RESEARCH PAPER 03/62
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The *Sexual Offences Bill* [HL]

Bill 128 2002-03

The *Sexual Offences Bill* 2002-03 is the culmination of two major reviews, on sexual offences and the management of sex offenders.

The policy background to the Bill is discussed in Library Research Paper 03/61. That paper provides background to these reviews, outlining current legislation and areas where the Government have identified a need for change. It also gives an outline of the Bill as presented in the House of Lords, and discusses the available statistical information on sexual offences and sex offenders.

This paper looks at the Bill as introduced in the House of Commons on 18 June 2003. It covers some of the more controversial issues such as consent in rape cases, child protection and protection of vulnerable people. Topics which were the subject of major Government amendments, including exposure and sexual activity in public toilets are also discussed.

The Bill is due to be debated on second reading in the House of Commons on 15 July 2003.

Arabella Thorp

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Summary of main points

The *Sexual Offences Bill* 2002-03 aims to modernise the law on sexual offences and to deter and manage sex offenders.

Key themes are:

- protection of children and other vulnerable people
- widening the law on rape and changing the permissible defences in relation to consent
- making the law more gender-neutral, repealing, for example, offences applying specifically to gay men
- tightening notification requirements on sex offenders and widening registration to those convicted overseas

The need for change was highlighted by two major public consultations. A review of sex offences was set up by the Government in 1999, the independent review group producing a consultation paper, *Setting the Boundaries*, in July 2000. A public consultation closed in March 2001. In addition the Government carried out a Review Part 1 of the *Sex Offenders Act 1997* and proposals were published for public consultation by Home Office in July 2001. During the period of this review ongoing changes were made to the criminal justice system and legislation

These two reviews fed into a white paper, *Protecting the Public* (Cm 5668), published in November 2002.

Following this the *Sexual Offences Bill* was introduced in the House of Lords on 29 January 2003 and completed its passage through the Lords on 17 June 2003. Part 1 of the Bill proposes a comprehensive reform of the law on sex offences in England and Wales. It would create several new offences, such as 'meeting a child following sexual grooming' and 'causing or inciting a child to engage in sexual activity', and redefine many existing ones including rape and sexual assault. Part 2 of the Bill would restate and extend existing provisions on registration of sex offenders and establish a range of new preventative civil orders, most of which would apply throughout the United Kingdom. For a clause-by-clause analysis of the Bill, see the Government's explanatory notes to the Bill.[1]

The Bill was amended substantially during its passage through the House of Lords. Some of the main areas of controversy in the House of Lords included:

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[1] Bill 128-EN

- the definition of rape;
- issues of consent;
- anonymity for defendants;
- how to treat children who sexually abuse;
- protection for people giving sex education and advice;
- sexual activity in public;
- exposure; and
- sentencing.

The Government made substantial amendments in the House of Lords to the way that consent would be determined in rape and sexual assault cases. It also redefined 'exposure' to avoid criminalising naturists, and made a number of changes to the child sex offences and sentencing provisions.

Two Government defeats in the House of Lords were: the introduction of a new specific offence of 'sexual activity in a public lavatory' following the Government's withdrawal of a proposed new offence of 'sexual activity in public'; and the addition of a new clause giving the defendant in rape and sexual assault cases the same right to anonymity as is enjoyed by the complainant.

The Bill was considered by three Parliamentary Select Committees: the House of Lords Select Committee on Delegated Powers and Regulatory Reform; the Joint Committee on Human Rights; and the House of Commons Home Affairs Committee.

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I Introduction

The Government's overhaul of the law on sexual offences was announced in 1999 and encompassed a number of reviews and consultations. These set out many of the problems and inconsistencies in the existing law and made proposals for a comprehensive new set of offences for England and Wales, as well as suggesting changes to the way sex offenders are managed throughout the UK. The end result was the publication of the *Sexual Offences Bill* in the House of Lords on 28 January 2003.

The *Sexual Offences Bill* has now completed its passage through the House of Lords, where it was amended substantially, both by the Government and following Government defeats. The Bill was introduced in the House of Commons as Bill 128 of 2002-03 on 18 June 2003. The Government's Explanatory Notes to the Bill provide an overview of the Bill as well as a clause-by-clause commentary.[2] Further information is available on the Sexual Offences Bill page of the Home Office website.[3]

This Paper looks at some of the main issues in the Bill as introduced in the House of Commons, and summarises the House of Lords debates. It includes a discussion of how the Bill would affect Northern Ireland and Scotland. A very brief outline of existing sex offences law in England and Wales is given as an appendix, and a final appendix provides a selective list of further reading. Its companion paper, Library Research Paper 03/61, provides an overview of the policy debate, including the criminal justice statistics that inform it.

The Government ministers responsible for the Sexual Offences Bill in the House of Lords were Lord Falconer of Thoroton (up to and including Report), Lord Bassam of Brighton, and Baroness Scotland of Asthal (Third Reading only). The main Opposition spokespeople were Baroness Noakes and Baroness Blatch; and Lord Thomas of Gresford and Baroness Walmsey for the Liberal Democrats.

II Overview of the Bill

A Home Office press release provides an overview of the Sexual Offences Bill:

> Protection for children and the most vulnerable is at the heart of the Sexual Offences Bill, published today. It is the most radical overhaul of sex offences legislation for 50 years and aims to provide a clear, coherent and effective set of laws that will increase protection, enable the appropriate punishment of abusers and ensure the law is fair and non-discriminatory.

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2 Bill 128-EN, 2002-03

3 http://www.homeoffice.gov.uk/justice/sentencing/sexualoffencesbill/index.html

The Bill ensures that existing Victorian laws on sex offences are fit for the 21st century, that they reflect today's society and attitudes and provide effective protection against today's crimes.

The Bill also contains new measures to strengthen the monitoring of offenders on the sex offenders register and a range of new offences and harsher sentences for sexual offences against children and vulnerable people…

…The Bill details proposals to:

Strengthen protection for children:

- Children under 13 will not be capable in law of giving consent to any form of sexual activity. Any sexual intercourse with a child under 13 will be charged as rape.
- A range of new offences designed to tackle all inappropriate sexual activity with children, including a new offence of causing a child to engage in sexual activity – which will capture behaviour such as inappropriately persuading children to undress.
- A new grooming offence based on meeting a child with the intention of committing a sex offence, and civil order to apply both to Internet and off-line grooming, which will enable restrictions to be placed on people displaying inappropriate sexual behaviour before an offence is committed.
- New offences with severe penalties against those who sexually exploit children for their own gain. The new offences relating to sexual exploitation of a child will protect children up to the age of 18. It will cover a range of activity including: buying the sexual services of a child, causing or encouraging children into sexual exploitation, facilitating the sexual exploitation of a child and controlling the activities of a child involved in prostitution or pornography.
- Maximum penalties for sexual offences against children and vulnerable people have been raised to reflect the severity of these crimes. Any offence involving penetration against a child under 13 or a person who lacks the capacity to consent, will attract a life sentence.

Strengthen protection for vulnerable people:

- Three new categories of offences to give extra protection to those with a learning disability or mental disorder from sexual abuse. Including 'breach of a relationship of care', to protect those who have the capacity to consent, but are vulnerable to exploitative behaviour.

Strengthen protection for the public:

- A new order to make those known to have been convicted of sex offences overseas register as sex offenders when they come to the UK, whether or not they have committed a crime here.

- All those on the sex offenders' register to confirm their details in person annually.
- Offenders on the register to provide National Insurance details as a further safeguard against evasion.
- The period within which a sex offender must notify the police of a change of name or address to be reduced from 14 days to three.
- Sex Offender Orders and Sex Offender Restraining Orders to be amalgamated into a Sexual Offences Prevention Order (SOPO) and made available for anyone convicted of a violent offence where there is evidence they present a risk of causing serious sexual harm.
- A new offence to protect the public from unacceptable sexual acts in public, complementing existing public order offences.
- A new offence to strengthen the law on indecent exposure
- A new offence of voyeurism capturing those who observe others without their knowledge for sexual gratification.

Strengthen offences for sexual violence:

- Clarifying the law on consent in regard to rape.
- A new offence of sexual assault by penetration.
- A new offence of causing sexual acts without consent
- Strengthening drug rape offences.
- Rape extended to include oral penetration.

Strengthen offences to deal with sexual exploitation:

- In addition to the new offences relating to sexual exploitation of children, there will be new offences relating to the sexual exploitation of adults.
- A new offence of trafficking people for sexual exploitation.[4]

III Lords second reading debate

The second reading debate on the Bill took place in the House of Lords on 13 February 2003[5] and provided an overview of the Bill and the areas that were likely to be controversial. Setting the Bill in the context of current law, Lord Falconer of Thoroton (then Home Office Minister of State) said:

> The law on sexual offences, as it stands, is archaic, incoherent and discriminatory. Much of it is contained in an Act dating from 1956, and most of that was simply a consolidation of 19th century law. It reflects neither the changes in society and social attitudes which have occurred since then, nor our increased knowledge of the profound and long-lasting effects of sexual abuse.

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4 Home Office press release 023/2003, *Publication of the Sexual Offences Bill – protection for children and the most vulnerable*, 29 January 2003

5 HL Deb 13 February 2003 cc 771-810; 842-82

> The Bill provides for new offences that set out clearly what is unacceptable sexual behaviour, together with appropriate penalties.[6]

In establishing whether a sexual offence has occurred, the issue of consent is of fundamental importance. Lord Falconer introduced the point thus:

> Under existing law, where a defendant is found to have an honest belief in the consent of the complainant, then even if such a belief is unreasonable, he must be found not guilty. We believe that that is wrong and must be corrected.
>
> We will introduce into the law on consent a test of reasonableness. Where the prosecution can establish that sexual activity has taken place, that the other person did not consent to it and that a reasonable person would, in all the circumstances, have doubted whether the complainant consented, if the defendant did not act in a way that a reasonable person would consider sufficient to resolve that doubt, the offence will be made out. All this will be for the prosecution to prove. The defendant remains innocent until proved guilty beyond reasonable doubt.[7]

The Bill includes a package of measures to protect children. Below the age of 13, children would, in effect, be deemed incapable of consenting to any form of sexual penetration or touching. Clause 2[8] provides for an offence of statutory rape, going further than the recommendations of the sex offences review.

Another set of clauses covers ostensibly consensual activity with children aged 13 to 15. These include a new offence to tackle the grooming of children by any means of communication. Lord Falconer explained:

> Following the recommendations of the Task Force on Child Protection on the Internet, we are creating a new offence to tackle the grooming of children both on- and off-line. The offence of meeting a child following sexual grooming and so on in Clause 17[9] will catch adults who undertake a course of conduct with a child leading to a meeting where the adult intends to sexually abuse that child either at that meeting or on a subsequent occasion.
>
> This offence is complemented by a new risk of sexual harm order, provided for in Clauses 110 to 115,[10] which will be used to prevent harm to children from sexually explicit communication or conduct where the adult has already engaged in such behaviour towards a child. This order could be used, for example, to stop

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6 HL Deb 13 February 2003 c 771
7 HL Deb 13 February 2003 c 772
8 Clause 2, HL Bill 26; Clause 6, Bill 128
9 Clause 17, HL Bill 26; Clause 17, Bill 128 (with amendments)
10 Clauses 110 to 115, HL Bill 26; Clauses 121 to 127, Bill 128 (with amendments)

> an adult sending a child adult pornography or indecent text messages by mobile phone.[11]

Lord Falconer also drew attention to other child protection measures relating to people in positions of trust and to family members. Existing legislation was being extended in both these areas. Recognising the complexity of the modern family unit, he said:

> We have therefore defined family relationships to take into account situations where someone is living within the same household as a child and assuming a position of trust or authority over that child, as well as relationships defined by blood ties, adoption, fostering, marriage or "common law" partnerships.[12]

The Bill would bring "more coherence and higher penalties to the criminal law surrounding prostitution, child pornography and trafficking". Child pornography offences would be extended "to protect children up to the age of 18."

Three new categories of offences were being introduced to protect persons with a mental disorder or learning disability – Lord Falconer considered these essential remedies to the inadequate redress of existing legislation. The offences are designed to capture exploitative behaviour by carers or by people who take advantage of an individual's incapacity to refuse or vulnerability to "relatively low levels of inducement, threat or deception."

Lord Falconer also referred to controversy and confusion over a clause[13] dealing with sexual activity in public:

> We shall therefore look at the drafting of this offence again during the Committee stage of the Bill to make sure we get it completely right. The offence will send out a strong signal of our intention to protect people from being the unwilling witnesses to overtly sexual behaviour in public that most people consider should take place in their own homes, while recognising that what consenting adults do away from the eyes of others is not a matter for the criminal law.
>
> The sexual offences that I have outlined today are sensible, consistent and balanced. We have dragged the law on sexual offences into the 21st century, in a way which will treat everyone in society equally. The discriminatory offences of buggery and gross indecency, which criminalise consensual sexual activity in private between men that would not be illegal between heterosexuals or between women, will be repealed at last.[14]

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11 HL Deb 13 February 2003 c 773
12 HL Deb 13 February 2003 c 773
13 Clause 74, HL Bill 26; Clause 67, Bill 128 (with amendments)
14 HL Deb 13 February 2003 c 775

Part 2 of the Bill deals with the management of sex offenders. A group of clauses on notification requirements re-enacts, with amendments, Part I of the *Sex Offenders Act 1997*. Lord Falconer went on:

> Additional protection will be offered by sexual offences prevention orders in Clauses 103 to 109,[15] which combine existing sex offender orders and restraining orders, and will allow for whatever prohibitions on an offender are necessary to protect the public.[16]

The Bill sees the addition of a new notification order applicable to those convicted of sexual offences abroad.

Baroness Noakes began by reiterating the Opposition's broad support for the Bill, though she regretted the length of time it had taken to reach this stage. Her contribution was underscored by four themes: "the effectiveness of the Bill, its internal consistency, whether too much is criminalised by the Bill and, last but not least, whether the Bill is validated by the views of the public."[17]

> Let me start with the definition of rape and the other major offences of assault by penetration and sexual assault. There are generally agreed to be problems with the law of rape given the conviction rates, which have been falling to levels that many believe are unacceptable. The finger has been pointed at the law in relation to consent and the Bill seeks to address that inter alia by the rebuttable presumptions in Clause 78.[18]
>
> The Government clearly hope that that will lead to greater conviction rates but, as the Minister intimated, doubts have been raised as to whether it will do that. Clause 78 not only states the blindingly obvious—for example, that a person who is asleep cannot consent—but perhaps more importantly treats the evidence of the complainant in a complex way that may be difficult for jurors to understand. There is a big question mark over how effective the Bill will be in that area.[19]

Baroness Noakes supported the creation of a sexual grooming offence, provided it was just that "and not a legal abyss into which innocent fools are sucked". On the face of the Bill, the offence would hinge on the *intent* in arranging a meeting with a child and could effectively create, citing Liberty, a "thought crime".

She questioned the internal consistency of the penalties prescribed in the Bill, citing the following example:

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15 Clauses 103 to 109, HL Bill 26; Clauses 102 to 111 (with amendments)
16 HL Deb 13 February 2003 cc 776
17 HL Deb 13 February 2003 c 777
18 Clause 78, HL Bill 26; Clause 76, Bill 128 (with amendments)
19 HL Deb 13 February 2003 c 777

> under Clause 11 there is an offence of inciting a child to engage in sexual activity which carries a possible term of up to 14 years imprisonment whereas the corresponding offence in relation to a person with a mental disorder or a learning difficulty carries a life sentence. I shall take a lot of persuading of the logic of that and that is not the only example.[20]

Suggested examples of over-criminalisation included consensual sex between two fifteen year olds and between two adults with learning disabilities.

Noting public concerns, Baroness Noakes welcomed the Government's undertaking to look again at the proposed offence of sexual activity in public:

> My last theme is whether the Bill passes the acid test of meeting the legitimate concerns of the public about the protection that the law should provide. I refer to the new offence of sexual activity in public as set out in Clause 74. It legitimises what is known as "cottaging"; that is sex between homosexuals in a public lavatory provided that it is in a cubicle and hence not seen. Mr Hilary Benn, a Minister in the Home Office, has been widely reported as confirming that.
>
> I believe that ordinary people are as outraged by hearing such sexual activity in public lavatories as they are by seeing it. In particular parents do not believe that their children should be exposed to such behaviour. For the record, I believe that exactly the same principles apply to heterosexual sex or to sex between two women.
>
> The Minister may well say that the existing offence of outraging public decency remains. But the plain fact is that the Government's drafting of Clause 74 will be regarded as giving the definition, by exception, of acceptable behaviour. I was glad to hear the Minister say that he is prepared to reconsider that. Also Clause 74 allows sexual activity in a dwelling house with the windows wide open, lights on and so on, but prohibits the same activity in a private garden. I can see a whole new dimension to disputes between neighbours opening up. The balance in Clause 74 is not right and we shall have to return to the matter in Committee.[21]

Lord Thomas of Gresford focused on rape, disagreeing with the contention that low acquittal rates were attributable to the Morgan defence (honest but unreasonable belief in consent). He drew attention to the Bill's introduction of an objective test, almost unknown in criminal law, into rape:

> Under the Bill, criminal responsibility for rape attaches to the defendant if he intentionally has sexual intercourse with the complainant without her consent and either, subjectively, does not believe that she consents or, objectively, in circumstances in which a reasonable man would have doubted whether the complainant was consenting, does not act in a way a reasonable man,

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[20] HL Deb 13 February 2003 c 778
[21] HL Deb 13 February 2003 cc 778-9W

> "would consider sufficient . . . to resolve such doubt".
>
> As to subjective lack of belief, it suffices that the defendant has given no thought as to whether the complainant consents. As to the objective belief, once one introduces the concept that it is sufficient, not that the defendant thought that she was consenting but that a reasonable man would have had a doubt about it, the defendant is liable to be convicted and sentenced to life imprisonment on the jury's assessment, not of his actual state of mind and actions, but of the hypothetical state of mind and actions of a hypothetical person.[22]

IV Rape and sexual assault

The Bill would create four new categories of rape and sexual assault:

- rape: penile penetration of the anus, vagina or mouth;
- assault by penetration: penetration of those areas but not with the penis;
- sexual assault: any non-consensual assault of a sexual nature; and
- sexual assault of a child under 13: any sexual activity involving a child under 13.

The interpretation clause makes it clear that these offences could be committed either by or on a transsexual person:

> References to a part of the body include reference to a part surgically constructed (in particular through gender reassignment surgery).[23]

The clauses of Part 1 of the Bill were re-arranged through Government amendments on Report, to separate out the offences against children more clearly.[24]

A. Definition of rape

The definition of rape was extended to include non-consensual anal penetration of a man or a woman by section 142 of the *Criminal Justice and Public Order Act 1994*. **Clause 1** of the Bill would now extend the definition further to include penetration of the mouth with the penis.

There had originally been a proposal to include oral penetration along with anal penetration in the definition of rape under the 1994 Act, but this was rejected by the then Government.[25] However, the evidence submitted to the recent sexual offences review

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22 HL Deb 13 February 2003 c 782
23 Clause 80(3)
24 See HL Deb 2 June 2003 cc1082-84
25 HL Deb 31 March 2003 c1050

persuaded this Government that oral penetration was as serious as other forms of 'forced penile penetration' and should therefore be included with them as rape.[26]

Lord Lloyd of Berwick was not convinced that simply because forced oral penetration was accepted as a very serious offence it should be included in the offence of rape.[27] Lord Campbell of Alloway agreed, suggesting that while forced oral penetration is serious, it is not rape as ordinarily understood or defined and should instead constitute a specific offence.[28] He and others proposed amendments which sought to deal with forced oral penetration outside the offence of rape.[29] However, the Government's view was that:

> Penile penetration is of a particularly personal kind. It carries risks of disease transmission and I believe that it should be treated separately from other penetrative assaults. In our view, it makes good sense for all forms of non-consensual penile penetration to be grouped together within the offences of rape.[30]

B. Acquaintance rape

Baroness Mallalieu noted that there seemed no difficulty in obtaining convictions for "towpath rape".

> It is the so-called consent cases that pose the greatest difficulty. Juries rightly see that such allegations are easy to make and difficult to disprove. Juries are correctly wary of convicting unless there is other evidence or evidence of violence as well…
>
> …Moving the goal posts to try to correct what is seen as an imbalance does not work. The abolition of the requirement to give a warning in sexual cases to look for corroboration, so far as I can judge, made no difference whatever to the conviction rates. Rape is quite rightly regarded as a very serious offence and offenders are sentenced as such. Juries are reluctant to convict in cases where the circumstances in their judgment do not merit such long custodial sentences: the boy who pushes his luck after a dance, the couple having difficulties and the husband who persists when the wife says she does not want sex, the cases where there has been a previous sexual history or a close friendship. Those may be serious matters; they may have lasting effects on those concerned. But juries are not fools. They look at the people who give evidence in front of them; they know how people can behave in delicate and highly charged emotional situations; and

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26 Lord Falconer of Thoroton, HL Deb 31 March 2003 cc1059-60
27 HL Deb 2 June 2003 c1077
28 HL Deb 31 March 2003 c1048
29 see HL Deb 31 March 2003 cc1048-61 and cc1143-56; HL Deb 1 April 2003 cc1184-5; HL Deb 2 June 2003 cc1077-8
30 Lord Falconer of Thoroton, HL Deb 2 June 2003 c1079

> they believe that the label of "rape" should be reserved for the most serious of sexual attacks.[31]

Baroness Walmsley said that the CPS should prosecute rape cases whenever there was a realistic chance of achieving a safe conviction.

> However, in cases where it appears that a conviction is unlikely I would rather have available a lesser, albeit serious, charge with a slightly less serious penalty than risk the guilty offender walking away completely free to re-offend. I suspect that many complainants would feel that way too. I hope that the Minister will give serious consideration to that constructive suggestion.[32]

In his reply to the debate,[33] Lord Falconer noted the "additional issues of betrayal of trust" raised by relationship rape;

> So it is difficult to see, as a matter of principle, that one should treat those kinds of cases as less serious offences. As a matter of principle we do not believe that it is right to have a lesser offence. As a matter of principle we believe it is right to have a reasonableness test because it would reflect a much better policy conclusion. We believe that a reasonableness test would be perfectly workable.[34]

C. Consent

1. Definition of consent

Clause 75 provides a definition of consent for Part 1 of the Bill:

> a person consents if he agrees by choice, and has the freedom and capacity to make that choice.

Setting the Boundaries had used the formula 'free and genuine agreement'. Baroness Walmsey would have preferred this to be the definition in the Bill, along with a requirement for capacity to consent. Lord Falconer said the Government had rejected this because of the concern that it might suggest that money or some other consideration may be involved in obtaining consent.[35]

2. Reasonable belief in consent

In an attempt to increase the conviction rate for rape and sexual assault, the Bill proposes to remove the current purely subjective defence of 'honest but unreasonable' belief in

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31 HL Deb 13 February 2003 cc 850 -1
32 HL Deb 13 February 2003 c 867
33 HL Deb 13 February 2003 cc 875-82
34 HL Deb 13 February 2003 c 878
35 HL Deb 19 May 2003 cc593-5

consent, and instead introduce an element of objectivity along with a series of presumptions about where consent is not deemed to be present. However, the debates in the House of Lords disclosed significant differences of opinion over how this should be done, and indeed if it should be done at all. The "really important point", according to Lord Lloyd of Berwick, was "whether we should now seek to interfere with the mental element in the crime of rape."[36]

The main argument for retaining complete objectivity is that if a person honestly believed that someone consented to sex - however unreasonable that belief - he did not have a sufficiently guilty mind to be convicted of rape. This view had been established by the courts in the 1976 case of Morgan,[37] and after being upheld by the Heilbron committee (1976), was enshrined in legislation by the Sexual Offences (Amendment) Act 1976.

The offence of rape in section 1 of the Sexual Offences Act 1956 now provides that a man commits rape if he has vaginal or sexual intercourse with a person who did not consent, and 'at the time he knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it'. However, if the court has to consider whether the defendant believed that the person was consenting to intercourse, the presence or absence of reasonable grounds for belief in consent is a matter to which the court is to have regard in considering whether he so believed[38]

The Criminal Law Revision Committee (1984) and most recently the Law Commission (2000) have upheld the defence of honest but unreasonable belief in consent.

Lord Lloyd of Berwick wanted to keep the *Morgan* defence, suggesting that the introduction of a subjective test of reasonableness would amount to allowing 'rape by negligence'.[39] Lord Ackner also approved of the *Morgan* defence, citing in its support what he saw as neglected work by the Heilbron Committee and the Criminal Law Revision Committee, and an essay by Professor Hogan.[40]

Baroness Noakes and others raised doubts as to whether this change would actually result in an increase in convictions,[41] though Baroness Noakes said that an objective approach to reasonableness was worth trying.[42]

Baroness Kennedy of the Shaws (the barrister Helena Kennedy QC) disagreed with the *Morgan* defence. She suggested that despite the very few cases in which an honest but

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36 HL Deb 13 February 2003 c 859
37 *DPP v Morgan* [1976] AC 182
38 *Sexual Offences (Amendment) Act 1976* s1(2)
39 HL Deb 31 March 2003 c1065
40 HL Deb 13 February 2003 cc 846-9
41 see for example Baroness Noakes, HL Deb 31 March 2003 c1093; Baroness Carnegy of Lour, HL Deb 31 March 2003 c1085
42 HL Deb 31 March 2003 c1071

unreasonable belief in consent has been claimed,[43] the judge invariably refers to the possibility in his direction to the jury:

> As a practitioner, I know - it has been stated in previous debates - that the Morgan defence is rarely used. I, like other, have never heard anyone in the courtroom say, "She was saying no. She was screaming her head off. She was fighting and beating me, but I thought she liked it that way and so I proceeded to have sexual intercourse with her." That is not what is said.
>
> Juries faced with a man saying "I didn't force her to have sexual intercourse" and a woman saying "Yes, he did" listen to the judge, who invariably directs the jury on Morgan even if it has not been raised.
>
> The judge says to the jury, "Members of the jury, if this man honestly believes she was consenting, then he has a defence". It is that formula in the judge's summing up which leaves juries saying, "Even though he is not saying it, maybe he did honestly believe it although she was saying no". Therefore, on the balance between the two, they use it to acquit men who are clearly guilty of the alleged offence.
>
> […] I do not want to see accused people having to prove they are innocent. But we should be prohibiting people from being negligent in their disregard from others when it comes to intimate abuse.[44]

Organisations quoted as supporting a 'reasonableness' requirement are Liberty, the Criminal Bar Association, the Metropolitan Police and the Rape Crisis Federation.[45] The law reform group Justice was described by its chairman as 'uncharacteristically divided' on the issue.[46]

In New Zealand the law was changed in 1986 to require reasonable grounds for a defence of belief in consent.[47] Lord Cooke of Thorndon, who for ten years was President of the Court of Appeal in New Zealand, said that this legislation had operated 'without much difficulty and to general public satisfaction'. He suggested that because both counsel and judge will tell the jury that the defence will be made out if the defendant believed on reasonable grounds that the complainant consented, the jury's task is simplified and prosecution is encouraged.[48]

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43 see eg discussion at HL Deb 31 March 2003 cc1087-8

44 HL Deb 2 June 2003 cc1055-57

45 HL Deb 31 March 2003 c1071

46 Lord Alexander of Weedon, HL Deb 2 June 2003 c1058

47 This was part of a much wider set of reforms to the law of rape in New Zealand: see *Sex Offences Law in Australia and New Zealand: the impact of change*, in *Setting the Boundaries: supporting evidence* July 2000: http://www.homeoffice.gov.uk/docs/volmain2.html

48 see HL Deb 2 June 2003 cc1058-60

The Bill had originally used the test of what a hypothetical 'reasonable person' would believe about consent. Variations on this are 'the reasonable person in the position of the defendant', or 'the reasonable person sharing the characteristics of the defendant'.[49] However, the 'reasonable person' test is recognised as being one which has always troubled the courts.[50] For instance it is not clear what characteristics should be assumed by the jury in seeking to take on the role of a 'reasonable person'.

Following considerable criticism,[51] the government therefore rejected this formula in favour of *reasonable belief in consent*, having regard to all the circumstances including any steps the defendant had taken to ascertain whether the complainant consented.[52] This now appears in **clauses 1, 3, 4 and 5**. Baroness Scotland explained the new test as follows:

> To satisfy those concerns, the revised version of the reasonableness test moves away from the concept of the "reasonable person" and requires the prosecution to prove that the defendant did not have a reasonable belief in consent. The test is supported by an explanation of the type of criteria to be used to determine whether the defendant's belief in consent was reasonable in relation to the alleged offence. The jury is directed to have regard to all the circumstances at the time, including any steps that the defendant may have taken to establish that the complainant consented to the sexual activity.
>
> Although we recognise that not every sexual act has to be preceded by specific actions on the part of the defendant, especially where the defendant and complainant are in a well-established, consensual sexual relationship, it is still imperative that the defendant must be certain that his partner consents to the sexual activity at the time in question. Doubt is most likely to arise in those cases where the defendant and the complainant are not in a well-established relationship and where it would be reasonable to expect the defendant to take steps to ensure consent. Our reasonableness test does not require the defendant to have taken any specific steps but makes it clear that where such steps have been taken they must be taken into account by the jury in deciding whether the defendant's claimed belief in consent was reasonable. Some might argue that that goes without saying, but we believe that it is important to send a clear message to everyone that sexual acts with another person must be mutually agreed and that we all have an individual responsibility to ensure that that is the case.[53]

The New Zealand judge Lord Cooke of Thorndon would have preferred a different wording, contained in an amendment which the Government had tabled but did not move. This would have made the criterion 'whether in all the circumstances, including any steps

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[49] These were the subject of a proposed amendment in Committee in the House of Lords: see HL Deb 31 March 2003 cc1100-09. See also Lord Falconer of Thoroton, HL Deb 19 May 2003 cc619-20.

[50] Lord Morris of Aberavon, HL Deb 13 March 2003 c1081

[51] see for example HL Deb 2 June 2003 cc1061-77

[52] see HL Deb 17 June 2003 cc669-78

[53] HL Deb 17 June 2003 c669

taken by person A to ascertain whether person B consents A could reasonably be expected to doubt whether B consents'.[54]

The Home Affairs Committee welcomed the Government's amendment:

> The revised test for determining whether a defendant's belief in consent—in a rape case—is reasonable (Clause 1(c)). We believe that the test is now clear, simple and sufficiently flexible to take account of characteristics, such as a learning disability, which might bear on the defendant's ability to understand that the complainant was not consenting.[55]

3. Presumptions about consent

Clauses 76 and 77 of the Bill would introduce a new list of circumstances in which it could be presumed that the complainant did not consent to sexual activity. This proposal was based on a recommendation of *Setting the Boundaries* but the government's list is more tightly drawn than suggested there. As a result of Government amendments in the House of Lords,[56] only two circumstances would now give rise to a conclusive presumption that there was no consent:

- where the defendant had intentionally deceived the complainant as to the nature or purpose of the act; or
- where he had deceived the complainant about his identity by impersonating someone known personally to the defendant.

In a further five circumstances the presumption against consent could be rebutted if the defence produced evidence to suggest that there was consent or at least a reasonable belief in consent. This would apply where:

- violence was being used or threatened against the complainant;
- the complainant feared that violence was being used or threatened against another person;
- the complainant was unlawfully detained;
- the complainant was asleep or unconscious; or
- the complainant was unable to communicate consent because of a physical disability.

Attempts to add to the list of rebuttable presumptions were generally rejected by the Government,[57] though Baroness Scotland did promise to consider one addition when the Bill is considered in the House of Commons: where the defendant has sex with the

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54 HL Deb 17 June 2003 cc675-6
55 Home Affairs Committee, *Sexual Offences Bill*, HC 639 2002-03, 10 July 2003
56 see HL Deb 17 June 2003 cc669-72
57 see HL Deb 19 May 2003 cc595-604

complainant knowing that he or someone else had intentionally administered a substance to her without consent.[58]

The rebuttable presumptions would come into play only once it has been proved beyond reasonable doubt that the defendant did the sexual act in question. The prosecution could then try to prove (also beyond reasonable doubt) that violence had been used or the complainant was unlawfully detained, asleep, unconscious or physically unable to communicate, and that the defendant knew about this. If one of these circumstances is proved, then it will be presumed both that the complainant did not consent and that the defendant did not reasonably believe that she did.

However, the defendant could rebut the presumption if he raised enough evidence to suggest either that the complainant did in fact consent, or that, even if she did not, the defendant reasonably believed that she had. The prosecution would then have to prove the issue of consent in the normal way. The defence would never have to *prove* that she had consented or that the defendant had reasonably believed that she had - this is therefore what is known as an 'evidential' burden instead of a 'persuasive' burden of proof.

In the original drafting of the clause a persuasive burden of proof had been placed on the defendant. He would have had to persuade the court 'on the balance of probabilities' before the presumption could be rebutted. This was strongly criticised in the House of Lords, so the Government introduced amendments on Third Reading to move to the lighter evidential burden.[59] Again the Home Affairs Committee welcomed the revised approach.[60]

Concerns about a list of presumptions included:

- conclusive presumptions are generally contrary to the 'fair trial' and 'innocent until proved guilty' provisions of the European Convention on Human Rights if they shift the burden of proof on to the defendant;[61]
- presumptions can defeat the traditional functions of the jury;[62]
- presumptions unnecessarily complicate the judge's directions to the jury;[63]
- a list would send a signal that those circumstances not on the list are not necessarily wrong;[64] and
- this list covers precisely the sort of cases in which a conviction is likely in any event.[65]

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58 HL Deb 17 June 2003 cc743-4
59 see HL Deb 17 June 2003 cc669-78
60 Home Affairs Committee, *Sexual Offences Bill*, HC 639 2002-03, 10 July 2003
61 Lord Thomas of Gresford, HL Deb 31 March 2003 c1134 and HL Deb 2 June 2003 cc1061-65
62 Lord Campbell of Alloway, HL Deb 17 June 2003 c675
63 Lord Thomas of Gresford, HL Deb 31 March 2003 c1134
64 Baroness Noakes, HL Deb 31 March 2003 c1132 and HL Deb 2 June 2003 c1080

D. Definition of 'sexual'

The word 'sexual' appears many times throughout Part 1 of the Bill, not only in the new offences of sexual assault and causing a person to engage in sexual activity without consent, but also in the offences relating to children and vulnerable people. **Clause 79** provides a definition:

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

This definition was apparently guided by the case law on the definition of the word 'indecent' in the context of an indecent assault.[66]

The phrase 'may (at least) be sexual' was chosen in an attempt to cover both acts that may or may not be sexual depending on the circumstances - such as digital penetration of a woman's vagina by a GP in his surgery - and acts that are always sexual.[67]

Lord Lucas was concerned that the words 'or all or some of these considerations' in paragraph (b) might allow a court merely to consider some of the circumstances, rather than taking into account all the relevant circumstances; or to consider the nature of the activity and not its circumstances. Baroness Scotland promised that this is not what the wording means.[68]

E. Anonymity

Complainants in cases of rape and various other sexual offences have the right to anonymity from the time an allegation is made.[69] Defendants in these cases no longer have anonymity, though for twelve years they did.[70]

Lord Ackner wanted to see a return to anonymity for defendants, as he had heard nothing to suggest that during those twelve years there were occasions when it worked to the disadvantage of justice.[71] Both Baroness Kennedy of the Shaws and Baroness Noakes accepted that the biggest problems relate to the publicity that may occur before charge.

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65 Baroness Mallalieu, HL Deb 31 March 2003 c1137; Baroness Noakes, HL Deb 2 June 2003 cc1079-80

66 Lord Falconer of Thoroton, HL Deb 19 May 2003 c617.

67 HL Deb 19 May 2003 c619

68 HL Deb 17 June 2003 cc744-7

69 now contained in the *Sexual Offences (Amendment) Act 1992* ss1-4

70 Anonymity for defendants was given by the *Sexual Offences (Amendment) Act 1976* s6, and removed by the *Criminal Justice Act 1988* s158.

71 HL Deb 2 June 2003 cc1084-95

However, whereas Baroness Noakes wanted to make sure that defendants' anonymity would cover everything from arrest onwards,[72] Baroness Kennedy's concern was that anonymity go no further than the point of charging. Her argument was that naming the person charged with an offence is one of the ways in which witnesses come forward.[73]

The Government rejected the arguments for giving anonymity to defendants. Lord Falconer suggested that:

> Singling out defendants in cases of sexual offences, as is being proposed, might also give the impression that there exists a presumption of doubt about the credibility of the complainant in sex offence cases which does not exist with other kinds of offences.[74]

As for pre-charge publicity, Lord Falconer referred to guidance issued by the Association of Chief Police Officers,[75] which makes it clear that anyone under investigation but not charged should not be named or have details provided that might lead to their identification before they are charged.[76] However, this is not always successful, for example in the recent case of Matthew Kelly cited by the Home Affairs Committee. The television celebrity was arrested in January this year as he came off stage, after a pantomime performance of Captain Hook in Birmingham. His arrest and subsequent investigation was widely publicised in the national and regional press under headlines such as 'Matthew Kelly held over child sex', 'Matthew Kelly accused of sex attacks on boys' and 'Matthew Kelly, the camp entertainer with an unconventional marriage; the weird life of Mr Saturday Night TV'. A month later, the police decided to take no further action on the grounds that there was insufficient evidence to charge.

Lord Ackner's amendment was accepted by the House of Lords on a close division (109 to 105) and now appears as **clause 2** of the Bill.

The Home Affairs Committee came out in favour of anonymity for the accused:

> 76. On balance, we are persuaded by the arguments in favour of extending anonymity to the accused. Although there are valid concerns about the implications for the free reporting of criminal proceedings, we believe that sex crimes do fall 'within an entirely different order' to most other crimes. In our view, the stigma that attaches to sexual offences—particularly those involving children—is enormous and the accusation alone can be devastating. If the accused is never charged, there is no possibility of the individual being publicly vindicated by an acquittal.

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72 HL Deb 2 June 2003 cc1086-87
73 HL Deb 2 June 2003 cc1085-86
74 HL Deb 2 June 2003 c1091
75 ACPO *Media Advisory Group Guidance No. 2 - Individuals Under Investigation*, December 2000: http://www.acpo.police.uk/policies/GN2.doc
76 HL Deb 2 June 2003 c1092

> […]
>
> 80. We therefore recommend that the reporting restriction, which currently preserves the anonymity of complainants of sexual offences, be extended to persons accused of those offences. We suggest, however, that the anonymity of the accused be protected only for a limited period between allegation and charge. In our view, this strikes an appropriate balance between the need to protect potentially innocent suspects from damaging publicity and the wider public interest in retaining free and full reporting of criminal proceedings.

The Government seems to be pursuing the approach of strengthening existing guidelines rather than introducing statutory anonymity:

> The Home Office is currently in talks with the police and the newspaper industry to see what can be done to strengthen guidelines about disclosure and reporting of the names of people being investigated.[77]

V Child protection

The Bill aims to bring a whole range of sexual offences against children together into one place. The current offences are spread out over several different pieces of legislation. The Bill's provisions on child sex offences are arranged as follows:

- any sexual activity with children under 13 (clauses 6 to 9);
- rape and sexual assault of children aged 13, 14 or 15 (included in the general offences in clauses 1 to 5);
- other sexual activity involving a child under 16 (clauses 10 to 17);
- abuse of a position of trust with a child aged 16 or 17 (clauses 18 to 26);
- sexual activity with a child family member (clauses 27 to 31);
- prostitution and pornography offences involving children (clauses 47 to 53);
- trafficking (both children and adults included in clauses 58 to 61); and
- preparatory offences (both children and adults included in clauses 62 to 64).

A. Offences against child under 13

These offences were the subject of Government amendments which may appear more significant than they are. As originally drafted, the Bill provided that where someone engages in sexual activity with a child under 13, he must be charged under one of the specific offences relating to children under 13. However, this might have meant that if during the course of a trial for one of the offences designed for children aged 13, 14 or 15 it emerged that the child was in fact under 13, the charge would have to be amended (and

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[77] BBC news online, *Sex case suspects 'should be anonymous'*, 10 July 2003: http://news.bbc.co.uk/1/hi/uk_politics/3054085.stm

judges can be reluctant to do this). The Government decided to remove the charging requirement and instead have a fall-back position. Now in all the general child sex offences if a child who was thought to be 13 or over turns out in fact to be under 13, the original charge could still stand (though there could be no defence of mistaken belief in age if the child was in fact under 13).[78]

The Human Rights Joint Select Committee raised the issue of whether it is a proportionate response to a pressing social need to impose criminal liability on children aged less than 13 who consensually engage in any sexual touching (including, apparently, kissing) together, and on a 13-year-old who kisses a consenting 12-year-old:

> Under [clause 8] of the Bill, two children aged 12 or less who by mutual consent touch each other in a sexual way would each be guilty of a criminal offence. Where a child aged 13 touches a child aged 12 with the latter's consent, the child aged 13 (but not the child aged 12) would be guilty of a criminal offence. [Clause 79] defines sexual touching in a way that would seem to include many activities of a kind in which some children regularly engage, including kissing. [Clause 8] would apply to children at an age when many of them are developing and exploring their sexuality. hnposung criminal liability on children in these circumstances engages their right to respect for private life under ECHR Article 8.1. The interference would be justified if it could be shown to advance one of the legitimate aims listed under Article 8.2, and to be necessary in a democratic society for that purpose, i.e. to serve a pressing social need and to be proportionate to the legitimate aim pursued.[79]

In a further report the Committee concluded that this

> 2.20 In our view, the Government has not established that the impact of clause 6 of the Sexual Offences Bill, imposing liability on children under 13 for all sexual touching whether or not there is consent and whether or not it can properly be regarded as indecent, would be proportionate to a legitimate aim so as to be justifiable under ECHR Article 8.2. The offence seems to us to be over-broad, to impose liability in a way that is not adequately tailored to the legitimate objective, to interfere with the right to respect for private life more than is necessary for that purpose in a democratic society, and to contain insufficient safeguards against violation of the rights. We draw this matter to the attention of each House.[80]

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78 see HL Deb 1 April 2003 cc1197-8

79 Joint Committee on Human Rights, *Scrutiny of Bills: Further Progress Report*, seventh report, HL 74, HC 547 2002-03, Appendix 8: Letter from the Chairman, to Lord Falconer of Thoroton QC, Home Office, on the Sexual Offences Bill

80 Joint Committee on Human Rights, *Scrutiny of Bills: Further Progress Report*, twelfth report, HL 119, HC 765 2002-03,

B. Children who sexually abuse

Baroness Walmsey and Baroness Noakes both tabled a number of amendments reflecting their concerns about how young people accused of sexual abuse should be dealt with, especially where the activity was consensual.[81] They felt that these children should if possible be dealt with outside the court system, without having to rely on the discretion of the CPS. Baroness Walmsey was particularly keen to see improved consistency, equality and availability of services for young sex offenders, and the involvement of multi-disciplinary professional teams at all stages along the lines of a model in Greater Manchester.[82]

The Government's response was that prosecution is certainly not the inevitable outcome where two children engage in consensual sexual activity; but that there will be cases in which under-16-year-olds commit crimes where prosecution or a warning is appropriate.[83] Lord Falconer thought that the amendment would amount to restricting the age of consent to situations where a person under 16 engages in sexual activity with a person who is 18 or over. He was unwilling to do this, stating that many children welcome the protection offered by the age of consent as it enables them to withstand peer pressure to engage in sexual activity until they are 16.[84] It also sends a message that teenagers should not have sex at an early age.

Baroness Blatch was concerned that amending the Bill to prevent young people being prosecuted for consensual sexual activity could mean that children would have to go into the witness-box to be examined on whether they consented to sexual activity with the young accused.[85]

Lord Falconer stated that the *Code for Crown Prosecutors* and other CPS guidance would be updated once the Bill has been given Royal Assent, in order to set out how children accused of the new offences should be treated.[86] He also referred to a number of government projects in this area, including an interdepartmental working group on the issues of young people who sexually abuse, and various initiatives by the Youth Justice Board and National Probation Directorate, as well as the forthcoming Green Paper on *Children at Risk*.[87] Baroness Scotland of Asthal gave more details of the various guidelines that will be issued to the police and prosecutors on how to treat consensual, non-exploitative sexual activity between teenagers.[88]

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81 see HL Deb 1 April 2003 cc1174-84, cc1195-7 and cc1211-1233; HL Deb 19 May 2003 cc590-92; HL Deb 2 June 2003 cc1102-9; HL Deb 17 June 2003 cc682-92

82 HL Deb 1 April 2003 c1214

83 Lord Falconer of Thoroton, HL Deb 1 April 2003 cc1176-77 and cc1223-29

84 HL Deb 2 June 2003 cc1106-8

85 HL Deb 1 April 2003 c1180

86 *ibid* c1227

87 *ibid* cc1178-79 and c1226

88 HL Deb 17 June 2003 cc689-91

Later debates in Committee looked at whether young people who are found guilty of a sexual offence should be put on the sex offenders register, and if so, for how long.[89]

C. Defence of mistake of age

Instead of providing a specific 'young man's defence' - that the defendant has reasonable grounds for believing the complainant was over the age of consent - the Bill integrates a limit on each of the child sex offences, the abuse of trust offences, the familial child sex offences and the offences of abuse of a child through prostitution or pornography. These would apply only if the complainant is under the relevant age (16 for the child sex offences and 18 for all the others) AND the defendant does not reasonably believe that the complainant was the relevant age or over. However, if the complainant was under 13 there would be no such limit.

D. Defence for providing advice and treatment to children

During the Lords' Committee stage, the government introduced a new defence to the offence of arranging or facilitating the commission of a child sex offence. It is intended to cover people who are providing sex education or sexual health advice, as long as they do not cause or encourage the child's sexual activity.[90] This now appears as **Clause 15(2) and (3)**. Baroness Gould of Potternewton confirmed that child protection organisations concerned had asked for this defence to allow them to continue their work without fear of prosecution or unsubstantiated allegations.[91]

Criticisms concentrated on whether this would create a 'paedophile's charter', either by protecting people providing sex education who then go on to commit a child sex offence,[92] or by allowing people to get into a position where they can abuse children.[93] Various amendments sought for instance to limit the defence so that it could not be used by convicted sex offenders, though the point was lost on a division (192 to 72).[94]

There appear to be safeguards to prevent this. For instance, Lord Skelmersdale thought that the words at the end of subsection (3) 'and not for the purpose of causing or encouraging the activity constituting the offence' would already prevent paedophiles from relying on the defence.[95] In addition, under proposals in the current *Criminal Justice Bill*,

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89 HL Deb 19 May 2003 cc627-32. See below for a discussion of the sex offender registration provisions of the Bill.

90 HL Deb 1 April 2003 c1235-47

91 HL Deb 1 April 2003 c1242

92 Baroness Noakes, HL Deb 1 April 2003 c1236

93 Baroness Blatch, HL Deb 1 April 2003 c1237-41

94 see for example HL Deb 2 June 2003 cc1110-14, and HL Deb 17 June 2003 cc692-699

95 HL Deb 1 April 2003 c1243

the courts would in some circumstances be able to take into account a person's previous convictions. Lord Falconer felt that it would be enough to rely on that, because:

> it is better for the court to assess whether in a particular case the evidence relating to the previous conviction is relevant, and, where it is fair, for it to be admitted, rather than providing a blanket prohibition on a whole class of offenders from relying on the exemption, even where there might be clear evidence that the defendant was acting for the protection of the child.[96]

The Government is considering whether the defence should exclude those who act for sexual gratification without necessarily going as far as causing or encouraging a sex offence involving a child.[97]

Baroness Walmsey wanted to see the new defence extended to cover people who are acting in the interests of a child's emotional well-being, as well as the three grounds originally provided (protecting from sexually transmitted disease, protecting physical safety, preventing pregnancy). [98] Despite Lord Falconer's fears that such a provision could potentially weaken the protection offered to children,[99] a Government amendment extended the exception to cover those who act to promote the child's emotional wellbeing by the giving of advice. Baroness Scotland was confident that this could not be exploited by abusers,[100] but Baroness Noakes was not convinced.[101]

There were concerns in the House of Lords about whether people giving sex education or advice to young people could have Risk of Sexual Harm Orders made against then under **clauses 121 to 127**. These new orders can be made, on the application of the police, against someone with no prior conviction for a sexual offence, if the court is satisfied that on at least two occasions he has engaged in sexually explicit conduct or communication with a child, and that such an order is necessary to protect a child or children from the defendant. The Government felt that the second of these requirements would prevent an order being made where the person had a perfectly legitimate reason for his behaviour.[102]

E. Sexual grooming

Clause 17 introduces a new offence of 'meeting a child following sexual grooming etc.' Baroness Noakes felt that calling the offence 'sexual grooming' was misleading, as the

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96 HL Deb 2 June 2003 c1113
97 Baroness Scotland of Asthal, HL Deb 17 June 2003 c696
98 HL Deb 2 June 2003 c1131-3
99 HL Deb 2 June 2003 cc1133-36
100 HL Deb 17 June 2003 cc703-5
101 HL Deb 17 June 2003 cc692-4
102 see HL Deb 19 May 2003 cc665-9

new offence was in her view simply about going to meet someone with intent to commit an offence.[103] The behaviour covered by the offence need not be sexual or even criminal.

The provision is included in this Bill as it is intended to prevent future sexual offences. It follows recommendations from the Government's internet task force,[104] though it is not restricted to internet grooming. Creation of this new offence has the support of the Metropolitan Police,[105] but both Liberty and the Criminal Bar Association had concerns about it.[106]

Lord Falconer of Thoroton submitted that if the police conducted a sting operation, the offender could be charged with attempting to commit the offence even if the offence itself could not technically have been committed as there was no child involved. The penalty for the attempt would be the same as for the substantive offence.[107]

Several attempts were made to extend the grooming offence to cover adults who lack the capacity to consent, but the Government decided that there was no evidence of a real need to do so.[108] Instead of 'erring on the side of caution' as she had with offences against children, Baroness Scotland suggested that adults with mental incapacity should be allowed to form consensual relationships which others find difficult to accept.[109]

The Home Affairs Committee supported this new offence despite having heard fears that it might be creating a 'thought crime' which could criminalise innocent communications with others.[110]

F. Abuse of position of trust

Clauses 18 to 26 restate and extend the offences of abuse of a position of trust which were introduced by the *Sexual Offences (Amendment) Act 2000*.[111]

Baroness Noakes tabled amendments to tease out the reasons for the differences between the abuse of trust offences and the care worker provisions of the Bill, regarding the issues of summary trial and maximum sentences.[112] These offences are similar in that they both concern ostensibly consensual sexual activity which would be made illegal simply

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[103] HL Deb 1 April 2003 c1263
[104] Lord Falconer of Thoroton, HL Deb 1 April 2003 c1256
[105] Baroness Blatch, HL Deb 1 April 2003 c1258
[106] HL Deb 1 April 2003 c1258-60
[107] HL Deb 1 April 2003 cc1266-7
[108] HL Deb 1 April 2003 cc1264-6; HL Deb 2 June 2003 cc1137-39; and HL Deb 17 June 2003 cc705-8
[109] HL Deb 17 June 2003 c708
[110] Home Affairs Committee, *Sexual Offences Bill*, HC 639 2002-03
[111] For background to this see Library Research Papers RP00/15, 7 February 2000 and RP99/4, 21 January 1999
[112] HL Deb 1 April 2003 cc1278-81

because of the defendant's rôle in relation to the complainant. The Government's justification for treating them differently was that:

> The young people protected by the offence to which the noble Baroness draws attention are essentially aged 16 or 17. We do not feel that they fall within the same category of vulnerability as those in the care offences with a mental disorder or learning disability.[113]

1. Who is in a position of trust?

The question of who should be considered to be in a position of trust was controversial in the House of Lords. The list now set out in **clauses 23 to 24** originally covered people looking after children who were:

- detained following conviction for a criminal offence, for example in a secure training centre or a young offenders institution;
- living in foster care; residential care (local authority, private or voluntary, including secure accommodation); and semi-independent accommodation;
- living somewhere where young people with medical conditions, physical or learning disabilities, mental illness or behavioural problems might be accommodated and includes NHS, private and voluntary accommodation; or
- in full time education in an educational institution;

It also included:

- personal advisers appointed by a local authority under the *Children Act 1989*. Such personal advisers generally provide help and support to children aged 16-17 who have been in local authority care; and
- adults who supervise children under bail supervision, a community sentence (for example a probation order, combination order, community service order, supervision order, attendance centre order) and those under conditions following release from detention following a criminal conviction (e.g. those released on licence from a young offenders institution)

The Bill provides for the Secretary of State to add to this list by order.

Suggestions as to further groups that should be covered by the definition were made by Baroness Blatch and Lord Faulkner of Worcester:[114]

- supervisors appointed under the *Children Act 1989* including those appointed under an education supervision order;

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[113] Lord Falconer of Thoroton, HL Deb 1 April 2003 c1281
[114] HL Deb 1 April 2003 cc1287-1304; HL Deb 2 June 2003 cc1144-50; HL Deb 17 June 2003 cc713-21

- officers of the Children and Family Court Advisory and Support Service (formerly known as guardians *ad litem*);
- registered childminders;
- sports coaches;
- voluntary youth and community workers;
- part-time teachers (and part-time students); and
- ancillary and care workers.

Baroness Blatch also wanted to remove the word 'regularly' from the definition of a position of trust.[115] She felt that leaving it in would exclude those who had irregular contact with the child regardless of how frequent the contact was, as well as those who spent only a short time with the child. She contrasted this definition with the provision for abuse by a care worker of a person with a mental disorder, which under the revised definition in clause 44 may be committed at their first encounter. Baroness Scotland's response was that the Government had included the term 'to exclude one-off encounters which do not allow for any sort of relationship of trust to have developed and for that to have been used in order to influence the child'.[116] Baroness Blatch's amendment was lost on a division (149 to 69).

Others, including Lord Thomas of Gresford and Lord Northbourne, were concerned about the effects on recruiting youth workers, teachers and coaches if they are included in this offence.[117]

Lord Falconer responded by setting out the criteria the Government used for considering when people are in a position of trust:

1. the individual is particularly vulnerable, for example on probation or in residential care;
2. the location and/or lack of access to other adults and absence of countervailing influence makes the individual particularly vulnerable;
3. the special influence of the adult: the relationship is *in loco parentis*.[118]

He suggested that these would also be the criteria to be used if an order were made to extend the statutory list.[119]

2. Additions to the list

Lord Falconer was open to suggestion on additions to the list. Government amendments brought young people in independent clinics and residential care homes under its

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[115] see HL Deb 17 June 2003 cc721-8
[116] HL Deb 17 June 2003 c725
[117] HL Deb 17 June 2003 c716
[118] HL Deb 1 April 2003 c1294
[119] HL Deb 1 April 2003 c1295

protection,[120] and the Government accepted another amendment which removed the reference to 'full-time' for teachers and students. [121]

Having undertaken in Committee to consider adding sports coaches to the list,[122] Lord Falconer said on Report that they would not be brought within the scope of the offence at this stage.[123] His main reason was that the Department of Culture, Media and Sport has now made a firm commitment to introduce a national coaching certificate, and once this is introduced, any licensed coach who uses his position to manipulate a young athlete in his charge into a sexual relationship may lose his licence and his livelihood.

Lord Falconer promised to review the position once the certificates had been introduced, and then if need be use his order-making powers to bring sports coaches within the scope of the defence. However, as the certificate will not be introduced until 2007, Lord Falconer also made a commitment to consult now on the extent of the problem and whether earlier measures were needed.[124] This did not satisfy Baroness Blatch who tabled further amendments on Third Reading.[125]

On Report Lord Falconer said he would table amendments in time for Third Reading to include children's guardians and supervisors appointed under the *Children Act 1988*.[126] However, this was not done. On Third Reading Baroness Scotland apologised that Government had not yet been able to table amendments on children's guardians and supervisors, and promised that this would be done in time for Committee in the House of Commons.

Lord Falconer rejected adding voluntary youth workers and childminders to the list,[127] and considered that ancillary and care workers were already covered by the Bill in situations in which they are able to abuse their position of trust.[128]

3. Defences

Defences to the abuse of trust offences were debated in Committee on 10 April 2003,[129] and also later on Report[130] and Third Reading.[131] Baroness Blatch felt that the defence for those who were in a sexual relationship before a position of trust arose was dangerous,

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120 HL Deb 1 April 2003 c1297
121 see HL Deb 2 June 2003 c1146
122 HL Deb 1 April 2003 c1297
123 HL Deb 2 June 2003 cc1150-3
124 HL Deb 2 June 2003 c1153
125 see HL Deb 17 June 2003 cc713-21
126 HL Deb 2 June 2003 c1150
127 HL Deb 1 April 2003 c1297
128 HL Deb 2 June 2003 c1151
129 HL Deb 10 April 2003 cc348-58
130 HL Deb 9 June 2003 cc16-20
131 HL Deb 17 June 2003 cc728-3

considering the example of a man who engineered sexual relationships with a child before a relationship of trust began.[132] She considered that a person who takes up a position of trust over someone with whom he is in a sexual relationship ought simply to choose between the relationship and the job.[133]

Lord Falconer highlighted the difference between that defence, where the start of the relationship was not the product of the abuse of trust relationship, and a defence that had appeared in the original Bill for relationships that predated the commencement of the provision but which might have begun whilst there was a relationship of trust. This second defence was removed from the Bill in Committee with the Government's support,[134] but the Government resisted all attempts to remove the defence that the sexual relationship pre-dated the relationship of trust. Baroness Scotland highlighted what she felt was at the nub of this:

> The key issue here is whether relationships between two individuals that are lawful should become unlawful because circumstances have resulted in one of the parties now having a position of trust of a caring role in relation to the other, or in the parties living together and/or caring for the other.[135]

She went on to state that the defence would not exempt abusive relationships:

> This exception does not apply when the relationship entered into was unlawful at the time; for example if the young person was under the age of consent or the relationship was with a close blood relative.[136]

G. Child family members

The offence of incest would be replaced by two new, wider groups of offences: familial child sex offences (**clauses 27 to 31**) and sex with an adult relative (**clauses 65 and 66**).

Baroness Blatch contrasted unfavourably the replacement of the term 'incest' with the retention of the term 'rape' in the Bill.[137] The argument on one side is that the existing name should be retained to make the severity of the offence clear; on the other hand, if the word connotes something very serious it may lead juries not to convict because of the stigma attached.[138]

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[132] HL Deb 10 April 2003 cc348-56
[133] HL Deb 9 June 2003 c17 and HL Deb 17 June 2003 cc729
[134] HL Deb 10 April 2003 cc357-8
[135] HL Deb 17 June 2003 c731
[136] HL Deb 17 June 2003 c732
[137] HL Deb 10 April 2003 cc359-60
[138] see Lord Thomas of Gresford, HL Deb 10 April 2003 c362

Lady Blatch was nevertheless glad to see the broadening of the offence to cover:

- sexual activity between family members of the same sex;
- oral sex or sexual acts falling short of penetration; and
- step-parents, step-siblings, uncles and aunts

She was however concerned that only the first of these points would apply to the new offences of sex with an adult relative, the others applying only to the offences with children.

1. Who is a family member?

Under **clause 29** family members would be divided into three groups for the purposes of the familial child sex offences:[139]

1. relatives in the first group would be included in any circumstances (parents, grandparents, siblings, half-siblings, uncles, aunts, step-parents, step-children, foster parents);
2. relatives in the second group would be included only if they live or have lived in the same household OR the accused had regularly been caring for the child (parent's partner, cousins, step-siblings, foster siblings);
3. relatives in the third group would be included only if they currently live in the same household AND the accused had regularly been caring for the child (anyone else who fits these criteria).

This division is based on the assumption that living together and being in a caring relationship are the critical criteria, whereas Baroness Noakes said that proximity in the context of family relations should be.[140]

Lord Falconer agreed to include step-siblings and foster siblings in the second group on Report.[141] However, he also moved partners or spouses of the child's aunt or uncle from the second to the third group.[142] This latter amendment was the subject of a division, which the Government won by 95 votes to 55.

Shifting burdens of proof, and consistency of sentencing, were again brought up for debate by Lord Thomas of Gresford and Baroness Noakes. In response Lord Falconer presented arguments to justify the differences between these provisions and the general child sex offences.[143] He did however introduce an amendment designed to make the maximum penalty for inciting a child family member to engage in sexual activity

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[139] see Baroness Noakes, HL Deb 9 June 2003 c21
[140] HL Deb 9 June 2003 c24
[141] HL Deb 9 June 2003 c23
[142] HL Deb 10 April 2003 cc385-94
[143] HL Deb 10 April 2003 cc364-9

comparable to that for the most serious behaviour that might be incited, that is, sexual intercourse.[144]

2. Defence

The Bill originally included a clause which would have provided a defence where family members began a relationship which was not illegal at the time but which became illegal once the Act came into force. The Government decided to remove this defence, as it had for the equivalent offence under the 'abuse of trust' provisions.[145] Instead it introduced a defence where the sexual relationship pre-dated the family relationship, again mirroring the defence provided for the abuse of trust offences.[146]

H. Child prostitution and pornography

Clauses 49 to 53 create a new set of offences which are designed specifically to cover those who abuse children through prostitution or pornography.

Baroness Noakes was concerned that the Bill should make it clear that there is a difference between adult prostitutes and child prostitutes, who she felt are always victims.[147] Her concerns were addressed on Report, when Lord Falconer introduced amendments to regroup the clauses to separate those dealing specifically with child victims from those covering prostitution generally. This allowed the former group of clauses to have the title '*Abuse of children through prostitution and pornography*'.[148]

At several stages the question arose of whether someone who acted 'for gain' would be covered by the Bill. Baroness Thornton wanted to ensure that someone who made a child watch a sexual act or photograph or pseudo-photograph[149] for gain was covered by the offence in **clause 13**, which currently refers only to someone who did the same thing for sexual gratification. Her intention was to restrict the availability of online pornography.[150] Lord Falconer was sympathetic to the aim but not the means, and referred to the Department of Trade and Industry's ongoing consultation on unsolicited commercial e-mail which is covering pornographic emails. He also promised to look at whether showing a child text for the purpose of gaining sexual gratification should be covered in the same way as photographs and pseudo-photographs.[151]

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144 HL Deb 10 April 2003 cc369-70
145 HL Deb 10 April 2003 c394
146 HL Deb 9 June 2003 c47. See also HL Deb 17 June 2003 cc728-34, for criticism of the defence.
147 HL Deb 13 May 2003 cc174-6
148 HL Deb 9 June 2003 cc57-9
149 The definition comes from the *Protection of Children Act 1978* s7 as amended, and covers still or moving images, whether made by computer graphics or otherwise, which appears to be a photograph. It also includes material which does not involve a real person
150 HL Deb 1 April 2003 c1202
151 HL Deb 1 April 2003 cc1206-10

Baroness Noakes, however, wanted to *remove* the reference to financial gain from the clauses on child prostitution and pornography, not least because she thought that having to prove gain would mean fewer convictions.[152] Lord Falconer's first response was that the Government had decided to remove the reference to 'gain' from the provisions on trafficking, but keep it for the child prostitution and pornography clauses. His justification was that this would avoid catching people who are 'not engaged in exploitative relationships, but who may, for example, be attempting to help someone or to act in their best interests.[153] However, 'after careful consideration' he changed his mind, and agreed to remove the word 'gain' from the child prostitution and pornography clauses (though it would remain in those dealing with adult prostitution).[154]

A series of government amendments in Committee was introduced in order to make it clear that the prostitution and child pornography and trafficking offences cover the situation where the offender committed the act in return for, or in the expectation of, sexual services.[155]

The Metropolitan Police suggested an amendment to the Bill to cover pimps who say that they knew a child was working as a prostitute but did not intend that to happen. Lord Falconer agreed to consider the amendment but did not think it added a great deal to the offence as the only relevant situation he could think of where a person had the requisite knowledge but not the intention was where he is no acting with free will.[156]

Under **clause 49** there are three tiers of maximum sentence, depending on the age of the child: life where the child is under 13 and there is penetration involved; 14 years where the person is under 16, and 7 years (or 6 months/fine on summary conviction) otherwise – ie. where the child is 16 or 17. The Bishop of Portsmouth felt that the penalty where the child was 16 or 17 years olds did not reflect the seriousness of the offence, and he quoted the Children's Society, Barnado's, Childline and the NSPCC in support of this view. However, Lord Falconer suggested that because sex with a 16 or 17 year old is not illegal in itself, this lower sentence was appropriate, and this was the view that prevailed in a division (157 votes to 24).[157]

VI Vulnerable people

In Committee, Lord Adebowale summarised the main failings in the current criminal law on sexual offences involving vulnerable adults:

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[152] HL Deb 13 May 2003 cc176-81
[153] HL Deb 13 May 2003 cc178-80
[154] HL Deb 9 June 2003 c60
[155] HL Deb 13 May 2003 cc173-4
[156] HL Deb 13 May 2003 c165
[157] HL Deb 13 May 2003 cc166-73

> It does not define capacity to consent and does not set out who can and cannot consent to sexual relationships and in what circumstances. It wrongly categorises people as being a mental defective or not a mental defective rather than focusing on whether an individual can consent to sexual relations in particular circumstances.

A press release from MENCAP suggested the scale of the problem and outlined the offences it would like to see instead:

> 'We have been vigorously campaigning for changes to unfair and outdated sexual offences laws for years – and every year that goes by, at least another 1,400 people will be deliberately targeted by sex offenders who know they are likely to get away with this most appalling of crimes.
>
> 'Less than 1% of cases against people with a learning disability reach conviction, and even if they are convicted, the maximum sentence offenders face is just two years. Because people with a learning disability may lack the capacity to consent to sex, they are not seen as equal in the eyes of the law.
>
> 'We will now be fighting hard to ensure that the Bill gives the real protection it needs to.'
>
> Mencap's Behind Closed Doors report on sex abuse against adults with a learning disability calls for new legislation:
>
> - That changes the maximum sentence for sexual abuse of a person with a severe learning disability to life imprisonment, rather than two years
> - For it to be a criminal offence for an individual to have sex with a person with a severe learning disability who is unable to consent to that sexual activity or to obtain sex with a person learning disability by threats or deception
> - For it to be a criminal offence for an individual working in a residential home or other care setting to have sex with a person with a learning disability
> - That creates a new test to determine a person's capacity to consent to sexual activity.[158]

A. Consent

The Bill provides a particular formula for determining consent where the complainant has a mental disorder or a learning disability. Instead of saying 'B does not consent', as it does in the rape and sexual assault offences, **clause 32 to 35** refer to the complainant 'being unable to refuse because of a mental disorder or learning disability'. A person

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[158] MENCAP press release, *Mencap welcomes new sex offences laws which could mean justice for vulnerable adults*, 20 November 2002: http://www.mencap.org.uk/html/news/story.asp?ID=266

would be deemed to be unable to refuse if he lacks the capacity to choose, whether because he lacks sufficient understanding of the nature or possible consequences of the activity, 'or for any other reason'.

Lord Adebowale would have preferred the phrase 'unable to consent', and cited BMA and Law Society guidance as well as Government consultation documents on mental capacity. He was unhappy that for adults, it is only in relation to people with mental disorders and learning disabilities that the term 'consent' is not used.[159] The Government's response was that to use the word 'consent' here would make the definition circular, as **clause 75** of the Bill states that 'a person consents if he agrees by choice, and has the freedom and the capacity to make that choice'.[160]

Lord Astor of Hever tabled amendments designed to avoid implying that people with learning disabilities cannot consent to sexual activities, or that there is a test that must be passed before a person with a learning disability can engage in sexual activity; and also to ensure that the inability to communicate does not relate to people who would be able to communicate their decision with appropriate support. The Government recognised the concern that the test of capacity is set at such a level that those with a learning difficulty may be required to be more aware of the implication of sexual activity than others.[161]

It was suggested that a definition of 'capacity' might be helpful here. Lord Falconer agreed to consider whether to include this, and if so how to formulate it.[162] The Government did not manage to prepare anything in time for Third Reading in the House of Lords, but promised that it would be returned to in the House of Commons.[163]

The *Draft Mental Incapacity Bill*,[164] published by the Government in June 2003, says that:

> a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of or a disturbance in the functioning of the mind or brain[…] It does not matter whether the impairment or disturbance is permanent or temporary.[165]

and goes on to define 'inability to make decisions':

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159 HL Deb 17 June 2003 c736
160 Lord Falconer of Thoroton, HL Deb 10 April 2003 c397
161 HL Deb 9 June 2003 c51
162 HL Deb 9 June 2003 cc50-52
163 Baroness Scotland of Asthal, HL Deb 17 June 2003 c737
164 Cm 5859: http://www.lcd.gov.uk/menincap/meninc.pdf
165 Draft Mental Incapacity Bill, clause 1

2 Inability to make decisions

(1) For the purposes of section 1 a person is unable to make a decision for himself if -
- (a) he is unable to understand the information relevant to the decision,
- (b) he is unable to retain the information relevant to the decision,
- (c) he is unable to use the information relevant to the decision as part of the process of making the decision, or
- (d) he is unable to communicate the decision (whether by talking, using sign language or any other means)

(2) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

(3) A person is not to be treated as unable to make a decision unless all practicable steps to help him do so have been taken without success.

(4) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(5) The information relevant to a decision includes information about the reasonably foreseeable consequences of -
(a) deciding one way or the other, or
(b) failing to make a decision

B. Physical as well as mental incapacity?

A group of amendments spoken to by Lord Astor of Hever sought to include people with physical incapacity in the groups of clauses on people with a mental disorder or learning disability, and also looked at the terminology used in the Bill.[166]

Lord Falconer felt that people who are unable to communicate because of a physical disability were covered by the (rebuttable) presumption about the absence of belief in consent, now contained in **clause 76**.[167] He also suggested that if the forthcoming Mental Health Bill itself adopted the term 'mental disability' instead of 'mental disorder' then this legislation could be changed at that stage. He also suggested that the Government would consider removing the reference to 'learning disability' as this came within the definition of 'mental disorder'.

[166] HL Deb 10 April 2003 c398-405
[167] HL Deb 10 April 2003 c402

C. Care workers

Clauses 40 to 46 on offences by care workers for people with a mental disorder or learning disability are comparable to clauses 18 to 26 on people in a relationship of trust with a child under 18. The activity might be consensual (there is no requirement here that the person is unable to refuse), but the care relationship would mean that it is considered abusive. As Lord Falconer put it,

> Consent here is totally irrelevant. It plays no part in the ingredients of the offences. To put it simply, the elements required for an offence are the relationship of care between the defendant and the victim, and the occurrence of sexual activity.[168]

If person were able to refuse and did so, the offence would be rape with a maximum sentence of life imprisonment. If they were unable to refuse, the charge could be framed under the general provisions on people with mental disorders or learning difficulties, which carry higher penalties than the care worker offences.

1. Who is a care worker?

The definition of 'care worker' (now contained in **clause 44**) was the subject of some debate in the House of Lords, with several amendments trying to make these provisions more consistent with those on abuse of a position of trust.[169] The Government did agree that some change to the original definition was needed, and so extended the list to cover people in community homes and voluntary homes, those who are likely to come into regular face-to-face contact with the person with a mental disorder but have not yet done so, and those who provide care, assistance or services outside an institution. Lord Falconer felt that this adequately covered many of the concerns raised, but he would not go as far as including entirely one-off encounters.[170]

2. Defences

The offences presume that a care worker knows about the mental disorder of the person under his care. However, if he can produce enough evidence to raise an issue about his knowledge of the person's mental disorder, then the prosecution would have to prove his knowledge in the usual way. This is known as an 'evidential burden', and differs from the 'burden of proof' which the Bill had originally imposed on care workers in these circumstances. Lord Thomas of Gresford was highly critical of placing the burden of proof on the defendant, but Lord Falconer had originally justified it by suggesting that where there is a relationship of care, there was a reasonable assumption that the carer will

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168 HL Deb 28 April 2003 c535
169 HL Deb 28 April 2003 cc543-52. See also HL Deb 9 June 2003 cc56-7
170 HL Deb 28 April 2003 cc548-9

know the condition of that person.[171] However, the Government later decided to lighten the burden to an evidential burden only, in line with its decision on proving consent in rape cases.[172]

Lord Astor of Hever suggested that care workers who provide help, advice and instruction for adults with mental disorders or learning difficulties to develop their awareness of their own sexuality should not be criminalised. He also called for Government to introduce national guidelines on sex education for such people.[173] Baroness Blatch echoed her cricitisms about a similar defence to the child sex offences: an abusive care worker could claim that he caused or incited sexual activity for educational purposes rather than for his own gratification.[174] Lord Falconer rejected the suggestion that some care workers could be licensed to provide sexual assistance for treatment purposes, but agreed to think about producing the guidance asked for.[175] However, when the matter was returned to on Report he said that the views of stakeholders on sex education in these circumstances were too divided to allow for guidance to be produced soon, and so for the time being it would simply have to be left to the discretion of the CPS as to whether to prosecute in the circumstances.[176]

Again, sexual relationships which pre-date the care relationship would not be criminalised (**clause 46**) but the defence that a sexual relationship in a care context had begun before the Act came into force was removed with the agreement of the Government.[177]

D. Trials and sentencing

In response to Baroness Noakes's concerns about trying offences relating to vulnerable people on a summary basis rather than on indictment, Lord Bassam of Brighton gave the Government's commitment to publishing guidance setting out the circumstances in which it felt such cases should be tried in the lower court.[178] However, the Government did not feel that it would be appropriate to issue guidance on whether or not to prosecute at all.[179]

Government amendments in Committee raised the maximum penalty for care workers who have (or cause or incite) sexual activity with a person with a mental disorder or learning disability. As originally drafted, the maximum penalty would have been seven years on indictment, or 6 months and a fine on summary conviction. **Clauses 40 and 41**

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171 HL Deb 28 April 2003 cc527-30
172 HL Deb 17 June 2003 cc738-9
173 HL Deb 28 April 2003 cc536-42; HL Deb 9 June 2003 cc54-6
174 HL Deb 28 April 2003 c539
175 HL Deb 28 April 2003 cc540-41
176 HL Deb 9 June 2003 cc55-6
177 see HL Deb 28 April 2003 cc552-7
178 HL Deb 28 April 2003 c525-6
179 HL Deb 10 April 2003 cc418-9

now provide a maximum of 14 years when penetration is involved and 10 years when it is not.[180] This is a similar approach to a number of other offences in the Bill.

VII Adult prostitution

The clauses of the Bill dealing with adult prostitution (**clauses 54-56**) have been separated out from the child prostitution clauses, and are now contained in a separate group entitled 'Exploitation of prostitution'. However, they do not amount to a wholesale review of prostitution offences generally. Lord Falconer accepted that the time had come for a review of prostitution and the sex industry generally, as recommended by *Setting the Boundaries,*[181] but was unable to give a timescale:

> We recognise that there should now be a sensible debate on the issue so that we can benefit from the views and practical experience of the agencies and voluntary organisations working with those at risk of, or involved with, prostitution.
>
> However, there remains much groundwork to be done before we will be in a position to announce the timing of such a debate.[182]

The two new offences – causing or inciting prostitution for gain (**clause 54**) and controlling prostitution for gain (**clause 55**) would replace the existing gender-specific offences in the *Sexual Offences Act 1956.* The government also introduced new provisions in Committee which sought to 'gender-neutralise' other prostitution offences.[183]

Amendments tabled by Lord Faulkner of Worcester in Committee sought to prevent the police and CPS using their discretion to prosecute the families of prostitutes, by requiring that someone could not be prosecuted for causing, inciting or controlling prostitution for gain unless they also used 'fear, force or fraud'.[184] The proposed amendments attracted support from many parts of the House but were withdrawn at that stage.

A similar point – whether two prostitutes working together would be committing the offence of 'controlling prostitution for gain' – was put by Baroness Walmsey.[185] However, Lord Falconer's opinion was that these circumstances were unlikely to amount to the offence.

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[180] see HL Deb 28 April 2003 c530-5
[181] HL Deb 13 May 2003 c183
[182] HL Deb 9 June 2003 c61
[183] see HL Deb 13 May 2003 cc196-200
[184] HL Deb 13 May 2003 cc181-9
[185] HL Deb 13 May 2003 cc192-4

Unlike the child-related offences, the requirement that these offences should be 'for gain' has been kept in the clauses on adult prostitution – along with the broad definition of 'gain' in **clause 56**.

VIII Trafficking

There have recently been a number of moves in the international community to attempt to combat the trafficking of humans for sexual or other purposes. As a result, the UK is committed to making it a criminal offence to traffic in human beings for the purposes of labour or sexual exploitation.[186]

The wording of the new trafficking offences in **clauses 58-61** does not exactly reflect that in the UN protocol to prevent, suppress and punish trafficking[187] or the EU framework decision on combating trafficking.[188] The Government said that the wording had been chosen because they did not wish to limit the offences to those carried out by the use of threats, force, coercion, abduction, fraud, deception or abuse of power or vulnerability, as the UN protocol has it. Its view was that where these abusive elements were present they could be charged in their own right.[189]

A major objection in the House of Lords was that the new offences tackle only sexual trafficking and not trafficking in general.[190] Lord Bassam of Brighton said that this was in hand:

> Work is in progress on developing an offence of trafficking for labour exploitation. As yet no legislative vehicle has been identified for taking that forward, but it is very much a work in progress. We recognise the importance of the point made by the noble Lord, but as I am sure he will appreciate, it is outside the scope of the Bill we are now considering.[191]

The Bill does not deal with the support available to victims of trafficking or the need to ensure a coherent approach from all the services involved. However, Lord Bassam used the 'clause stand part' debate to discuss the government initiatives in these areas:

- the Immigration Service has developed close working relationships with social services and the police, in locations including Heathrow, Gatwick and Dover, 'to identify children and risk and to ensure that they get help when most needed';

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186 See Library standard note SN/SG/1985, *Human Trafficking*, 11 June 2003

187 *United Nations, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, United Nations Doc. A/55/383 (2000)

188 *European Union Council Framework Decision 2002/629/JHA*, Official Journal of the European Communities L 203 (1 August 2003): http://europa.eu.int/scadplus/printversion/en/lvb/l33137.htm

189 HL Deb 13 May 2003 cc202-5

190 Lord Skelmersdale, HL Deb 13 May 2003 c201, c212

191 HL Deb 13 May 2003 c222s

- a working group on unaccompanied children has been set up by the Home Office Immigration and Nationality Directorate and the Department of Health which provides 'an active forum for social services and the Immigration Services to discuss identification and profiling issues;
- the Home Office has published a 'toolkit' for practitioners in the field, 'to help them identify and deal with trafficked victims';
- a pilot project providing safe houses for adult women in prostitution was announced in April 2003;
- child victims of trafficking may be taken into care under the *Children Act 1989* by local authorities who are free decide how best to provide services for children in need in their own area, for example by providing safe houses along the lines of that for children run by West Sussex County Council (which covers Gatwick airport);
- the Reflex task force co-ordinates intelligence and operations against trafficking and smuggling;
- the current Operation Maxim involves joint police and Immigration Service operations against trafficking in London.[192]

There were calls in the House of Lords for a statutory period of reflection, along the models of Sweden, Italy and the USA, during which victims of trafficking would not be returned to their home countries so that they could consider providing intelligence or evidence against their traffickers. A similar arrangement does form part of the Home Office pilot project for adults mentioned by Lord Falconer, and the Government has stated that children will not be returned to their countries of origin 'unless robust arrangements have been put in place for their safety'.[193] However, the Government is concerned that a statutory reflection period is 'inflexible' and 'could act as an incentive for trafficking'.[194]

The need to prove gain was again raised in connection with trafficking. Lord Hylton did not think that this should be a requirement of the offence, and the Government accepted this in principle, bringing in amendments on Report to remove the reference to 'gain'.[195]

As the Bill does not have a separate set of offences to cover trafficking of children, a number of proposed amendments sought to ensure that, at least where children were involved, the case could be tried on indictment only; and that there would be a minimum sentence or at least a more serious penalty. These were resisted by the Government.[196] Lord Hylton said:

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[192] HL Deb 13 May 2003 cc218-20, 222
[193] HL Deb 13 May 2003 c222
[194] HL Deb 13 May 2003 c222
[195] HL Deb 13 May 2003 cc200-1
[196] HL Deb 13 May 2003 cc205-12

> I regret that the trafficking clauses do not differentiate between adults and children or adequately define a child. As a result, some children may escape protection. The onus is therefore on the Government to explain why they have not defined a child as anyone under 18, as was done in two UN conventions, on trafficking and on the rights of the child. We have ratified both conventions. ECPAT UK produced evidence in 2001 showing that trafficked children were mainly aged 13 to 17.[197]

Lord Falconer replied to this by pointing out that everybody was covered as regards criminal offences in relation to trafficking:

> The only reason for putting in a separate definition of children would be to have a higher maximum penalty in relation to trafficking children. The penalty in the Bill is 14 years maximum, which is the highest determinate sentence that one can get.[198]

IX Offences in public

A. Sexual activity in public

This is one of the most controversial areas of the Bill. During the course of the Lords' debates the Government reversed its position on a new general offence of sexual activity in public, and then failed to stop a specific attempt of 'sex in a public toilet' being added to the Bill.

The controversy has centred on homosexual activity in public toilets. The Bill had originally included a new offence of sexual activity in public, covering both heterosexual and homosexual activity. This was intended to add to the existing common-law offence of outraging public decency and public order offences, and complement the repeal of the particular definitions of privacy in the current homosexual offences. Under the *Sexual Offences Act 1956* as amended, buggery and gross indecency between males are not treated as taking place in private if more than two people are present OR if they take place in a public toilet.

However, following many criticisms of the proposed 'sexual activity in public' clause, the Government decided there were enough defects in it to withdraw it completely, and go back to relying on the existing public decency and public order offences (but without reinstating the homosexual offences). This led people to believe that sexual activity in public - or in a public toilet - would not be successfully prosecuted.

Baroness Noakes moved an amendment in Committee to introduce a specific offence of sexual activity in a public toilet, following a letter of 15 April 2003 from Lord Falconer

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[197] HL Deb 13 February 2003 c 842
[198] HL Deb 13 February 2003 c 881

notifying his intention to withdraw the clause on sexual activity in public.[199] She agreed that the Government's clause was flawed, referring to the widespread belief that it would have allowed sexual activity in public toilets provided it was not seen – in other words, shutting the door would have been enough to prevent it being an offence. However, she suggested that the Government's general intention had been right, not least because the existing offences are weak and difficult to prove. Her arguments could be summarized as follows:

- the existing common law offence of outraging public decency also requires the sexual activity to be seen;
- it even requires two or more people to have been able to see it;
- offensive or disgusting behaviour in a public lavatory does not amount to the public order offence of threatening, abusive or insulting behaviour likely to cause a breach of the peace;
- outraging public decency existed as a criminal offence when the *Sexual Offences Act 1967* was introduced, yet it was still felt necessary then to provide a specific prohibition on homosexual activity in public toilets;
- in 2001 the conviction rate for outraging public decency was only 20% of cases proceeded against;
- even if a conviction is secured, the offence appears to attract low sentences;
- outraging public decency is a very broad offence that is not targeted solely at sexual activity, and is capable of flexible interpretation;
- it has hitherto been applied with a bias towards being disapproving of homosexual activity; and
- the Metropolitan Police want sex in public toilets to remain illegal.

Lady Saltoun's objections to the Government's original offence were of a rather different nature and illustrated some potential problems of a wide offence of sexual activity in public:

> It seems to me to be a very restrictive injunction worthy of the Government in nasty nanny mode and determined to interfere in every area of people's private lives. What constitutes a dwelling? Is an hotel bedroom a dwelling? Is a tent a dwelling? Is a sleeping compartment of a train a dwelling? Is the back of a car on a dark night a dwelling? Is a cabin on a ship a dwelling? I would hardly describe them as such, yet to prohibit sexual activity in any of them or indeed outside a building at all seems almost unbelievably puritanical and worthy only of the most bigoted ayatollah or the very nastiest nanny killjoy.[200]

[199] HL Deb 19 May 2003 cc576-88
[200] HL Deb 19 May 2003 c582

The Government accepted that the offence originally proposed was flawed because it did not deal adequately with the problem of the closed cubicle door. It submitted that its new approach was appropriate because:

- outraging public decency covers all lewd, obscene or disgusting behaviour that outrages public decency
- the behaviour does not have to be witnessed on the particular instance so long as it is capable of being witnessed or seen, and that includes being heard;
- the Government are acting to make the offence of outraging public decency triable either way rather than on indictment only, and to increase to 12 months the maximum sentence that a magistrate's court can pass, through the current *Criminal Justice Bill*; and
- section 5 of the *Public Order Act 1986* adds further protection in that it covers sexual activity within the sight or hearing of a person likely to be caused harassment, alarm or distress.[201]

There appears to be no limit on the amount of fine or period of imprisonment that may be imposed for the common law offence of outraging public decency, provided the sentence is not inordinate.[202] However, the offences of causing harassment, alarm or distress under the *Public Order Act 1986* are summary only, and therefore only very limited penalties can be imposed.[203]

The Home Affairs Committee recommended that section 5 of the *Public Order Act 1986* be amended to make it clear that it covers sex in public toilets:

> 46. At present, section 5 of the Public Order Act 1986 covers (among other things) "threatening, abusive or insulting words or behaviour, or disorderly behaviour" which is likely to cause harassment, alarm or distress. Although it may be possible—and the Government argue that it is possible—to apply this to sex in public toilets, we believe that it should be made more explicit.
>
> 47. There is much concern and disagreement as to whether this Bill will legalise sexual activity in public toilets. We recommend that sexual activity in public toilets should be a criminal offence and suggest that this could be dealt with by an amendment to section 5 of the Public Order Act 1986, which makes it clear that "insulting" behaviour includes sexual behaviour. This would dispense with the need to prove specific sexual acts and also has the advantage of empowering the police to give a warning before making an arrest. We believe that it is appropriate

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[201] Lord Falconer of Thoroton, HL Deb 19 May 2003 cc585-7

[202] *Archbold: Criminal Pleading, Evidence and Practice 2003*, Butterworths, 2003, p1801

[203] **s4**: 6 months' imprisonment and/or a fine of up to £5,000 (unless the offence was racially or religiously aggravated, in which case up to 2 years' imprisonment or a fine can be imposed on conviction on indictment); **s5**: 6 months' imprisonment and/or a fine of up to £1,000 (or up to £2,500 if the offence was racially or religiously aggravated)

> for this offence to be dealt with in the Magistrates' Court, rather than in the Crown Court.[204]

B. Exposure

Naturists, and also artists' models, were concerned that the new offence of 'exposure' in **clause 68** would, unlike the existing 'indecent exposure' offence, criminalise their nudity. They conducted a large-scale campaign which resulted in a Government amendment to the Bill, though the Government still felt that the original recklessness provision would not have criminalised naturists or life models.[205]

As it is now worded, the offence of exposure would not cover being reckless as to whether alarm or distress is caused by intentionally exposing the genitals. Exposure would be criminal only if it were done in the knowledge or with the intention that somebody would see and be distressed.

The Government rejected a suggestion that the offence should apply only where there is sexual motivation (as is the case for the new voyeurism offence). Its reason was that 'there are cases where the purpose of the [exposure] is to frighten and terrify with no sexual motive'.[206] Despite having decided that non-sexual trafficking could not be included in a sexual offences bill although trafficking for sexual exploitation is, Lord Falconer refused to split up the exposure offence between sexual and non-sexual behaviour.[207]

The Home Affairs Committee was happy with the Government's approach here:

> The removal of recklessness from the offence of exposure (Clause 69), which we believe adequately addresses the concerns of naturists. We do not accept that the offence should be further restricted by a requirement for a sexual motive as this would run the risk of undermining the very purpose of the offence, which is to protect individuals from distressing—and potentially dangerous—types of behaviour.[208]

C. Voyeurism

Seeking sexual gratification will be a necessary element of the new voyeurism offence in **clause 69**. The offence will cover those who seek sexual gratification from seeing people who are naked or 'using a lavatory' or 'doing a sexual act that is not of a kind ordinarily done in public', whilst inside a 'structure' or somewhere where privacy could not

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[204] Home Affairs Committee, *Sexual Offences Bill*, HC 639 2002-03, 10 July 2003
[205] see HL Deb 19 May 2003 cc555-69
[206] HL Deb 19 May 2003 cc558-68
[207] HL Deb 19 May 2003 c567
[208] Home Affairs Committee, *Sexual Offences Bill*, HC 639 2002-03, 10 July 2003

reasonably be expected.[209] However, it will not criminalise those who get sexual gratification from seeing people naked in public.

The Government introduced some changes to the drafting of the clause in Committee, because it felt that people should not be criminalised simply for looking at a moving or still image which might have been recorded through voyeuristic means. As originally drafted, the offence of voyeurism would potentially have caught readers of pornographic magazines, even though it would normally be difficult to establish that they knew the person represented had not consented to their image being recorded or viewed. The new drafting of clause 69 would criminalise only the person recording the image where there was no consent to do so. It would not cover people publishing or looking at such images.[210]

X Sentencing

One of the Government's aims in this Bill was to provide a more appropriate set of penalties for the new sexual offences contained in Part 1 of the Bill. Its initial decisions on sentencing - both length of maximum sentence and availability of summary proceedings - were challenged throughout the House of Lords debates, in relation to a whole range of offences. The Government therefore made a number of changes to its original proposals, although it did not accept all the suggestions. Its rationale was explained by Lord Falconer of Thoroton in Committee.[211]

The following table sets out the maximum sentences which would now be available on conviction on indictment (and summary conviction where available) under the Bill:

Clause	Offence	Maximum (indictment)	Maximum (summary)
	Rape etc		
1	Rape	Life	-
3	Assault by penetration	Life	-
4	Sexual assault	10 years	6 months/fine
5	Causing sexual activity without consent: *with penetration*	Life	-
	Causing sexual activity without consent: *no penetration*	10 years	6 months/fine
	Offences against children under 13		
6	Rape	Life	-
7	Assault by penetration	Life	-
8	Sexual assault	14 years	6 months/fine
9	Causing/inciting sexual activity of child: *with penetration*	Life	-
	Causing/inciting sexual activity of child: *no penetration*	14 years	-

[209] according to the definitions given in **clause 70**
[210] HL Deb 19 May 2003 cc569-71
[211] see for example HL Deb 1 April 2003 cc1190-1, cc1193-4 and c1201 on child sex offences.

	Offences against children under 16		
10	Sexual activity with child: *offender 18 or over*	14 years	-
14	Sexual activity with child: *offender under 18*	5 years	6 months/fine
10	Causing/inciting sexual activity of child: *offender 18 or over*	14 years	-
14	Causing/inciting sexual activity of child: *offender under 18*	5 years	6 months/fine
12	Sexual activity in presence of child: *offender 18 or over*	10 years	6 months/fine
14	Sexual activity in presence of child: *offender under 18*	5 years	6 months/fine
13	Causing child to watch sexual act: *offender 18 or over*	10 years	6 months/fine
14	Causing child to watch sexual act: *offender under 18*	5 years	6 months/fine
15	Arranging/facilitating commission of child sex offence	14 years	6 months/fine
17	Meeting child following sexual grooming	7 years	6 months/fine
	Abuse of trust of child under 18		
18	Sexual activity with child	5 years	6 months/fine
19	Causing/inciting sexual activity of child	5 years	6 months/fine
20	Sexual activity in presence of child	5 years	6 months/fine
21	Causing child to watch sexual act	5 years	6 months/fine
	Offences against child family member		
27	Sexual activity with child: *offender 18 or over*	14 years	-
	Sexual activity with child: *offender under 18*	5 years	6 months/fine
28	Inciting sexual activity of child: *offender 18 or over*	14 years	-
	Inciting sexual activity of child: *offender under 18*	5 years	6 months/fine
	Offences against person with mental disorder/learning disability		
32/36	Sexual activity with such a person: *with penetration*	Life	-
	Sexual activity with such a person: *no penetration*	14 years	-
33/37	Causing/inciting sexual activity of such a person: *with penetration*	Life	-
	Causing/inciting sexual activity of such a person: *no penetration*	14 years	-
34	Sexual activity in presence of such a person: *unable to refuse*	10 years	-
38	Sexual activity in presence of such a person: *presence procured by inducement/threat/deception*	10 years	6 months/fine
35	Causing such a person to watch sexual act: *unable to refuse*	10 years	-
39	Causing such a person to watch sexual act: *agrees because of inducement/threat/deception*	10 years	6 months/fine
	Offences by care workers against person with mental disorder/learning disability		
40	Sexual activity with such a person: *with penetration*	14 years	-
	Sexual activity with such a person: *no penetration*	10 years	6 months/fine
41	Causing/inciting sexual activity of such a person: *with penetration*	14 years	-
	Causing/inciting sexual activity of such a person: *no penetration*	10 years	6 months/fine
42	Sexual activity in presence of such a person	7 years	6 months/fine
43	Causing such a person to watch sexual act	7 years	6 months/fine
	Abuse of children under 18 through prostitution/pornography		

49	Paying for sexual services of child: *child under 13, with penetration*	Life	-
	Paying for sexual services of child: *child under 16 (Northern Ireland: 17)*	14 years	-
	Paying for sexual services of child: *child under 18*	7 years	6 months/fine
50	Causing/inciting child prostitution/pornography	14 years	6 months/fine
51	Controlling child involved in prostitution/pornography	14 years	6 months/fine
52	Arranging/facilitating child prostitution/pornography		
	Exploitation of prostitution		
54	Causing/inciting prostitution for gain	7 years	6 months/fine
55	Controlling prostitution for gain	7 years	6 months/fine
	Trafficking for sexual exploitation		
58	Trafficking into UK	14 years	6 months/fine
59	Trafficking within UK	14 years	6 months/fine
60	Trafficking out of UK	14 years	6 months/fine
	Preparatory offences		
62	Administering substance with intent to commit sexual offence	10 years	6 months/fine
63	Committing any offence with intent to commit sexual offence	10 years	6 months/fine
64	Trespass with intent to commit sexual offence	10 years	6 months/fine
	Sex with adult relative (offender 16 or over)		
65	Penetration	2 years	6 months/fine
66	Consenting to penetration	2 years	6 months/fine
	Other offences		
67	Sex in public lavatory	2 years	6 months/fine
68	Exposure of genitals	2 years	6 months/fine
69	Voyeurism	2 years	6 months/fine
71	Intercourse with animal	2 years	6 months/fine
72	Sexual penetration of corpse	2 years	6 months/fine

Fourteen years is the maximum determinate penalty that can be imposed - the next step up is life imprisonment. The current *Criminal Justice Bill* is seeking to increase the maximum penalty available on summary conviction from six to twelve months.[212]

The main increases from the sentences available for the current sexual offences are in the areas of sex offences against children and against persons with a mental disorder. For example, the current maximum penalty for unlawful sexual intercourse with a girl under 16 is two years on indictment (and summary trial is also available).[213] For the offence of 'intercourse with a defective' the maximum sentence is again only two years' imprisonment under current law (indictment only).[214]

[212] HL Bill 69 2002-03
[213] *Sexual Offences Act 1956* s6
[214] *Sexual Offences Act 1956* ss7, 9

In a couple of instances the new maximum sentence will be lower than it is currently: sex with an adult relative (incest currently carries a seven year maximum)[215] and intercourse with an animal (the current maximum for buggery of an animal is life imprisonment).[216]

The *Criminal Justice Bill* which is currently being considered by the House of Lords[217] includes a large number of new provisions on sentencing. These are outlined in the Explanatory Notes to that Bill:

> The Bill aims to provide a sentencing framework which is clearer and more flexible than the current one. The purposes of sentencing of adults will be identified in statute for the first time, as punishment, crime reduction, reform and rehabilitation, public protection and reparation. The principles of sentencing will be set out, including that any previous convictions, where they are recent and relevant, should be regarded as an aggravating factor which will increase the severity of the sentence. A new Sentencing Guidelines Council will be established. Sentences will be reformed, so that the various kinds of community order for adults will be replaced by a single community order with a range of possible requirements; custodial sentences of less than 12 months will be replaced by a new sentence, (described in the Halliday Report as "custody plus"), which will always involve a period of at least 26 weeks post-release supervision in the community; and sentences over 12 months will be served in full, half in custody, half in the community, with supervision extended to the end of the sentence rather than the 3/4 point as now. Serious violent and sexual offenders will be given new sentences which will ensure that they are kept in prison or under supervision for longer periods than currently. At the other end of the custodial scale, several "intermediate" sanctions will be introduced. These include intermittent custody and a reformed suspended sentence in which offenders have to complete a range of requirements imposed by the court. The intention is for the court to be able to provide each offender with a sentence that best meets the need of the particular case, at any level of seriousness, and for sentences to be more effectively managed by the correctional services who will need to work together closely in delivering the new sentences.[218]

XI Sex offenders

Part 2 of the Bill covers ‘notifications and orders’. The new provisions which the Government wants to see were summarised in a Home Office press notice announcing the publication of the Bill:

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[215] *Sexual Offences Act 1956* ss10, 11
[216] *Sexual Offences Act 1956* s12
[217] HL Bill 69 2002-03
[218] HL Bill 96-EN, para. 6

- A new order to make those known to have been convicted of sex offences overseas register as sex offenders when they come to the UK, whether or not they have committed a crime here.
- All those on the sex offenders' register to confirm their details in person annually.
- Offenders on the register to provide National Insurance details as a further safeguard against evasion.
- The period within which a sex offender must notify the police of a change of name or address to be reduced from 14 days to three.
- Sex Offender Orders and Sex Offender Restraining Orders to be amalgamated into a Sexual Offences Prevention Order (SOPO) and made available for anyone convicted of a violent offence where there is evidence they present a risk of causing serious sexual harm.[219]

These provisions add to and extend those currently contained in the *Sex Offenders Act 1997* and the *Crime and Disorder Act 1998*. However, they will not all appear on the face of the Bill as the Government intends to implement some of the changes through secondary legislation

Some of the issues on sex offender registration/notification which raised particular concerns in the House of Lords were how young sex offenders and people convicted of consensual homosexual offences should be treated, and also how to deal with sex tourists.

A. Young offenders

The Government rejected suggestions from Lord Astor of Hever and Baroness Walmsey that the police or the courts should be given discretion over whether a young sex offender should go on the register. Lord Falconer's arguments were broadly that:

- the proposed amendments are not necessary because the procedures that lead to a young offender being charged, prosecuted, convicted and placed on the register, as well as the length of time that he or she is required to register, are supposed to take into account age, maturity and the individual circumstances of the case;
- young offenders remain on the register for only half the period that would apply to an adult offender; and
- notification is an administrative requirement, not a penalty.[220]

However, on Third Reading Baroness Scotland said that the Government were amending the provisions on registration so that young offenders would go on the register only if they receive a custodial sentence.[221] This restriction does appear in relation to some of the offences in Schedule 3. The Government may also consider changes to the way the

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[219] Home Office press notice 023/2003, *Publication of the Sexual Offences Bill – protection for children and the most vulnerable*, 29 January 2003

[220] HL Deb 19 May 2003 cc627-30

requirements on notification of foreign travel apply to children. Such changes could be made through regulations.[222]

B. Homosexual offences

When the age of consent for homosexual activity was lowered from 18 to 16 by the *Sexual Offences (Amendment) Act 2000* there was no provision for those convicted before then of purely consensual homosexual offences with men aged 16 or 17 to come off the sex offenders' register. The Government then resisted calls to remove the registration requirement from those who had been convicted of something which is no longer an offence, stating that registration is considered an administrative requirement, not a penalty.

However, in response to amendments tabled in Committee by Lord Thomas of Gresford and Lord Alli, Lord Falconer signalled that the Government was now looking for a satisfactory way to resolve these problems.[223] By Report he was able to say that the Government would be able to provide a final statement of its intentions in time for consideration of the Bill in Committee in the House of Commons.[224] The main difficulty appears to be separating convictions for purely consensual homosexual activity from those which were non-consensual.

C. Sex tourism

1. Recent government initiatives

A Home Office press release of 15 April 2003 summarises the existing measures in place to tackle sex tourism:

- Standard post-release licence conditions prohibit leaving the country without permission.
- Restrictions can also be imposed as part of a probation order in certain cases
- Registered sex offenders are required to notify the police if they intend to travel abroad for eight days or more. The police can pass information about the offender to other jurisdictions, where it would stop the offender from committing an offence overseas.
- The Sex Offenders Act 1997 enables courts in the United Kingdom to deal with UK citizens who commit sex offences against children abroad. This provision is re-enacted in the Sexual Offences Bill.
- We are proposing, as part of the Sexual Offences Bill, a new order that would require those who have committed sex offences overseas to register when they come to the UK.

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221 HL Deb 17 June 2003 c740
222 Lord Falconer of Thoroton, 19 May 2003 c642
223 HL Deb 19 May 2003 cc631-2
224 HL Deb 9 June 2003 c111

- The Criminal Justice Act 1998 makes it an offence for a person to conspire to commit an offence outside the UK, including sexual offences against children.
- We are working with Governments, law enforcement agencies and NGOs to tackle this problem head on wherever it occurs. The FCO and DfID support projects in many parts of the world aimed at combating those who commit offences against children.[225]

2. Notification of foreign travel

As a result of a short consultation held earlier this year on the issue of sex offenders who travel abroad,[226] Ministers announced on 15 April 2003 that offenders who plan to travel abroad for three days or more will have to notify police of their intentions at least seven days in advance.[227] The existing rules, introduced in 2001, cover those who intend to be away for eight days or more, and require only 48 hours' notice to be given.

The Government signalled in Committee that these changes will not appear on the face of the Bill but in the regulations covering foreign travel notification,[228] partly to enable the change to be co-ordinated with Scotland.[229]

3. Foreign travel order

A new foreign travel order (FTO) was announced in March 2003,[230] and introduced as an amendment to the Bill in Committee.[231] The provisions now appear as **clauses 112-120** of the Bill.

The FTO would be used to prevent those convicted of sexual offences against children from travelling to specified countries where there is a risk they will abuse children. Its proposed effect is set out in a Home Office press release:

> The foreign travel banning order […] will enable courts, following an application by a chief officer of police, to prohibit sex offenders from travelling abroad in certain circumstances. It would be a civil preventative order and operate in the same way to current sex offender orders. Two conditions would need to be met before an order could be made:

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225 Home Office press notice 118/2003, *Government crackdown on sex tourism*, 15 April 2003: http://www.homeoffice.gov.uk/n_story.asp?item_id=456

226 Home Office, *Sexual Offences Bill: Government proposals on the issue of sex offenders who travel abroad*, 5 March 2003: http://www.homeoffice.gov.uk/docs/travel_abroad.pdf

227 see Home Office press notice 118/2003, *Government crackdown on sex tourism*, 15 April 2003: http://www.homeoffice.gov.uk/n_story.asp?item_id=456

228 *Sex Offenders (Notice Requirements) (Foreign Travel) Regulations 2001*, SI 2001/1846

229 Lord Falconer of Thoroton, 19 May 2003 cc641-2

230 see Home Office press notice 063/2003, *Government action on sex tourism*, 5 March 2003: http://www.homeoffice.gov.uk/n_story.asp?item_id=394

231 see HL Deb 19 May 2003 cc655-65

- The person will have been previously convicted of a sexual offence against a child under 16 either in the UK or abroad;
- The court must be satisfied, from behaviour displayed by the offender since the original offence, that a foreign travel banning order is necessary to protect children outside the UK from serious sexual harm. [232]

The Government had considered simply amending the provisions on Sexual Offences Prevention Orders (SOPOs) instead of introducing a new type of order, but found there were too many difficulties involved.[233]

Lord Falconer highlighted the following aspects of FTOs when introducing the amendments:

- FTOs are specifically targeted against people with a history of sexual offending against children as the Government consider that they present the greatest risk of future offending overseas;
- the offence itself, and/or the conviction, finding or caution for the offence, may have taken place in the UK or overseas, and can have occurred at any time, whether before or after the Bill comes in to force;
- 'serious sexual harm' is defined in **clause 113** as serious physical or psychological harm caused by the defendant doing anything outside the UK which would amount to one of the relevant UK sex offences against children under 16;
- the behaviour giving rise to the concern about risk of serious sexual harm must have taken place since the date of the defendant's first conviction for a relevant sexual offence;
- evidence of this behaviour would be presented as part of a detailed risk assessment prepared by the police;
- when considering an application for an FTO, the court may consider what alternative measures are potentially available, for example notifying relevant authorities abroad of the offender's intended travel plans;
- if an FTO is granted, it must specify the country or countries to which the offender is prohibited from travelling; or, where the risk warrants it, it may specify that all travel outside the UK is prohibited. An FTO may also prohibit travel to anywhere in the world other than to a named country - for example where an offender needed to travel to a particular country for family reasons;
- there is a maximum term of six months for an FTO, renewable on further application from the police;
- if an FTO is made against an offender who is not already required to be on the sex offenders' register, he would as a result be subject to the foreign travel notification requirements of **clause 87** for the duration of the FTO;

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[232] Home Office press notice 118/2003, *Government crackdown on sex tourism*, 15 April 2003: http://www.homeoffice.gov.uk/n_story.asp?item_id=456

[233] Lord Falconer of Thoroton, HL Deb 19 May 2003 c656

- the offender may appeal to the Crown Court against the making of an FTO, and an FTO may be varied, renewed or discharged;
- breach of any requirement of an FTO will be a criminal offence, punishable with up to five years' imprisonment.[234]

A comparable travel ban is available for football hooligans. The *Football (Disorder) Act 2000* enables the courts to impose football banning orders on individuals who have been involved in disorder, even if they have not been convicted of a football-related offence, and empower the police to stop people leaving the country before a big game while they seek banning orders against them. When making a banning order, the court must order the person to surrender his passport during periods when the international ban is activated, unless it believes that there are exceptional circumstances.

In March 2002 the Court of Appeal ruled that the restriction on freedom of movement which football banning orders involved was justified on public policy grounds to prevent violence and disorder at foreign matches and, if properly operated, the scheme of the Act satisfied the requirements of proportionality. The proceedings on an application were civil in character, but the standard of proof to be applied was practically indistinguishable from the criminal standard.[235]

D. Risk of Sexual Harm Orders

Clauses 121-127 would create a new civil order - the Risk of Sexual Harm Order (RSHO) - which may be obtained against persons who have no previous convictions for sexual, or any other, offences. This drew the attention of the Home Affairs Committee, which highlighted the concerns of Liberty and the Joint Committee on Human Rights.[236] The Committee was somewhat reassured by seeing the draft Guidance on RSHOs, but nevertheless had some concerns:

> 58. Whilst we accept the need for Risk of Sexual Harm Orders (RSHOs), we recommend that their use be carefully monitored by the Home Office and the numbers reported annually to Parliament.
>
> […] 60. We recommend that Clause 121(5)(b), which requires a RSHO to be made for a fixed period of at least five years, be deleted from the Bill. The courts should be given discretion to make whatever length of order is needed to protect a child or children from harm.
>
> […] 62. We also believe that the grounds for making an interim RSHO should match more closely the grounds for a full order and recommend that the Bill be amended accordingly.

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[234] HL Deb 19 May 2003 cc659-61
[235] *Gough and anor v Chief Constable of the Derbyshire Constabulary*, [2002] Q.B. 1213, 20 March 2002
[236] Home Affairs Committee, *Sexual Offences Bill*, HC 639 2002-03, ch 6

XII Northern Ireland

Northern Ireland is in the middle of its own review of sexual offences. Nevertheless, the Bill does seek to make some changes to the law in Northern Ireland, including removing some of the discrepancies in its treatment of heterosexual and homosexual people.

The provisions of the Bill which would apply to Northern Ireland are:

- meeting a child following sexual grooming;
- abuse of trust offences;
- most of the prostitution, pornography and trafficking offences;
- sexual activity in a public lavatory;
- exposure;
- voyeurism;
- intercourse with an animal;
- sexual penetration of a corpse;
- offences outside the UK; and
- all of Part 2 (notifications and orders) with modifications - see clause 134

Some changes to sexual offences laws in Northern Ireland are also made by Part IV of the *Criminal Justice (Northern Ireland) Order 2003*,[237] apparently in order to be compliant with the European Convention on Human Rights.[238] However, this does not amount to anything like a wholesale revision, so the Northern Irish offences still appear similar to those in England and Wales which are being repealed by this Bill.

XIII Scotland

A. General

None of the new sexual offences in Part 1 of the Bill would apply to Scotland. However, most of Part 2 (notifications and orders) will apply to the whole of the UK including Scotland.[239] The exception is Risk of Sexual Harm Orders as set out in **clauses 121 to 127**. These would not apply to Scotland, though the Scottish Executive may decide in due course whether similar provisions are to be brought forward for Scotland.[240] Government amendments introduced on Report extended to Scotland the provisions for foreign travel orders in **clauses 112 to 120**.[241]

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[237] SI 2003/1247
[238] see HL Deb 1 April 2003 c1268-70 and HL Deb 9 June 2003 c107ff
[239] There are some modifications relating to Scotland - see clause 101, 103, 109, 110, 118 and 119.
[240] HL Deb 9 June 2003 c97
[241] see HL Deb 9 June 2003 cc100-02

Clause 139(5) states that 'this Act is to be taken to be a pre-commencement enactment'. This means that any reference to the Secretary of State (usually giving the power to made regulations or amending orders) is translated to mean 'Scottish Ministers' where appropriate.[242] Where the subject matter relates to a devolved area of law, the UK Parliament legislates only with the agreement of the Scottish Parliament. The agreement is formally given by what is known as a Sewel Motion. The *Sexual Offences Bill* was the subject of a Sewel Motion in the Scottish Parliament on 20 March 2003.[243]

B. Jurisdiction

The question of jurisdiction of the courts where an offence was committed in Scotland arose in the context of the abuse of trust provisions of the Bill. A Government amendment gave the courts in England, Wales and Northern Ireland extra-territorial jurisdiction to deal with offences of abuse of trust committed in Scotland.[244] The Scottish Parliament has yet to bring the existing abuse of trust offences into force in Scotland. Concerns about the implications of this led to a division which the Government won by 33 votes to 10. The provision now appears as **clause 22**.

A similar issue was explored in relation to the new trafficking offences. **Clause 61(2)**, in seeking to deal with international aspects of trafficking, would give the courts in England, Wales and Northern Ireland jurisdiction over events which happened in Scotland even if perpetrated by Scottish people. The Government explained that this was unlikely to happen in practice as there is an equivalent offence in Scots law:

> As regards the specific position of Scotland and trafficking, the situation is complicated, but I do not see a problem with the provision remaining. Although it is true that the provision gives English, Welsh and Northern Irish courts jurisdiction over acts carried out anywhere in the UK, it is likely that, where appropriate, any acts carried out in or in relation to Scotland would be tried by the Scottish courts under their own trafficking provisions. These provisions are contained in Section 22 of the *Criminal Justice (Scotland) Act 2003*, which stipulates in Scottish law that is is an offence to traffic someone into, out of, or within the UK for the purposes of exploiting them in prostitution of pornography. In keeping with our offences, that carries a maximum penalty of 14 years imprisonment.
>
> Like our offences, the Scottish offences take jurisdiction over acts committed anywhere in the UK and over acts committed extraterritorially by UK nationals and companies incorporated in the UK. Therefore, the Scottish Parliament has adopted what the noble and learned Lord rightly described as a not very common approach. I cannot say whether it is unique. In practice, that means that we

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[242] *Scotland Act 1998* s53

[243] HC Deb 30 June 2003 c16W, and http://www.scottish.parliament.uk/S1/official_report/session-03/sor0320-02.htm col 19830

[244] HL Deb 1 April 2003 cc1284-87

> would expect prosecutors from both sides of the border to liaise as to the most appropriate place for a prosecution, taking into account where the act took place, where the defendant lives, where witnesses live and, as the noble and learned Lord will know, the usual sorts of issue as to where the appropriate jurisdiction lies.[245]

C. Sex offenders

A group of Government amendments was introduced on Report[246] which were intended to implement the recommendations of the Scottish Expert Panel of Sex Offending, chaired by Lady Cosgrove.[247] The approach of including them in this Bill rather than in Scottish legislation was apparently approved by Scottish Ministers.[248] The main changes included:

- removing the age and sentencing thresholds for registration following conviction for abduction of a woman or girl with intent to rape, assault with intent to rape or ravish, and indecent assault;
- adding to the list of offences which require registration those concerning sexual acts involving a mentally disordered person who has not consented, and sexual relationships between persons providing care services and mentally disordered persons; and
- where a non-sexual offence is charged, allowing judges to determine from the facts of a case whether there was a significant sexual aspect and so order the offender to register.

XIV Review of operation of the Act

The Conservatives called for a statutory review of the operation of the Bill once it becomes law. This was debated in Committee,[249] on Report[250] and on Third Reading.[251] The final version of the amendment set out only two absolute requirements which a review should address - conviction rates and sentencing experience - leaving the rest to the discretion of the Government. Baroness Scotland recognised the importance of keeping the operation of the new offences under review, but not necessarily in the way suggested by the Opposition:

> The Sexual Offences Bill is, of course, a major piece of legislation. We shall need to keep a very close eye on the operation of the new offences following the enactment of the Act. The noble Baroness, Lady Blatch, has quite rightly said that

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245 Lord Falconer of Thoroton, HL Deb 13 May 2003 cc226-7
246 HL Deb 9 June 2003 cc93-102
247 *Reducing the Risk: Improving the Response to Sex Offending*, report of the Expert Panel on Sex Offending chaired by Lady Cosgrove, 2000: http://www.scotland.gov.uk/library3/justice/roso-00.asp
248 Lord Bassam of Brighton, HL Deb 19 May 2003 c635ff
249 HL Deb 19 May 2003 cc679-81
250 HL Deb 9 June 2003 cc102-4
251 HL Deb 17 June 2003 cc747-50

> the Bill introduces some very new provisions. It will be important to monitor what happens in relation to those.
>
> However, we are not sure that the best way of doing that is necessarily through a statutory requirement to produce an annual report to Parliament ad infinitum. We would therefore like more time to consider how best to monitor the operation of the Act, and we shall make our position clear as the Bill passes through the Commons. A number of models could be adopted more capable of keeping an eye on policy developments. Bearing in mind the new area, it may be that that will be the better course. We have not been able to settle the best way to follow it through, but we believe that there is a need for it.[252]

XV Select Committee Reports

The House of Lords Select Committee on Delegated Powers and Regulatory Reform considered the Bill in February, concluding:

> There is nothing in the delegated powers in this bill to which the Committee wishes to draw the attention of the House.[253]

The Joint Committee on Human Rights also considered the Bill as introduced in the Lords. The Committee's report publishes a letter from the Chairman to the then Minister of State at the Home Office, Lord Falconer. The Committee formed the provisional opinion that the Bill was generally compatible with relevant human rights obligations, subject to four points. These came under the headings:

- Sexual touching and children under the age of 13
- People with mental disorders and learning disabilities
- Mandatory period of notification to the police of young sex offenders
- Risk of sexual harm orders (RSHOs)[254]

A subsequent report from the Joint Committee published the Home Office response. Following further consideration, the Committee concluded that only the first of these four areas posed a significant risk of violating human rights under the European Convention:

> 2.20 In our view, the Government has not established that the impact of clause 6[[255]] of the Sexual Offences Bill, imposing liability on children under 13 for all

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[252] HL Deb 17 June 2003 c749

[253] House of Lords Select Committee on Delegated Powers and Regulatory Reform, *11th Report*, HL Paper 55 2002-03

> sexual touching whether or not there is consent and whether or not it can properly be regarded as indecent, would be proportionate to a legitimate aim so as to be justifiable under ECHR Article 8.2. The offence seems to us to be over-broad, to impose liability in a way that is not adequately tailored to the legitimate objective, to interfere with the right to respect for private life more than is necessary for that purpose in a democratic society, and to contain insufficient safeguards against violation of the rights. We draw this matter to the attention of each House.[256]

On 10 July 2003, the Home Affairs Committee published its report on the *Sexual Offences Bill*, taking into account amendments made during its passage in the Lords. The Committee broadly welcomed the Bill and endorsed some of the key amendments made during its passage.

> In particular, we welcome:
>
> • The revised test for determining whether a defendant's belief in consent—in a rape case—is reasonable [Clause 1(1)(c)]. We believe that the test is now clear, simple and sufficiently flexible to take account of characteristics, such as a learning disability, which might bear on the defendant's ability to understand that the complainant was not consenting.
>
> • The changes to the presumptions against consent and belief in consent (Clauses 76 & 77), which respond to several concerns about the operation of the original provisions. In our view, it is not unreasonable to require the defendant—in the circumstances specified—to show sufficient evidence to raise a real issue about consent, or his belief in consent, before the matter can be put to the jury. We also support the conclusive presumptions, on the basis that the amended Clause is now confined to two very specific (and indeed unusual) situations involving deception and impersonation, both of which reflect the existing law.
>
> • The removal of recklessness from the offence of exposure [Clause 68], which we believe adequately addresses the concerns of naturists. We do not accept that the offence should be further restricted by a requirement for a sexual motive as this would run the risk of undermining the very purpose of the offence, which is to protect individuals from distressing—and potentially dangerous—types of behaviour.
>
> We also support the extension of rape to include non-consensual penile penetration of the mouth (Clause 1(1)(a)) and the creation of a new offence to cover 'sexual grooming' of children (Clause 17).
>
> However, there are other aspects of the Bill which continue to cause us some concern. Whilst we support the removal of [the original] Clause 74 from the Bill

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254 Joint Committee on Human Rights, *Scrutiny of Bills: Further Progress Report*, seventh report, HL Paper 74 HC 547 2002-03

255 Clause 6, HL Bill 26; Clause 8, Bill 128 (with amendments)

256 Joint Committee on Human Rights, *Scrutiny of Bills: Further Progress Report*, twelfth report, HL Paper 74 HC 547 2002-03

(which proposed a new offence of 'sexual activity in public'), its disappearance has not addressed concerns about sex in public toilets. We recommend that sex in public toilets should be a criminal offence and suggest that this might be achieved by amending section 5 of the Public Order Act 1986. In any event, we believe that such an offence should be dealt with in the Magistrates' Court, rather than in the Crown Court. Whilst we accept the need for Risk of Sexual Harm Orders, we have concerns about the requirement for orders to be made for a minimum period of five years and the comparatively low threshold for making an interim order.

Finally, we considered the issue of anonymity for defendants, which has since found its way into Clause 2 of the Bill in relation to rape. We recommend that the reporting restrictions, which currently preserve the anonymity of complainants of sexual offences, be extended to persons accused of those offences (which extend beyond rape). We suggest, however, that the anonymity of the accused be protected only for a limited period between allegation and charge. In our view, this strikes an appropriate balance between the need to protect potentially innocent suspects from damaging publicity and the wider public interest in retaining free and full reporting of criminal proceedings. [257]

[257] Home Affairs Committee, *Sexual Offences Bill*, HC 639 2002-03

Appendix 1: Existing sexual offences legislation[258]

Sexual Offences Acts 1956 to 1992

The *Sexual Offences Act 1956* consolidated the statutory law with regard to sexual offences. The *Sexual Offences Act* 1967 amended the law relating to homosexual acts. It provided, *inter alia*, that buggery or acts of gross indecency between men over the age of 21 years (now 18 years) and in private would no longer amount to offences.

The *Sexual Offences (Amendment) Act 1976* enacted a statutory definition of rape, and provided for the anonymity of complainants and defendants in rape cases. The provisions relating to anonymity of defendants were repealed by the *Criminal Justice Act 1988*, s.158. The *Sexual Offences (Amendment) Act 1992* extended the existing anonymity provisions in order to cover victims of various sexual offences from the time an allegation is made. The *Youth Justice and Criminal Evidence Act 1999* repeals the anonymity provisions in the 1976 Act and amends the 1992 Act so as to extend its operation to cover offences previously covered only by the 1976 Act.

These Acts may be cited together as the *Sexual Offences Acts 1956 to 1992* (see s.8(2) of the *Sexual Offences (Amendment) Act 1992*).

Sexual Offences Acts 1985 and 1993

The *Sexual Offences Act* 1985 increased the penalties for attempted rape and indecent assault on a woman. It also created two summary offences relating to the soliciting of women by men for the purposes of prostitution. The *Sexual Offences Act* 1993 abolished the common law presumption that a boy under 14 years was incapable of sexual intercourse.

Criminal Justice and Public Order Act 1994

This Act effected further substantial changes to the law. It redefined the offence of rape to include non-consensual anal intercourse with a man or a woman. It made lawful the buggery of a woman in private where the woman consents and both parties are over 18. It legalised homosexual acts in private where both parties consent and are over 18; the previous minimum age had been 21. It extended the *Sexual Offences Act* 1967 to the armed forces and the merchant navy. It revised the penalties for the various circumstances in which buggery renncins unlawful despite the consent of both parties. It further extended the anonymity provisions to cover allegations of inchoate offences.

It also abolished any requirement for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of the victim of a sexual offence.

Sexual Offences (Conspiracy and Incitement) Act 1996

Section 2 of the 1996 Act extended the jurisdiction of the courts of England and Wales in relation to offences of incitement to commit certain sexual offences against children. Section 1 (dealing

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[258] Adapted from *Archbold: Criminal Pleading, Evidence and Practice 2003*, Butterworths 2003, pp1725-7

with conspiracy) was repealed by the *Criminal Justice (Terrorism and Conspiracy) Act 1998*: see now the more general section 1A of the *Criminal Law Act 1977*, inserted therein by the 1998 Act, on conspiracy to commit offences outside the United Kingdom.

Sex Offenders Act 1997

The long title to the Act describes it as an Act to require the notification of information to the police by persons who have committed certain sexual offences, and to make provision with respect to the commission of certain sexual acts outside the. United Kingdom.

Part I (ss.1-6) imposes "notification requirements" on certain sex offenders. Failure, without reasonable excuse, to comply with the notification requirements is an offence, as is the provision of false information (s.3).

Part II (ss.7 and 8) extends the jurisdiction of the courts of the United Kingdom (section 8 relating to Scotland).

The Act has been extensively amended by the *Criminal Justice and Court Services Act 2000*.

Sexual Offences (Protected Material) Act 1997

This Act makes provision for regulating access by defendants and others to certain categories of material disclosed by the prosecution or by the Criminal Cases Review Commission in connection with proceedings relating to certain sexual and other offences, a list of which is contained in the Schedule to the Act

Youth Justice and Criminal Evidence Act 1999

This Act contains further restrictions on the cross-examination of complainants in sexual offences. First, it prohibits cross-examination by the accused in person. Secondly, it tightens up the rules as to cross-examination of the complainant about previous sexual experience. Thirdly it extends the latter restrictions to complainants of all sexual offences, whereas they were formerly confined to allegations of "a rape offence".

Sexual Offences (Amendment) Act 2000

This Act amends the Acts of 1956 and 1967 so as to reduce the age at which consensual homosexual activity in private is lawful from 18 years to 16 years. It also created a new offence consisting of a person aged 18 or over having sexual intercourse or engaging "in any other form of sexual activity with or directed towards" a person under that age if he is in a position of trust in relation to that person.

Appendix 2: Further reading

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