the Ashton amendments was inspired by his concern that, if the age of consent for homosexual acts were to be lowered to 16, the House should be convinced that a group of young people between the ages of 16 and 18 would not be put at risk. (c782)

Richard Allan agreed with the purpose behind Joe Ashton's amendments, although he felt that they were not worded correctly, and added that he was himself concerned about girls of 16 and 17 who are involved in prostitution and exploited by pimps.[149] (c778)

The Home Office Minister Alun Michael announced that the interdepartmental working group set up to identify the additional safeguards needed to prevent those who are unsuitable to do so from working with children would also look at the measures necessary to protect 16- and 17-year-olds who may be vulnerable to abuse by those in positions of trust. He said that the government considered the protection of the vulnerable an absolute priority, but that he could not accept Mr Ashton's amendments because they would create a new set of difficulties and anomalies. (cc786-91)

Joe Ashton's main amendment was rejected by the House of Commons on a division, by 234 to 194 votes.

The House of Lords did not have any particular proposals on abuse of trust before it during its debate on the age of consent, but the general topic was nevertheless raised several times.[150] Earl Russell felt that such protection was necessary to prevent the abuse of power both where one of the parties is *in loco parentis* and where a person uses fear or favour derived from an official position to obtain sexual favours (c963). Baroness Young said that the government's acceptance that it was necessary to set up a working party to deal with those young people most at risk illustrated the problems with lowering the age of consent to 16 (c972).

When the debate returned to the Commons on 28 July 1998,[151] Jack Straw said that although the equalisation of the age of consent was a simple, non-technical issue, abuse of trust was not:

> There are complexities in the definition of abuse of trust, in the behaviour which is dealt with, in the interlocking with non-statutory safeguards that are already in place, such as professional codes, and in the relationship with the current criminal law,

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[149] The government has now issued draft guidance for consultation on treating prostitutes who are under 18 primarily as the victims of abuse - see p35 above

[150] HL Deb 22 July 1998 vol 592 cc936-76

[151] HC Deb 28 July 1998 vol 317 cc176-211

> under which any coercive sexual activity is already against the law and carries criminal sanctions. (c183)

At this stage Joe Ashton also recognised that his amendment would not have dealt with the difficulty that even those who commit sexual offences against children under the existing law and are caught are not prosecuted. (c194)

3. Interdepartmental working group on abuse of trust

On 4 June 1998 it was announced that the inter-departmental working group of officials being set up to investigate how to prevent sex offenders working with children would also look at further possible measures to protect 16 and 17 year olds who may be vulnerable to abuse by those in a position of trust such as carers, teachers and leaders of organised residential activities.[152] Following the debate on the age of consent on 22 June 1998, this matter was described as a ‘key issue’ for the group, which would look at a possible new criminal offence in this area.[153] More details of the group’s work were given in the following PQ:

> **Mrs. Brinton**: To ask the Secretary of State for the Home Department what further plans he has to tackle the issue of preventing unsuitable people from working with children and to protect young people from abuse by those in positions of trust following the debate on lowering the age of consent from 18 to 16 years on 22 June; and if he will make a statement.
>
> **Mr. Michael**: During the debate on 22 June 1998, Official Report, columns 709-811, I referred to the interdepartmental working group set up to look as a matter of priority at further safeguards needed to prevent those unsuitable from working with children and to protect young people from abuse by those in positions of trust. The group is due to meet on 30 July.
>
> The need to protect vulnerable 16 and 17 year olds from abuse of trust was discussed at length in the debate on 22 June. The working group will look carefully at the concerns expressed. Issues to be considered will include: the definition of a position of trust; the scope of occupations to be covered; the definition of those to be protected; the kind of behaviour to be prohibited; existing safeguards and possible new mechanisms for prohibiting such behaviour, including a possible new criminal offence. Any proposals will relate to the need to protect both boys and girls and will take account of issues such as avoiding the criminalisation of the younger partner in a relationship based on abuse of trust.
>
> On the issue of preventing those unsuitable from working with children, the working group’s programme of work will include: how working with children can be defined; how to define those unsuitable to work with children; existing and potential safeguards to prevent unsuitable people working with children; a possible new

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[152] HC Deb 4 June 1998 vol 313 cc304-5

[153] ‘Government action to protect vulnerable teenagers from abuse of trust’, *Home Office press notice 276/98*, 17 July 1998

> offence to support the safeguards; and the possible establishment of a central register of those unsuitable to work with children, including questions of quality assurance, access, scope and cost.
>
> The working group will also take into account the report of Sir William Utting's review of safeguards for children living away from home and the Government's response to this review which is expected to be published by the Ministerial Task Force later this year. In particular, consideration will be given to those recommendations dealing with choosing the right staff.
>
> The working group, which will be led by the Home Office, will hold regular meetings during the autumn and is tasked to make recommendations by the end of December. Other Departments involved include: the Department for Education and Employment; the Department of Health; the Welsh Office; the Charity Commission; the Crown Prosecution Service; and the Lord Chancellor's Department. This group will also look at how best to involve outside organisations in the work. The group's recommendations will relate to England and Wales, but representatives from the Scottish and Northern Ireland Offices will also be involved.[154]

This inter-departmental working group published its Interim Report in November 1998.[155] It stated that much of the concern which had been expressed in Parliament and elsewhere stemmed from the need to deal more effectively with abusive behaviour which was already illegal but where the safeguards were felt to be inadequate, or enforcement and prosecution problematic. The large majority of organisations who responded to the consultation exercise carried out by the group in August and September 1998[156] believed that conduct amounting to abuse of a position of trust in relation to those over the age of consent was better regulated by professional codes than by a criminal offence, but that these codes needed to be made more effective and comprehensive. The kind of concerns expressed by consultees over an offence included:

- its inflexibility
- the potential for malicious accusation
- difficulties of proof and definition
- the damaging effects of a trial on the young person
- the lack of any widespread evidence of abuse of trust as opposed to abuse against children and young people generally which is already covered by the criminal law
- the position of a younger party who, if homosexual, would be 'outed' by any criminal prosecution or indeed might be at risk of prosecution himself if under the age of consent

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[154] HC Deb 17 July 1998 vol 316 cc348-9w

[155] Dep 98/1325, 25 November 1998

[156] The consultation letter, which asked for responses on both aspects of the group's remit, is annexed to the Interim Report. It was sent to a number of intermediary and umbrella organisations in the voluntary sector; professional bodies, particularly in the areas of education and social services; the Association of Chief Police Officers; various employment organisations; and a selection of Members and Peers.

- the danger that it would lead organisations to think that nothing else need be done by them

The working group recommended against any general offence of abuse of trust, but concluded that in certain strictly limited circumstances of particular vulnerability where the position of trust is strong and well-established, a new criminal offence would be justified to protect young people from behaviour which would otherwise be lawful. The working group also recommended a major initiative to strengthen codes of conduct generally to protect young people from those in positions of authority over them (see p39 above), and set out its belief that work on abuse of trust as a whole should be seen in the context of ongoing work aimed at preventing unsuitable people from working with children.

The principal concern of the working group was to protect children under 18, as it felt there was less concern for the vulnerability of children over the age of majority. However, as there are many existing offences relating to sexual behaviour with certain categories of under-18-year-olds, additional safeguards were needed only to protect children over 16,[157] as well as those aged 14 and 15 with whom any sexual intercourse is already illegal but who do not have the protection of the *Indecency with Children Act 1960* [para. 11]. It has yet to make a recommendation in relation to vulnerable adults.

The group recommended that 18 should be the minimum age at which a person could prosecuted for such an offence. It had discussing the possibility of setting it at a higher age, but agreed with Ministers that 18 was the logical age to set and any other approach would be anomalous. It did not wish the younger party to be liable to prosecution, as happens with the existing offences of buggery (with a male or a female) and gross indecency between males. [paras 13-15]

It was not in favour of listing those activities which would be unlawful, but instead recommended that the offence should cover 'sexual intercourse, whether vaginal or anal, and other sexual activity.' This would cover heterosexual, homosexual and lesbian sexual behaviour, and the protection should apply equally to boys and girls. The test should be whether a reasonable person would see the behaviour as sexual even without knowing of the context of the activity or the intentions of the parties engaged in it. [para. 10]

However, the working group did want to limit the circumstances in which the offence could be committed, and suggested a list of the situations which would be covered. This included children who are in detention under any enactment; looked after by a local authority; resident in an institution regulated to provide health and/or social care; or in full time education. It did not cover various other situations suggested by the respondents to its consultation exercise,[158]

[157] The working party emphasised that its proposals would not discriminate on grounds of sex and sexual orientation and must protect both boys and girls equally. However, until the age of consent is lowered, boys under 18 are already considered to have some protection through the current prohibition on homosexual acts where one of the participants is under 18.
[158] See Annex B to the Interim Report

as the group felt that there was not the direct relationship of trust seen as integral to the offence. However, the group recommended that the Secretary of State be given the power to amend such a list by affirmative resolution. Only adults who are involved in 'regularly caring for, training, supervising or being in sole charge of person aged under 18' in such situations should be caught by the offence. [paras 16-19]

The group recognised that full-time education is a very wide category, but stressed that the pupil/teacher relationship is one where the position of trust is particularly strong. It saw as a priority the need to protect those with learning difficulties who may attend any school or further education establishment, as well as those in boarding schools that may also have day pupils. It considered that any attempt to distinguish between pupils would be anomalous, and therefore recommended that all full-time education should be covered.

A leading article in *The Scotsman* last June suggested that:

> very few teachers or social workers seek to take sexual advantage of the children in their care … Much more common is the false accusation made by a spiteful adolescent against a resented figure of authority. For every teacher found guilty of seducing a pupil, there are many more cases in which innocent professionals are damaged by malicious falsehoods. That already fraught situation would deteriorate still further were an unnecessary new criminal offence to be created.[159]

The National Association for Head Teachers (NAHT), in its response to the working group on abuse of trust, stated that it did not see any difference in a relationship between a young person and a teacher or a caretaker. Teaching organisations, such as the Association of Teachers and Lecturers (ATL) and the NAHT, stated that the introduction of a new offence could result in criminalising acceptable behaviour. They felt that cases needed to be treated on an individual basis. The National Association of Teachers (NUT) raised the issue of false allegations and the effect any new measure might have on teacher recruitment.

The problems of relationships which pre-exist a relationship of trust, and of marriage between a young person and one in a position of trust, were discussed by the working group. It recommended that a defence be allowed in the latter case (to ensure compliance with the European Convention on Human Rights which protects the right to marry and the right to respect for private and family life) but not in the former. A limited exception for those cases where there are existing relationships before the new offence comes into force was also recommended as a transitional provision. [paras 20-24] Finally another defence was recommended where the accused did not know and could not reasonably be expected to have known that the younger party was under 18 and/or that he or she was in a specified relationship of trust with the accused. [para. 26]

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[159] 'Ambiguous sexual politics', *The Scotsman*, 23 June 1998

Although the Scottish Office was represented on the interdepartmental working group whose recommendations were reflected in the present Bill, the group's interim report did not discuss Scots law. This is in fact a devolved matter where the Scottish Parliament has the power to legislate. A separate consultation document was sent out to a variety of organisations in Scotland in October 1998, and of the 23 consultees who have responded so far more were in favour of a new offence than were against it. However, some of the opponents of the offence could be considered to carry particular weight.

Various bodies in Northern Ireland (where the existing criminal law is directly comparable in this area to that in England and Wales although the age of consent for heterosexuals is 17) were sent the same consultation letter by the interdepartmental working group on abuse of trust as went to interested groups in England and Wales. The range of responses was broadly in line with that of those groups.

In response to the interim report, the Home Office Minister Paul Boateng announced that the government accepted the recommendation of the working group to create a limited criminal offence to protect boys and girls of 16 and 17 from sexual advances by those in authority over them in specific circumstances. As announced in the Queen's Speech on 24 November 1998, the government brought forward proposals intended to implement this recommendation at the same time as it gave Parliament an opportunity to vote on equalising the age of consent for boys and girls this session.[160] However, the *Sexual Offences (Amendment) Bill 1998-99* fell on the second reading debate in the House of Lords (see above). The debates on this Bill, and the amendments introduced to it by the Commons, are discussed below in relation to the relevant clauses of the current Bill.

D. The *Sexual Offences (Amendment) Bill* [Bill 55 of 1999-2000]

General issues relating to the whole of the *Sexual Offence (Amendment) Bill*, as well as Clause 1 of the Bill dealing with the equalisation of the age of consent, are considered above (pp28-31). Jack Straw has stressed that the issue of abuse of trust should be seen as separate from that of the age of consent for homosexual acts.[161]

The clauses of the Bill discussed in this section are those which aim to create a new offence of abuse of trust. This would apply where a person aged 18 or over, in specified circumstances, has sexual intercourse or engages in any other sexual activity with or towards a person under 18, if the older person is in a position of trust in relation to the younger person. Various situations in which children under 18 are considered to be potentially vulnerable to such abuse are set out, which include detention or residential care as well as schools and colleges. These provisions are intended to apply to England and Wales, Northern Ireland and Scotland, and would work in tandem with the strengthened codes of conduct

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[160] HL Deb vol. 595 c2WA, 25 November 1998
[161] HC Deb 25 January 1999 c20

which the Government is seeking to encourage.[162] The *Explanatory Notes* published with the Bill set out the government's view on what these clauses will achieve.

Paul Boateng has set out four principles which underpin the proposals on abuse of trust:

1. Vulnerability of the young person
2. Location
3. Special influence of the adult
4. Lack of access to other adults.[163]

Under **Clause 3(1)** it would be an offence for a person aged 18 or over to have sexual intercourse or engage in other sexual activity with a person under that age if he[164] is in a position of trust in relation to the younger person. It is not clear on the face of the Bill how the new offence would interact with existing sexual offences relating to children, as no reference is made to a lower age limit for the younger person below which only the existing sexual offences would apply. There would therefore be a number of circumstances in which several alternative charges would be possible.

Existing offences cover non-consensual sexual acts and so it is likely that the new offence would only be used where the younger party had given (or purported to give) their consent. Paul Boateng has said that the offence is primarily about protecting 16 and 17-year-olds in what would otherwise be consensual relationships. He also mentioned that the courts will treat abuse of trust as an aggravating factor in relation to existing offences.[165]

However, it should be noted that a conviction for any offence is only possible where there is sufficient evidence, either from a complainant or from other sources. Where the alleged victim is unwilling to co-operate with the police it is considerably less likely that a conviction will result. The *Explanatory Notes* to the Bill do state that the government expects the offence of abuse of trust to act more as a deterrent than to result in a large number of actual prosecutions, which it suggested might only be 10 to 15 a year (para. 21).

'Sexual intercourse' for the purposes of the new offence would include both vaginal and anal intercourse [**Clause 3(1)(a)**], and 'sexual activity' is further defined by **Clause 3(5)**. This definition, as suggested by the interim report of the working group on abuse of trust,[166] is intended to be objective, as it refers to any activity which a reasonable person would regard as sexual in all the circumstances. Any activity which a reasonable person would regard as sexual activity only if he was aware of the parties' intentions, motives of feelings is specifically excluded. The *Explanatory Notes* (para. 15) give the example of a sports trainer

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162 *ibid* c25. See p39 above, and Home Office, Dfee etc, *Caring for Young People and the Vulnerable? Guidance for preventing abuse of trust,* 1999.

163 Standing Committee E, 2 February 1999 c4

164 the term 'he' would include 'she' - *Interpretation Act 1978*, section 6

165 Standing Committee E, 9 February 1999 c59

166 Interim report, 25 November 1998, Dep 98/1325, para. 10 - see p54 above

tackling a pupil on a rugby pitch and suggest that this definition would mean that such actions could not be challenged because of alleged hidden motives.

The factual circumstances which will fulfil the definition of a ‘position of trust’ for the purposes of the Bill are set out in **Clause 4**. The Bill does not simply create a presumption that in these circumstances a position of trust exists between the parties, as was suggested by the Howard League Working Party report (see above, pp46-47).

The offence will only apply where the older person is regularly involved in caring for, training, supervising or being in sole charge of[167] young people under 18 in the particular institutions or circumstances listed in subsections (2) to (5) of Clause 4. These closely follow the list given by the working group on abuse of trust,[168] and were chosen as it was felt that this limited the definition to those circumstances where the young person is particularly vulnerable or the relationship of trust particularly strong (*Explanatory Notes*, para. 14). The Secretary of State (or Scottish Minister) is given the power to add to this list by affirmative order [Clause 4(1) and (6)].

During the debates on last session’s Bill[169] in Standing Committee E, several Members would have liked to see the list expanded to include for example members of a church or a youth organisation, step-relations or adoptive relations; but others thought the list was already too broad.[170]

Clause 4(2) refers to young people in any form of detention; Clause 4(3) is intended to cover the full range of settings in which young people might be accommodated by a local authority (or equivalent body in Northern Ireland), including foster care; residential care (local authority, private or voluntary, including secure accommodation); and semi-independent accommodation. It would include young people who are being looked after by the local authority as the result of a court order and young people who are being looked after on a voluntary basis. It also covers young people in small children's homes in England and Wales that are not currently regulated under the Children Act 1989.

Clause 4(4) is intended to cover young people who are resident in an institution providing health or social care, such as hospitals, children’s homes or residential case. Clause 4(5) relates to persons under 18 who are receiving full-time education in an institution. Clause 4(8) gives a definition of ‘full-time education at an educational institute’ which did not appear in the original version of the Bill last session. A person would be regarded as receiving full-time education at an educational institution if he is registered or otherwise enrolled as a full-time pupil or student at the institution, or he receives education at the institution under an arrangement with another educational institution at which he is

[167] This is almost identical to the definition contained in Part V of the *Police Act 1997* for the purposes of obtaining enhanced criminal record checks.
[168] Interim report, 25 November 1998, Dep 98/1325, para. 16
[169] Bill 10, Session 1998-99
[170] Standing Committee E, 9 February 1999, cc65-128

registered. Part-time students would not be covered by the Bill. This provision extends to Scotland where many students go to university at the age of 17.

During the Second Reading debate on the Bill last session, the Home Secretary stressed that full-time education as a whole should come within the scope of the Bill because teachers are in loco parentis even when pupils are 16 or 17. He also said that there would be practical difficulties in trying to create separate groups within the category.[171] The need to protect students who are enrolled at one institution and receive part of their education at another institution was raised during the Commons Committee Stage debate on the Bill.[172] The Government took legal advice which suggested that such students would not have been covered by the Bill as it stood,[173] and therefore introduced an amendment at the Commons Report Stage to bring such students within the scope of the Bill.[174]

The defences which would be available to a person charged with the new offence are set out in **Clause 3(2)**. Clause 3(2)(a) provides a defence of mistake as to the younger person's age; it would also be a defence if he could show that he did not know, and could not reasonably be expected to have known, that he was in a position of trust in relation to the younger person. [Clause 3(2)(b)] A further defence is provided where the parties are lawfully married [Clause 3(2)(c)], and a transitional provision relating to sexual relationships which started before the provision comes into force is also included, as recommended by the working group on abuse of trust.[175] [**Clause 3(3)**]. However, the Bill does not propose that a defence would be available to a defendant who wished to plead that the sexual relationship with the younger person began before they entered into a relationship of trust.[176]

During the second reading debate on the Bill last session, Dr Evan Harris raised the issue of whether the 'marriage' defence would be discriminatory against homosexual couples, who cannot of course marry.[177] He proposed a new defence where the young person's parent or guardian had consented to the relationship in question; but this raised the possible problem of a person in a position a trust being able to consent to their own relationship with a young person.[178] Paul Boateng stated that

> The defence in the Bill is drafted in such a way as to make it absolutely clear that we do not regard marriage as a sort of bothole into which those who have offended against the law may retreat so that culpability for an inappropriate action before marriage would somehow be removed from them. The defence is very narrowly

[171] HC Deb 25 January 1999,vol 324 cc 27-8
[172] Standing Committee E, 9 February 1999, cc 85-128
[173] see letter from Jack Straw to Sir Norman Fowler, 25 February 1999
[174] HC Deb 1 March 1999 vol 326 cc 785-8
[175] Interim report, 25 November 1998, Dep 98/1325, para. 24
[176] This is despite the suggestion in the working group's interim report - *ibid* para. 22
[177] HC Deb 25 January 1999 vol 324 cc36-37, c87; and see c109
[178] Standing Committee E, 4 February 1999 cc11-24

> drafted so that an inappropriate relationship will be culpable of itself and, indeed, subsequent marriage will not excuse that culpability.[179]

The new offence would be triable either way, with a maximum penalty of six months' imprisonment and/or a fine of up to £5000 following summary conviction, or five years and/or an unlimited fine on indictment. [**Clause 3(4)**]. The maximum sentence which originally appeared in last session's Bill was two years' imprisonment - other sexual offences which attract a maximum sentence of two years' imprisonment on indictment include unlawful sexual intercourse with a girl under 16, consensual homosexual acts in private where both parties are over 21, and administering drugs to obtain or facilitate sexual intercourse with a woman. By contrast, gross indecency with a child under the *Indecency with Children Act 1960* attracts a maximum sentence of 10 years' imprisonment, and buggery with a person under 16 can be punished with life imprisonment, as can rape.

A number of Members felt that two years might not be enough for a particularly serious instance of breach of trust, and James Clappison suggested a maximum period of five years' imprisonment instead.[180] The Government was initially reluctant to introduce yet another anomaly to the law of sexual offences[181], but later decided to substitute a higher maximum sentence because the offence was already restricted to abuse of trust in its most aggravated form, and because it considers the maximum penalty for unlawful sexual intercourse with a girl under 16 to be too low. However, Jack Straw stated that the penalties for the new offence would be considered along with those for other sexual offences in the Review.[182] The new maximum sentence of five years rather than two was introduced as a Government amendment in the Report stage, and agreed to without a division (although Richard Allan was concerned to stress the difference between consensual and non-consensual acts which is relevant here).[183]

James Clappison proposed an amendment to the Bill last session which aimed to provide that where an existing sexual offence against a child was aggravated by breach of trust the maximum sentence should be raised.[184] He drew a parallel with racially aggravated offences under the *Crime and Disorder Act 1998*. Paul Boateng replied that where appropriate the Bill's provisions could be used against any young person, even those under 16, instead of the existing sexual offences; and that case-law has confirmed that breach of trust is already an aggravating factor. He felt that the proposed new clause would only create further anomalies, and that the matter should be considered instead by the Sexual Offences Review. The amendment was lost by 13 votes to 6.

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179 *ibid* c18
180 Standing Committee E, 4 February 1999 c33
181 Paul Boateng – *ibid* c38
182 letter from Jack Straw to Sir Norman Fowler, 25 February 1999
183 HC Deb 1 March 1999 vol 326 cc776 ff
184 Standing Committee E, 9 February 1999 cc53-65

Clause 5 would add the new offence of abuse of position of trust to the list of offences in England and Wales, Scotland and Northern Ireland which are subject to the notification requirements of the *Sex Offenders Act 1997* (see p31 above). As a result of a Government amendment during the debates in Standing Committee E, however, those committing the new offence would be exempt from the requirement to register if they were under 20 at the time of the offence.[185] This matches the exceptions already in the *1997 Act* for the offences of unlawful intercourse with a girl between 13 and 16, buggery and gross indecency.[186] Richard Allen wanted to give the court a discretion over whether or not to impose the requirement to register, but the Government was unwilling to introduce an element of discretion ahead of the report of the review of the *1997 Act*.[187]

Clause 6 was introduced as a new clause to last session's Bill by Paul Boateng in Standing Committee E. It adds the new offence of abuse of trust to the list of offences for which the courts may impose extended sentences under the *Crime and Disorder Act 1998*. An 'extended sentence' comprises the normal period of imprisonment and supervision for the offence, followed by an 'extension period' during which the offender continues to be on licence. The total period of the extended sentence must remain within the normal maximum penalty available for the offence.[188]

[185] Standing Committee E, 11 February 1999 cc131-3
[186] *Sex Offenders Act 1997* Sch 1 para 2(a)
[187] Standing Committee E, 11 February 1999 cc138-9
[188] see Research Paper 98/44, and Home Affairs Section standard note *Sentencing and supervision of sex offenders* (2 October 1998)

Appendix: Court proceedings and cautions[189]

Tables 1 to 5 show court proceedings and cautions of males for a range of sexual offences in England and Wales, from 1993 to 1997. This covers the two years before and three years after the *Criminal Justice and Public Order Act 1994* came into force. 1998 figures will not be available until shortly after this paper is printed.

When the *1994 Act* amended the *Sexual Offences Act 1956* it not only lowered the age of consent for homosexual men but altered the definitions of a number of sexual offences, so interpretation of the figures and comparison across years is difficult. Even with the offences broken down into the detail shown in the tables, it is impossible to produce a total figure for all homosexual offences. For example, the large number of prosecutions for buggery with a boy under 16 or a woman or an animal includes an unknown number of homosexual or consensual acts.

According to the Secretary of State for Northern Ireland, information is not available about the ages of persons convicted of, or involved in, homosexual offences in Northern Ireland.[190]

In Scotland, less detailed data are available. The numbers of persons proceeded against, and with a charge proved, where the main offence was a homosexual act under s.80(7) of the *Criminal Justice (Scotland) Act 1980*, s.13(5) of the *Criminal Law Consolidation Act 1995* or under the Common Law in Scotland are shown below. The figures for 1990 to 1995 are revised.

	1990	1991	1992	1993	1994	1995	1996	1997	1998
Proceeded against									
16-20	13	9	4	7	1	4	4	1	2
21 and over	76	105	77	71	91	60	44	45	38
Total[1]	89	114	81	78	93	64	49	47	40
Charge proved									
16-20	13	9	4	6	1	4	0	1	1
21 and over	73	99	75	70	85	54	44	39	36
Total[1]	86	108	79	76	87	58	45	41	37

[1] Totals include 8-15 year olds

Source: Scottish Office

[189] Joseph Hicks, Social and General Statistics Section

[190] HC Deb vol 298 c741-2, 24 July 1997

Table 1

Court proceedings and cautions of males for certain sexual offences, England and Wales 1993
before the Criminal Justice and Public Order Act 1994 - 'age of consent' 21

	Prosecutions				Cautions				Convictions				Immediate custody			
	10-17	18-20	21+	Total	10-17	18-20	21+	Total	10-17	18-20	21+	Total	10-17	18-20	21+	Total
Buggery																
With a boy under 16 or woman or animal	18	18	257	293	19	-	8	27	4	5	126	135	-	5	101	106
With male over 16 without consent	-	2	33	35	-	2	2	4	-	3	14	17	-	1	11	12
By male over 21 with male under 21 with consent	1	-	7	8	-	1	1	2	-	-	4	4	-	-	4	4
By male with male other than above	-	3	5	8	6	6	3	15	-	1	4	5	-	-	2	2
Attempted buggery																
With boy under 16 or woman or animal	5	1	9	15	5	-	2	7	5	1	14	20	1	-	9	10
With male over 16 without consent	-	-	2	2	-	-	1	1	-	-	2	2	-	-	2	2
By male over 21 with male under 21 with consent	-	-	1	1	-	-	-	-	-	-	-	-	-	-	-	-
By male with male other than above	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Assault with attempt to commit buggery	1	-	5	6	-	-	-	-	-	-	2	2	-	-	2	2
Indecency between males																
By male over 21 with male under 21	1	3	88	92	1	2	49	52	-	1	51	52	-	-	4	4
By male with other male other than above	1	8	439	448	12	20	389	421	-	5	332	337	-	-	2	2
Procuration																
Male over 21 procuring male under 21 to gross indecency	-	-	11	11	-	-	7	7	-	-	7	7	-	-	-	-
Male procuring male over 21 to gross indecency (a)	1	-	26	27	1	-	32	33	-	-	22	22	-	-	-	-
Soliciting by male	1	8	199	208	6	14	185	205	-	6	118	124	-	-	-	-

(a) other than cases of procuring acts of buggery which are not offences

Source: Home Office

Table 2

Court proceedings and cautions of males for certain sexual offences, England and Wales 1994

before the Criminal Justice and Public Order Act 1994 - 'age of consent' 21

	Prosecutions				Cautions				Convictions				Immediate custody			
	10-17	18-20	21+	Total	10-17	18-20	21+	Total	10-17	18-20	21+	Total	10-17	18-20	21+	Total
Buggery																
With a boy under 16 or woman or animal	37	14	291	342	25	-	16	41	17	6	110	133	1	4	88	93
With male over 16 without consent	-	-	23	23	2	-	2	4	-	1	22	23	-	-	15	15
By male over 21 with male under 21 with consent	1	1	4	6	1	-	-	1	-	1	6	7	-	-	4	4
By male with male other than above	-	-	5	5	3	1	1	5	-	-	1	1	-	-	-	-
Attempted buggery																
With boy under 16 or woman or animal	2	2	17	21	4	1	1	6	2	3	11	16	-	3	9	12
With male over 16 without consent	-	-	1	1	-	-	1	1	-	-	1	1	-	-	1	1
By male over 21 with male under 21 with consent	-	-	-	-	-	-	-	-	-	-	2	2	-	-	2	2
By male with male other than above	-	-	1	1	-	-	-	-	-	-	1	1	-	-	1	1
Assault with attempt to commit buggery	1	-	6	7	3	-	-	3	-	-	2	2	-	-	-	-
Indecency between males																
By male over 21 with male under 21	3	2	71	76	2	3	37	42	2	2	57	61	-	-	8	8
By male with other male other than above	3	9	520	532	8	5	382	395	2	6	411	419	-	-	-	-
Procuration																
Male over 21 procuring male under 21 to gross indecency	-	-	13	13	-	-	18	18	-	-	8	8	-	-	-	-
Male procuring male over 21 to gross indecency (a)	1	-	23	24	-	-	72	72	1	-	18	19	-	-	-	-
Soliciting by male	-	8	116	124	4	5	245	254	-	6	76	62	-	-	1	1

(a) other than cases of procuring acts of buggery which are not offences

Source: Home Office

Table 3

Court proceedings and cautions of males for certain sexual offences, England and Wales 1995, 'age of consent' 18

	Prosecutions				Cautions				Convictions				Immediate custody			
	10-17	18-20	21+	Total	10-17	18-20	21+	Total	10-17	18-20	21+	Total	10-17	18-20	21+	Total
Buggery																
With a boy under 16 or a woman or animal	11	3	110	124	4	-	4	8	4	2	80	86	2	1	72	75
With male over 16 without consent	-	-	3	3	1	-	1	2	-	1	7	8	-	-	4	4
By male over 21 with male under 21 with consent	-	-	1	1	-	-	-	-	-	-	1	1	-	-	1	1
By male with male other than above	-	-	-	-	-	-	-	-	1	-	1	2	1	-	-	1
By male of a male under 16	5	2	41	48	2	-	-	2	1	2	26	29	-	2	26	29
Other	-	-	8	8	1	-	2	3	-	1	8	9	-	1	6	7
Attempted buggery																
With boy under 16 or woman or animal	-	-	6	6	1	-	-	1	-	-	14	14	-	-	11	11
With male over 16 without consent	-	-	-	-	-	-	-	-	-	-	2	2	-	-	2	2
By male over 21 with male under 21 with consent	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Assault with attempt to commit buggery	-	1	4	5	2	-	-	2	1	-	-	1	-	-	-	-
Indecency between males																
By male over 21 with a male under 21	2	2	47	51	4	2	41	47	-	2	51	53	-	-	9	9
By male with other male other than above	2	6	274	282	2	-	126	128	1	1	237	239	-	-	4	4
Gross indecency by a male aged 21 or over with a male under 18	-	-	10	10	-	-	4	4	-	-	11	11	-	-	4	4
Gross indecency by a male aged under 18 with another male	2	-	-	2	3	-	-	3	2	-	-	2	-	-	-	-
Gross indecency by a male aged 18 or over with another male aged 18 or over	-	-	149	149	-	6	159	165	-	-	105	105	-	-	1	1
Procuration																
Male over 21 procuring male under 21 to gross indecency	-	-	8	8	-	-	14	14	-	-	8	8	-	-	-	-
Male procuring male over 21 to gross indecency	1	-	7	8	-	-	16	16	-	-	9	9	-	-	-	-
Male living off earnings of male prostitute	-	-	1	1	-	-	-	-	-	-	1	1	-	-	1	1
Male over 21 procuring or attempting to procure male under 21 to gross indecency with another male	-	-	1	1	-	-	-	-	-	-	2	2	-	-	1	1
Procuring or attempting to procure male to gross indecency with male other than above	-	-	6	6	1	1	19	21	-	-	1	1	-	-	-	-
Soliciting by male	1	1	109	111	1	6	119	126	1	2	69	72	-	-	-	-

some definitions of offence with very few known offenders have been omitted

Source: Home Office

Table 4

Court proceedings and cautions of males for certain sexual offences, England and Wales 1996, 'age of consent' 18

	Prosecutions				Cautions				Convictions				Immediate custody			
	10-17	18-20	21+	Total	10-17	18-20	21+	Total	10-17	18-20	21+	Total	10-17	18-20	21+	Total
Buggery																
With a boy under 16 or a woman or animal	-	-	16	16	2	-	3	5	-	-	5	5	-	-	5	5
With male over 16 without consent	1	-	2	3	-	-	-	-	-	-	2	2	-	-	2	2
By male over 21 with male under 21 with consent	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
By male with male other than above	-	-	-	-	-	-	1	1	-	-	-	-	-	-	-	-
By male of a male under 16	9	-	57	66	5	-	-	5	2	3	61	66	-	1	61	62
Other	-	-	10	10	2	-	1	3	-	-	5	5	-	-	3	3
Attempted buggery																
With boy under 16 or woman or animal	-	-	3	3	1	-	-	1	-	-	2	2	-	-	2	2
With male over 16 without consent	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
By male over 21 with male under 21 with consent	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Assault with attempt to commit buggery	-	-	3	3	-	-	-	-	-	-	-	-	-	-	-	-
Indecency between males																
By male over 21 with a male under 21	-	-	10	10	-	2	25	27	-	-	4	4	-	-	-	-
By male with other male other than above	1	2	129	132	2	1	56	59	1	2	90	93	-	-	-	-
Gross indecency by a male aged 21 or over with a male under 18	-	-	9	9	-	-	4	4	-	-	11	11	-	-	4	4
Gross indecency by a male aged under 18 with another male	-	-	-	-	11	-	-	11	1	-	-	1	-	-	-	-
Gross indecency by a male aged 18 or over with another male aged 18 or over	-	4	126	130	-	3	200	203	-	2	108	110	-	-	-	-
Procuration																
Male over 21 procuring male under 21 to gross indecency	-	-	1	1	-	-	5	5	-	-	1	1	-	-	-	-
Male procuring male over 21 to gross indecency	-	-	-	-	1	-	8	9	-	-	-	-	-	-	-	-
Male living off earnings of male prostitute	-	-	2	2		-	-	-	-	-	3	3	-	-	3	3
Male over 21 procuring or attempting to procure male under 21 to gross indecency with another male	-	-	-	-	-	-	3	3	-	-	3	3	-	-	2	2
Procuring or attempting to procure male to gross indecency with male other than above	-	-	6	6	1	-	22	23	-	-	5	5	-	-	1	1
Soliciting by male	-	4	99	103	4	2	54	60	-	2	66	68	-	-	-	-

some definitions of offence with very few known offenders have been omitted

Source: Home Office

Table 5

Court proceedings and cautions of males for certain sexual offences, England and Wales 1997, 'age of consent' 18

	Prosecutions				Cautions				Convictions				Immediate custody			
	10-17	18-20	21+	Total	10-17	18-20	21+	Total	10-17	18-20	21+	Total	10-17	18-20	21+	Total
Buggery																
With a boy under 16 or a woman or animal	6	4	138	148	3	2	2	7	3	3	93	99	-	1	88	89
With male aged 16 or over without consent	1	-	3	4	-	-	-	-	-	-	-	-	-	-	-	-
By male aged 21 or over with male under 21 with consent	-	3	15	18	3	1	2	6	-	1	15	16	-	-	9	9
By male with male other than above	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
By male of a male under 16	2	1	104	107	3	1	-	4	2	-	68	70	-	-	67	67
Other	-	-	1	3[a]	2	-	-	2	-	-	-	-	-	-	-	-
Attempted buggery																
Assault with attempt to commit buggery[b]	1	-	3	4	-	-	2	2	-	-	5	5	-	-	4	4
Indecency between males																
By male with other male other than below	-	3	78	81	-	3	72	75	-	1	54	55	-	-	-	-
Gross indecency by a male aged 21 or over with a male under 18	-	-	30	30	-	-	11	11	-	-	17	17	-	-	4	4
Gross indecency by a male aged 18-20 with a male under 18	-	2	-	2	-	3	-	3	-	1	-	1	-	-	-	-
Gross indecency by a male aged under 18 with another male	1	-	-	1	4	-	-	4	-	-	-	-	-	-	-	-
Gross indecency by a male aged 18 or over with another male aged 18 or over	-	6	197	203	-	6	195	201	-	1	162	163	-	-	2	2
Procuration																
Man or woman living, wholly or in part, on the earnings of male prostitution	-	-	2	2	-	-	-	-	-	-	2	2	-	-	1	1
Male over 21 procuring or attempting to procure male under 21 to gross indecency with another male	-	-	6	6	-	-	1	1	-	-	6	6	-	-	5	5
Procuring or attempting to procure male to gross indecency with male other than above	-	1	16	17	1	-	19	20	-	-	8	8	-	-	-	-
Soliciting by male	1	3	70	74	1	2	86	89	1	2	44	47	-	-	1	1

a) Not all 'other' offences were listed by the Home Office

b) Buggery and Attempted Buggery offences under the Sexual Offences Act 1956 Sec 12 as amended by the Criminal Justice and Public Order Act 1994 Sec 143.

Note: Some definitions of offence with very few known offenders have been omitted

Source: Home Office